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EUROPEAN UNION COMMUNICATIONS LAW

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4.1 INTRODUCTION

The past thirty years and more has seen an extraordinary level of policy, legal, and regulatory activity in the telecommunications sector within the European Union (EU); with well over 100 different directives, decisions, regulations, recommendations, and resolutions, relating to every aspect of the industry, having been adopted since 1984.[1] Such activity is a clear illustration that market liberalization should not be confused with concepts of market deregulation. While from a UK perspective, initial EU regulatory intervention in the telecommunications sector seldom impinged on the wider public consciousness, largely due to developments already commenced domestically,[2] some Member States experienced significant political fall-out from Commission initiatives in the area, such as public sector industrial action.

[1] Council Recommendation (84/549/EEC) concerning the implementation of harmonization in the field of telecommunications, OJ L 298/49, 16 November 1984.

[2] See further Chapter 3.

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The chapter is broadly divided in two: the first part reviews the historical development and key components of the EU regulatory framework; the second part examines particular elements addressed by the framework. It is not the objective of this chapter to provide a detailed analysis of every legal instrument in the field, in part because such a treatment would require a complete book on its own; but also because many aspects are examined in depth in other chapters of the book. Rather this chapter is designed to place the mass of EU laws, decisions, and regulations into a comprehensible contextual framework.

4.2 EVOLVING POLICY AND THE REGULATED SPHERE

The development of EU policy and legislation in the telecommunications sector can be broadly distinguished into three phases. In the first phase, between 1987 and 1993, the objective was the liberalization of telecommunications equipment and certain service sectors, whilst preserving for the incumbent the provision of network infrastructure, seen by many as a natural monopoly. In order to protect the network, it was believed that it was necessary to safeguard the revenues of the incumbent. As the provision of voice telephony services constituted the incumbent's main source of income, such services were categorized as a 'reserved service', not subject to the process of liberalization. The Commission outlined its initial position on the role of telecommunications in the creation of the Single Market in a Green Paper of 1987.[3] This paper set out three basic principles upon which the regulatory framework would be established:

- Liberalization of areas currently under a monopoly provider;
- Opening access to telecommunication networks and services, through harmonization and the development of minimum standards;
- Full application of the competition rules.

In the second phase, from 1993 to 2002, full market liberalization became politically acceptable as concerns about the impact of liberalization failed to materialize. The key commitment to liberalization came on 22 December 1994, when the Council of Ministers committed themselves to the target date of 1 January 1998 for full liberalization of the voice telephony monopoly and telecommunications infrastructure in the majority of Member States.[4] The fact that such a fundamental

[3] Commission, 'On the Development of the Common Market for Telecommunications Services and Equipment', COM(87) 290 final of 30 June 1987. See also Commission, 'On the Way to a Competitive Community-Wide Telecommunications Market in the Year 1992', COM(88) 48 final of 9 February 1988.

[4] Council Resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures, OJ C 379/4, 31 December 1994.

change in the legal framework governing a market was undertaken and substantially achieved in a relatively short period of time illustrates the considerable degree of consensus between Member States, the Community institutions, and industry itself. However, the reality of a fully competitive market, as well as the establishment of a single European market, is taking considerably longer, as the divergent interests involved emerge and are fully expressed during the process of implementation.

A third phase of EU telecommunications policy commenced on 25 July 2003, when the new 'Framework Directive'[5] and the specific measures came into force, the 'New Regulatory Framework' (NRF):

- The 'Authorisation Directive';[6]
- The 'Access and Interconnection Directive';[7]
- The 'Universal Services and User's Rights Directive;'[8]
- The 'Communications Privacy' Directive.[9]

This new regulatory regime emerged from the Commission's 1999 Communication Review,[10] which was itself designed to respond to a range of pressures for reform. First, from a legal perspective, the adoption in 1997 of the World Trade Organization (WTO) agreement on 'basic telecommunications' and associated Reference Paper[11] required certain transposition into European law, even though it represented in large part existing EU regulatory principles. Second, from a regulatory perspective, the flexibility within the existing regime had resulted in considerable divergences in practice between the Member States, inhibiting the development of a single market in the telecommunications sector.[12] Third, competition had been introduced or existed in all areas of the telecommunications market and there was a recognized desire to simplify the regulatory framework by

[5] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, OJ L 108/33, 24 April 2002.

[6] Directive 2002/20/EC on the authorization of electronic communications networks and services, OJ L 108/21, 24 April 2002. See further Chapter 6.

[7] Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108/7, 24 April 2002. See further Chapter 8.

[8] Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, OJ L 108/7, 24 April 2002. See further Chapter 9.

[9] Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201/37, 31 July 2002. See further Chapter 13.

[10] See Commission Communication, 'Towards a new framework for Electronic Communications infrastructure and associated services: The 1999 Communications Review', COM(1999)539, 10 November 1999; at p vi.

[11] See further Chapter 16, at Section 16.4.

[12] The Commission has produced reports on the implementation of the regulatory framework since 1998; the most recent was published in 2015; available at <https://ec.europa.eu/digital-single-market/en/news/implementation-eu-regulatory-framework-electronic-communications-2015>.

moving towards greater reliance on the application of *ex post* European competition rules, and away from the array of *ex ante* measures.[13] Fourth, at a technical and market level, the phenomenon of convergence between previously distinct industries has blurred and undermined existing regulatory schemes, as noted in the Framework Directive:

> The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. (Recital 5)

The NRF is designed therefore to embrace all forms of communication or transmission technology, whether used to carry voice calls, Internet traffic, or television programmes; while the concept of telecommunications has been replaced by the concepts of 'electronic communications networks' and 'electronic communications services', defined in the following terms:

> 'electronic 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, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.
>
> 'electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC[14], which do not consist wholly or mainly in the conveyance of signals on electronic communications networks. (Framework Directive, at Articles 2(a) and (c))

As with any regulatory regime, definitions constitute the boundaries that determine what falls within and outside the regulated sphere. Such definitions attempt to reflect, not describe, the marketplace to which they apply, since an undertaking's

[13] For the purpose of this Chapter, the phrase *ex ante* ('before the fact') is used in respect of regulatory measures that proactively control the manner in which entities operate going forward; while *ex post* ('after the fact') refers to measures that arise in reaction to the decisions and activities of entities.

[14] This measure has now been codified in Directive 2015/1535/EU laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241/1, 17 September 2017.

activities may result in concurrent application of different regimes. However, clear and comprehensive definitions contribute towards legal certainty, which in turn reduces potential barriers to market entry. While the NRF establishes a single regime for the provision of conveyance or conduit services, the provision of content services over such networks and services is governed under EU law by at least two, currently, distinct regimes for the provision of 'audiovisual media services' and 'information society services'. The former involves 'providing, or exercising editorial content' and falls under the 'Audiovisual Media Services' (AVMS) Directive;[15] while the latter consists of services that are *more than* 'wholly or mainly in the conveyance of signals', and are primarily regulated under the 'Electronic Commerce' Directive.[16] The boundary between this latter activity and the provision of electronic communication services is particularly blurred, given the potential variety of approaches that could be adopted for interpreting the phrase 'mainly in the conveyance of signals'; from quantitative to qualitative measures, including the imputed intention or effect of suppliers in the market and the perception of consumers.[17] As well as uncertainty concerning *how* the phrase should be interpreted, a secondary issue concerns *who* interprets? A prospective service provider could approach the regulator for an opinion on whether a proposed service falls within the regulated sphere, or it may prefer to take legal advice on its regulatory position and act accordingly. Conversely, a regulator may be reluctant to make determinations of status, preferring to place the onus on the regulatee to determine in the first instance, intervening only when considered necessary. Blurred regulatory boundaries therefore create uncertainties for market participants and new entrants.

The most obvious example of the current lack of clarity is the emergence of Over-the-Top (OTT) communication services such as Apple's FaceTime, Facebook Messenger, Telegram, and Snapchat (to list but a few!), which are applications that enable various forms of communication. On a strict technical interpretation of EU concepts, they would not appear to be 'electronic communication services' as their services do not consist 'mainly' in the 'conveyance of signals', since they are a device-based software application and their usage requires the user to have access

[15] Directive 2010/13/EU 'on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services', OJ L 95/1, 14 April 2010. Note that a proposal to reform the current regime was agreed by the EU institutions on 6 June 2018. See Commission Proposal COM(2016) 287 final of 25 May 2016. See further Chapter 14, at Section 14.2.5.

[16] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, 17 July 2000.

[17] The Audiovisual Media Services Directive employs this criterion for determining whether an 'on-demand' audiovisual media service is 'television-like'; see Recital 24.

to an underlying transmission service, such as a Wifi link.[18] From a consumer perspective, however, the service is likely to 'feel' like a communication service, despite the distinct technical layers involved. A technical approach to interpretation obviously narrows the scope of regulatees, while a functional approach widens the scope.

Until recently, EU national regulatory authorities (NRAs) have tended to adopt a technical approach, considering most OTT communication services to fall outside the regulated regime. However, pressure has been building up to shift towards a more functional approach. Traditional operators have complained that they are placed at a substantial regulatory disadvantage vis-à-vis providers of OTT communication services.[19] While national courts and the Court of Justice of the European Union (CJEU) have been called upon to make determinations of status.[20] As a consequence of these pressures, the Commission has proposed to redefine an 'electronic communication service' to encompass three distinct categories of service:

- Services consisting wholly or mainly in the conveyance of signals;
- 'internet access services', which are defined as 'a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used';[21] and
- 'interpersonal communications service', defined as 'a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s); it does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service.'[22]

[18] See Commission Staff Working Document on The Treatment of Voice over Internet Protocol (VoIP) under the EU Regulatory Framework, 14 June 2004, at 3.

[19] eg ETNO response to the public consultation on the evaluation and review of the regulatory framework for electronic communication networks and services available at <https://etno.eu/datas/positions-papers/2015/Expert_contributions/ETNO_Response_Telecoms_Framework_Review_consultation_071215.pdf>.

[20] See in Germany, Ruling of 11 November 2015, Administrative Court of Cologne, Ref 21 K 450/15, *Google v BNetzA*. See also Case C-518/11, *UPC Nederland v Gemeente Hilversum*, 7 November 2013, at paras 35–47.

[21] As defined at Art 2(2) of Regulation 2015/2120 laying down measures concerning open internet access, OJ L 310/1, 26 November 2015 (Open Internet Access Regulation).

[22] Proposal for a Directive establishing the European Electronic Communications Code, COM(2016) 590 final of 14 September 2016 ('2016 Proposal'), at Art 2(5).

This latter term is intended to capture 'functionally equivalent services', such as OTT messaging services.[23] The interactive nature of an 'interpersonal communication service' must enable the recipient of the information to respond (recital 18), which means a two-way functionality. The examples given of services that are not considered to fall within the definition are 'linear broadcasting, video on demand, websites, social networks, blogs, or exchange of information between machines' (recital 18). Social networks and blogs are presumably excluded to the extent that they do not enable 'direct' communication, although they do generally involve interactivity. With Facebook, for example, a person's 'wall' would fall outside the definition, while Facebook Messenger would be within.

The 'ancillary' exclusion is intended to be interpreted narrowly, under 'exceptional circumstances', where the service cannot be used without the principal service and 'its integration is not a means to circumvent the applicability of the rules' (recital 18). The example given is a communication channel within an online game. In addition, the Commission's proposal to replace the Communications Privacy Directive would include such 'minor ancillary features' within the regime.[24]

Although the NRF creates a single tier of regulation for the provision of transmission services, rather than the content being transmitted over such services, this distinction is not a clear-cut one, and the 2009 Reforms contain a number of content-related provisions not previously addressed under the NRF, including contractual limitations placed on the ability of users to access or distribute lawful content or operate lawful applications; provisions designed to facilitate the enforcement of owners' intellectual property rights, and measures designed to ensure that a minimum quality of service is provided over public communications networks, in order 'to prevent degradation of service and the hindering or slowing of traffic over networks'.[25] These provisions implicitly recognize that content impacts on conduit, as the economics of the former can impact directly on the market conditions of the latter.[26]

As well as excluding content services, the NRF does not generally govern the provision and use of 'telecommunications terminal equipment' or 'radio equipment', the physical kit, or other components that are connected to an electronic communications network or service by end-users, which are subject to a separate 'type approval' regime.[27] The regulatory boundary between a network and equipment was

[23] See Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications, COM(2017) 10 final of 10 January 2107, at Recital 11.

[24] Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications, COM(2017) 10 final of 10 January 2017, at Art 4(2). See further Chapter 13, at Section 13.2.

[25] Universal Services Directive, Article 22(3).

[26] See further Chapter 15.

[27] Framework Directive, Art (1)4. See further Section 4.4.3.

referred to as the 'interface', which meant either the 'network termination point' for fixed network access or the 'air interface' for wireless access,[28] although this concept has since been removed. Certain end-user equipment may also contain components that are categorized as an 'associated service' under the NRF:

> those services associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so and include, inter alia, number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identity, location and presence service. (Framework Directive, Article 2(ea))

'Conditional access systems' control access to encrypted radio or television broadcast signals,[29] a content service, and are generally contained with a set-top box or 'enhanced digital television equipment'.[30] We therefore have another blurred regulatory boundary, whereby an item of consumer equipment, the set-top box, contains components that fall within the NRF, while other equipment and systems for accessing content services would lie outside the regulated sphere.

A final distinction made in the NRF is between 'public' electronic communication networks and services and non-public, the former being subject to the bulk of the regulatory obligations and attention. Despite the importance of this regulatory boundary, the NRF does not further define what distinguishes public from private, except to state that the former is 'available to the public'.[31] It is therefore left to national implementing legislation or national regulators to offer further clarity. In the UK, for example, Ofcom has stated that a service is 'publicly available' if it is 'available to anyone who is both willing to pay for it and to abide by the applicable terms and conditions'; as distinct from a bespoke service provided to a restricted group of customers.[32] However, this is another area where regulatory ambiguity and legal uncertainty may arise.

While the current regime was intended to be future-proofed, the NRF Directives also contain a review procedure obliging the Commission to report to Council and Parliament about the 'functioning' of the Directives.[33] The first such review took place in 2006 (the '2006 Review'). Overall, the conclusions were that the NRF

[28] Directive 99/5/EC, at Art 2(e).

[29] Framework Directive, Art 2(f). See further Chapter 8, at Section 8.3.4.5 and Chapter 14, at Section 14.3.3.2.

[30] Ibid, at Art 2(o). [31] Ibid, at Art 2(d).

[32] Oftel, Guidelines for the interconnection of public electronic communications networks, 23 May 2003, at para 6.1 *et seq*; as endorsed in Ofcom's Guidelines on the General Conditions of Entitlement, see <http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/gce/gcoe/>.

[33] eg Framework Directive, at Art 25.

was operating successfully, with only relatively minor amendments and improvements being proposed.[34] In November 2007, the Commission published a series of legislative proposals to amend the NRF, key areas for reform being in respect of spectrum management and the procedural burden in respect of the market reviews and the resultant *ex ante* remedies.[35] Adoption of the final texts occurred in November 2009 (the '2009 Reforms'): The 'Citizens' Rights' Directive[36] and the 'Better Regulation' Directive.[37] Member States were required to transpose these amendments into national law by May 2011.

A second review was commenced in 2015 and led to the publication, in September 2016, of the Commission's proposal to establish the 'Electronic Communications Code' ('Code').[38] The Code is part of the REFIT programme to simplify EU laws, which in this case involves recasting four of the five NRF measures into a single code. It does not radically depart from the NRF, so cannot be considered to represent a new generation of EU telecommunications law, but is intended to consolidate the existing instruments.[39] On 5 June 2018, political agreement on the new Code was reached between the Commission, Parliament, and Council.

4.3 SOURCES OF LAW

The basis for Community involvement in the telecommunications market has primarily been founded on two different strands of European Treaty law: competition law (Articles 101–109) and the establishment of the 'Internal Market' (Article 114).[40] The former articles have been primarily used to open up national markets to

[34] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services, COM(2006) 334 final (28 June 2006); and accompanying Commission Staff Working Document, SEC(2006) 816.

[35] See Commission Communication, Report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services in accordance with Directive 2002/21/EC and Summary of the 2007 Reform Proposals, COM(2007)696 rev 1 ('2007 Reform Proposals').

[36] Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 337/11, 18 December 2009.

[37] Directive 2009/140/EC amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 337/37, 18 December 2009.

[38] 2016 Proposal. [39] See further below and Chapters 6, 7, 8, and 9.

[40] Treaty on the Functioning of the European Union ('TFEU'), OJ C 83/47, 30 March 2010.

competition, whilst the latter has primarily addressed competition issues between national markets, through harmonization measures.

Surprisingly, however, the telecommunications market has not been subject to harmonization measures under the freedom to provide services provisions of the Treaty (Articles 56–62). As a consequence, the provision of 'electronic communication services' is not subject to the 'country of origin' principle, whereby businesses established in one Member State are free to supply services into the other twenty-seven Member States without further authorization or regulatory control from the recipient state (except in limited and procedurally controlled circumstances).[41] This is in stark contrast to the provision of other closely related services, specifically 'information society services' and 'audiovisual media services'. The Commission has repeatedly sought to address this apparent anomaly, with the adoption of a 'one-stop shopping procedure',[42] a proposal to establish a European Communications Markets Authority,[43] and a 2013 proposal for a single authorization regime;[44] each of which has either been disregarded or rejected by the Member States. While the current approach was initially seen as reflecting perceptions that communication services were intimately tied to the physical networks over which they operated; the continued intransigence of the Member States must be viewed as being deeply rooted in a range of political imperatives and the 'public interest' nature of telecommunications.

Initiatives within each area have been the responsibility of different departments of the European Commission; harmonization measures originating within DG Connect and liberalization issues residing primarily with the DG Competition. The role of DG Competition in the development of EU policy in the telecommunications sector has been very considerable. Indeed, the manner in which EU competition law has been applied to the telecommunications sector provides a case study of the significance of competition law within the *acquis communautaire*. In particular, Article 106(3) of the Treaty of the Functioning of the European Union (TFEU) bestows a supervisory function upon the Commission, supported by special law-making powers:

> 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.

[41] See <http://ec.europa.eu/internal_market/services/docs/services-dir/guides/cop_en.pdf>.

[42] Directive 97/13/EC on a common framework for general authorisations and individual licences in the field of telecommunications services, OJ L 117, 7 May 1997, Art 13.

[43] See further Section 4.7.2.

[44] Proposal for a Regulation laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, COM(2013) 627 final of 11 September 2013.

Therefore, in addition to the more traditional forms of regulatory intervention by a competition authority against undertakings engaged in anti-competitive practices, the Commission could require Member States to fundamentally alter the terms of entry into a particular market.

In 1988, the Commission took the almost unprecedented step of issuing a Directive under Article 106(3),[45] on competition in the market for telecommunications terminal equipment, followed by a further Directive on telecommunication services in 1990.[46] The scope of such 'Commission' directives was viewed by a number of Member States as an illegal exercise of the Commission's competence. Both directives were challenged before the CJEU, but were decisively upheld as legitimate measures.[47] As such, European competition law grants the Commission legislative as well as regulatory competence in the telecommunications sector. By contrast, Internal Market measures, under Article 114, are adopted through the co-decision procedure, by the Council and Parliament.

While the majority of measures have taken the form of Directives, the Commission has utilized the full range of legal instruments available under the TFEU: Regulations, Decisions, and Recommendations.[48] Regulations are obviously the most significant instrument of harmonization, since they are 'directly applicable' in Member States. To date, however, only four Regulations have been adopted in the sector, three addressing issues of substantive regulation, local loop unbundling (LLU),[49] mobile roaming,[50] and 'open internet access';[51] while the fourth implemented an institutional reform, the establishment of BEREC.[52]

The LLU measure was adopted in 2000, at the height of the 'dot.com' boom, when it was seen as imperative that rapid progress be made in upgrading the fixed access network to exploit the potential of the internet.[53] At that time, there was significant public clamour for action, which galvanized the institutions to adopt a more interventionist regulatory approach. Similarly, 'mobile roaming' was a high

[45] The relevant Treaty provision at the time was 90(3).

[46] Directive 88/301/EEC, OJ L 131/73, 27 May 1988 and Directive 90/388/EEC, OJ L 192/10, 24 July 1990.

[47] Case C-202/88: *France v Commission* [1992] 5 CMLR 552; and Case C-271/90 *Spain v Commission* [1992] ECR I-5833.

[48] TEC, Art 249.

[49] Regulation 2887/2000 of the European Parliament and Council of 18 December 2000 on unbundled access to the local loop, OJ L 336/4, 30 December 2000; which was repealed by the Better Regulation Directive (Art 4).

[50] See Regulation (EC) 717/2007 on roaming on public mobile telephone networks within the Community, OJ L 171/32, 29 June 2007; repealed by Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union, OJ L 172/10, 30 June 2012.

[51] See n 22.

[52] Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337/1, 18 December 2009. See Section 4.7.

[53] It was repealed by the Better Regulation Directive (n 37), at Art 4.

profile issue with the general public, who experienced high roaming charges when travelling within Europe, as well as being politically symbolic of the desire to promote greater European integration. The justification for a Regulation was the 'urgency and persistence of the problem',[54] and followed on a sectoral inquiry carried out by DG Competition in 2000,[55] and investigative raids carried out against nine European mobile operators based in the UK and Germany.[56] The initial 2007 Regulation was first amended in 2009, then replaced in 2012 by a measure, which was then amended again in 2015 leading to the abolition of roaming charges by 15 June 2017.[57] Such direct 'state' intervention in the market, mandating the retail price of a service, is not just prompted by competition and consumer protection concerns, but is another indication of the 'public interest' nature of telecommunications,[58] in this case, the desire to promote the concept of the EU as a single market. The Open Internet Access Regulation addresses the issue of 'net neutrality', constraining the ability of operators to discriminate certain types of content, application, or service (see further Chapter 15). Taken together, it becomes apparent that the choice of a Regulation as the legislative instrument correlates to the extent of public consciousness and debate around the applicable issue.

The Commission has also made extensive use of 'soft law' measures, both formal Recommendations[59] and informal guidelines and notices.[60] Under the Framework Directive, the Commission can issue a recommendation to address divergences in the implementation by NRAs of regulated tasks under the NRF,[61] to which NRAs must 'take the utmost account of',[62] but which have no binding legal force.[63] Such documents are used both to further harmonization among Member States, providing a benchmark of good practice for national regulatory authorities,

[54] COM(2006) 382 final, 12 July 2006, at p 8.

[55] See <http://ec.europa.eu/comm/competition/sectors/telecommunications/archive/inquiries/roaming/index.html>.

[56] Commission Press Release, 'Statement on inquiry regarding mobile roaming', MEMO/01/262, 11 July 2001.

[57] Regulation 531/2012, as amended, at Art 6a. [58] See Chapter 1, at Section 1.7.

[59] eg Commission Recommendation 2005/698/EC 'on accounting separation and cost accounting systems under the regulatory framework for electronic communications', OJ L 266/64, 11 October 2005 and Recommendation 2010/572/EU 'on regulated access to Next Generation Access Networks', OJ L 251/35, 25 September 2010.

[60] eg Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, OJ C 233/2, 6 September 1991.

[61] Framework Directive, Art 19(1). [62] Ibid, Art 19(2).

[63] TFEU, Art 288. However, national courts are bound to take recommendations into consideration when deciding disputes, especially where they 'cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions'. (Case C-28/15, *Koninklijke KPN BV v ACM*, 15 September 2016, at para 41). The Framework Directive also provides the Commission with the power to adopt a binding decision on a matter, two years after issuing a recommendation (Art 19(3)(a)).

particularly in respect of the complex but critical areas of pricing and cost accounting, as well as providing assistance to undertakings, both market players and potential entrants, about how the Commission views particular matters, particularly in terms of competition analysis.

However, while 'soft law' has been used by the Commission to pursue its competition agenda, it is pertinent to note that the NRF does not expressly acknowledge the use of self-regulation as an element of the regulatory regime; while co-regulation is only referred to once in connection with the enhancement of service quality.[64] This is in contrast to the position adopted in some Member States, such as the UK,[65] where industry self-regulation is expressly referred to as a means of moving towards deregulation as competitive markets become established. The technical complexity of the telecommunications market has always meant that much of the input on certain issues, such as interconnection, primarily consisted of the convening and oversight of particular industry groups; intervening only in the event of impasse. As regulators reduce or withdraw from *ex ante* intervention in the market, as they are obliged to do under the NRF,[66] then increasing reliance is likely to be made upon industry to regulate itself. This silence about the role of self-regulation runs counter to general EU policy reflected in an Interinstitutional Agreement on Better Law-making, which expressly acknowledges the potential role of self-regulation,[67] as do measures in related areas, specifically the provision of audiovisual media services.[68]

DG Internal Market has also been responsible for some initiatives relating directly or indirectly to the telecommunications sector. It is responsible for electronic commerce issues, including regulating the provision of 'information society services',[69] which will generally be offered by telecommunication services providers. DG Internal Market was also responsible for data protection issues, which included sectoral measures imposing special obligations in the telecommunications sector; although the responsibility has subsequently transferred to the DG Justice.[70]

The CJEU has inevitably played a role in the development of European telecommunications law as the ultimate arbiter of European legal instruments. Proceedings have come before the Court based on one of four legal grounds provided for under the TFEU:[71]

[64] Universal Services Directive, Recital 48.

[65] ie The Communications Act 2004, s 6(2), requires Ofcom to have regard to whether policy could be achieved through 'effective self-regulation', which is further defined at s 6(3).

[66] See Framework Directive, at Art 16(3). [67] OJ C 321/1, 31 December 2003, at paras 22–23.

[68] Audiovisual Media Services Directive at Art 4(7). [69] See n 14. [70] See further Chapter 13.

[71] See generally Commission, *Guide to the Case Law of the Court of Justice of the European Union in the field of Telecommunications* (January 2010), available at <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/guidetocaselaw2010en_0.pdf>.

- *Infringement proceedings* (Article 258)—As part of its role to ensure implementation of Community measures, the Commission has brought proceedings against certain Member States for non-implementation or incorrect implementation of telecommunication measures.[72]
- *Judicial review proceedings* (Article 263)—Member States have challenged the Commission's right to legislate on particular matters; as discussed above in respect of Article 106(3) measures.
- *Annulment proceedings* (Article 263)—Persons have a right of appeal to the Court of Justice where they have been affected by a decision, such as a refusal to permit a merger;[73] against the fees payable for the granting of a GSM licence,[74] and against having been found to have infringed EU competition provisions.[75]
- *Preliminary rulings* (Article 267)—The Court has been required to consider questions of interpretation in respect of telecommunications measures referred to it by national courts,[76] often in the form of challenges made against decisions taken by NRAs.[77]

Finally, it should be noted that the WTO agreements addressing the telecommunications sector, such as the Annex of Telecommunications and the Reference Paper, comprise a potential source of EU law in terms of interpretation and application, if not a basis for initiating proceedings before the Court of Justice.[78]

4.4 LIBERALIZATION OF THE EU TELECOMMUNICATIONS MARKET

As noted, the basis for the liberalization of Member State markets was the application of European competition law. The first indication of the potential impact of these rules arose in a Commission decision against the UK incumbent, British

[72] eg Case C-411/02, ECJ, 16 March 2004 (Austria); Case C-500/01, OJ C 47/6, 21 February 2004 (Spain); Case C-97/01, OJ C 184/4, 2 August 2003 (Luxembourg); Case C-221/1, OJ C 274/14, 9 November 2002 (Belgium); Case C-146/00, OJ C 84/23, OJ 6 April 2002 (France); Case C-396/99 [2001] ECR I-7577 (Greece); Case C-429/99, OJ C 369/3, 22 December 2001 (Portugal).

[73] eg Case T-310/00, *MCI Inc v Commission and France* [2004] 5 CMLR 26, against the Commission's decision to prohibit the merger of *MCI WorldCom/Sprint*.

[74] *max.mobil Telekommunikation Service GmbH v Commission* [2002] 4 CMLR 32.

[75] eg *France Télécom SA v Commission* [2007] 4 CMLR 21, and *Deutsche Telekom AG v Commission*, CFI Judgment, 10 April 2008.

[76] eg Case C-18/88 *RTT v GB-Inno-BM SA* [1991] ECR I-5941; Case C-79/00 *Telefónica de España SA v Administración General del Estado* [2002] 4 CMLR 22; and Case C-369/04, *Hutchison 3G (UK) Ltd & ors v Commissioners of Customs and Excise*, 26 June 2007 re: payment of VAT on spectrum auction transactions.

[77] eg Cases C-152/07 and C-154/07, *Arcor AG & Co. KG and others v Bundesrepublik Deutschland*, 17 July 2008.

[78] See further Chapter 16, at Section 16.4.4.

Telecommunications (BT), for an 'abuse of dominant position' under what is now Article 102 of the TFEU. The decision concerned a 'scheme' adopted by BT prohibiting private message-forwarding agencies in the UK from relaying telex messages received from and intended for relay to another country.[79] The Commission's decision was appealed by the Italian government to the ECJ, whilst the British government intervened in support of the Commission.[80]

One issue for the CJEU to decide was whether BT, as a public body, was subject to the competition rules of the Treaty of Rome. The Court found that despite its public sector status, BT was operating as an 'undertaking' for the purposes of Article 102. It noted that any regulatory powers that had been given to BT were strictly limited and, therefore, the particular scheme in question 'must be regarded as forming an integral part of BT's activities as an undertaking' (para 20). In a subsequent decision, the Court confirmed that Article 102 was applicable to 'undertakings' holding a dominant position even where that position arose through law rather than the activities of the undertaking itself.[81]

The Italian government also argued that BT was exempt from the competition rules by virtue of being entrusted with the provision of services of 'general economic interest', under Article 106(2), which could be threatened by the loss of revenue resulting from the provision of private message-forwarding services. The Court held that it was for the Commission, under Article 106(3), to ensure the application of this provision and there was no evidence that such activities would be detrimental to the tasks assigned to BT (paras 28–33). The Court also noted that BT's statutory monopoly only extended to the provision and operation of telecommunication networks, not the supply of services over such networks (para 22). The *British Telecom* case was a landmark decision in the development of EU policy in the telecommunications sector and led to further investigations by the competition authorities into the activities of Europe's incumbent operators.

The Commission has applied European competition law to the activities of telecommunications operators through behavioural and structural controls.[82] The former have been imposed both in *ex ante* legislative instruments, as well as *ex post* decisions imposing behavioural undertakings as conditions for the approval of certain commercial agreements. Structural controls have been imposed primarily through *ex post* competition investigations and decisions relating to agreements,

[79] Decision 82/861, OJ L 360/36, 21 December 1982.

[80] Case 41/83 *Re British Telecommunications: Italy v Commission* [1985] 2 CMLR 368.

[81] Case 311/84 *Centre Belge d'Etudes de Marché-Télé-Marketing v Compagnie Luxembourgeoise de Telediffusion SA and Information Publicite Benelux SA* [1986] 2 CMLR 558.

[82] See also Chapter 10.

joint ventures, merger activities, and even state aid[83] in every aspect of the sector. Such regulatory intervention has extended to alliances and mergers between national incumbents;[84] in the mobile sector;[85] concerning internet infrastructure;[86] and with providers of content services.[87] In all these cases, the Commission has been concerned to protect the interests of European consumers and industry against the inevitable commercial pressures created by the developing global economy. The Commission, as competition authority, has also fined undertakings for abusive practices in the market, including Deutsche Telekom AG,[88] Wanadoo Interactive,[89] and Telefónica SA.[90]

During the initial phases of telecommunications liberalization in Europe, the process was underpinned by two legal phrases that were key elements of the *ex ante* legislative measures adopted by the Commission, that of 'special or exclusive rights' and 'essential requirements'.

4.4.1 'Special or exclusive rights'

As already discussed, Article 106(1) of the EC Treaty concerns 'public undertakings or undertakings to which Member States grant special or exclusive rights'. The primary mechanism by which the Commission decided to liberalize national telecommunications markets, under the Equipment and Services Directives, was by requiring Member States to withdraw the grant of any 'special or exclusive rights' in respect of such activities. Rather than simply addressing the *exercise* of such rights, the Commission went further and challenged the continued *existence* of such rights. Their existence was seen as distorting competition within the markets at Community level; whilst their abolition would not 'obstruct, in law or in fact, the performance' of any service of 'general economic interest' (Article 106(2)), such as universal service, which had been entrusted to undertakings granted such 'special or exclusive rights'.

[83] eg *France Télécom* [2003] OJ C 57/5, 12 March 2003. On 20 July 2004, the Commission ordered France Télécom to repay up to £1.1bn in back taxes, estimated savings that the firm had made from the granting of exemptions from local taxes that constituted a form of state aid. *Mobilcom* [2003] OJ C 80/5, 3 April 2003 and [2003] OJ C 210/4, 5 September 2003.

[84] eg *France Télécom and Deutsche Telekom* (Case No IV/35.337—Atlas; OJ L 239/23, 19 September 1996); *Telia and Telenor* (Case IV/M.1439; OJ L 40/1, 9 February 2001).

[85] eg *Vodafone Airtouch and Mannesmann* (Case No Comp/M.1795; OJ C 141/19, 19 May 2000).

[86] eg *WorldCom and MCI* (Case IV/M.1069; OJ L 116/1, 4 May 1999).

[87] eg *AOL and Time Warner* (Case No COMP/M.1845; OJ L 268/28, 9 October 2001).

[88] OJ L 263/9, 14 October 2003, imposing a fine of €12.6m.

[89] Decision of 16 July 2004, imposing a fine of €10.35m.

[90] Decision of 4 July 2007, imposing a fine of €151m.

Member States challenged both directives before the CJEU.[91] The Court found in the Commission's favour in respect of the withdrawal of exclusive rights, but upheld the claims of the Member States in respect of the limitation imposed on the granting of special rights, on the grounds that the Directives failed to specify what 'special rights' were or the reasons that such rights were contrary to the provisions of the Treaty. Such provisions were therefore void. As a consequence, the Commission amended the Services Directive to clarify the distinction between 'exclusive rights' and 'special rights',[92] which the CJEU subsequently endorsed.[93] 'Special rights' would include powers of compulsory purchase and derogations from laws on town and country planning[94] that are granted to undertakings 'otherwise than according to objective, proportional and non-discriminatory criteria'.[95] During the liberalization process, the procurement practices of telecommunication operators that were public undertakings and operating under special or exclusive rights were also subjected to regulatory controls.[96] Such rules are now only applicable to the purchasing of telecommunication systems and services, rather than the provision of such services.[97]

Despite full market liberalization, Article 106(3) may continue to be relevant to the European telecommunications market. First, in a number of Member States the incumbent operator continues to be a 'public undertaking', through full or partial state ownership, and as such could be subject to state measures which infringe EU competition law. Second, where an operator has been granted 'special or exclusive' rights in a different sector of activity, such as broadcasting or water supply, the exercise or existence of such rights might be perceived as distorting the competition in the telecommunications market.[98] As a consequence, *ex ante* controls may be imposed on such undertakings, to ensure structural separation between the activities.[99]

[91] See n 35.

[92] See Art 2(1) of Commission Directive (94/46/EC) of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L 268/15, 19 October 1994.

[93] Case C-302/94, *R v Secretary of State for Trade and Industry, ex parte British Telecommunications plc*, ECR I-6417, at para 34.

[94] Ibid, at Recital 11.

[95] Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services, OJ L 249/21, 17 September 2002.

[96] Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors, OJ L 199/84, 9 August 93, now repealed.

[97] Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94/65, 28 March 2014, Art 8.

[98] For the application of Art 106 to the broadcasting sector see Case C-260/89, *Elliniki Radiophonia Tileorassi* (1991) ECR I-2925. In the UK, Ofcom has the power to impose 'privileged supplier' conditions on an operator in such circumstances (Communications Act 2003, s 77).

[99] Framework Directive, Art 13.

4.4.2 Essential requirements

A key element in the Commission's liberalization directives was reference to the concept of 'essential requirements'. The free movement of goods (ie telecommunications equipment) and the freedom to provide services was achieved by restricting the ability of a Member State to prohibit the supply of equipment and services except for 'non-economic reasons in the general public interest', otherwise referred to as the 'essential requirements'. Such reasons reflect the derogations expressly provided for in the TFEU, ie 'on grounds of public policy, public security or public health' (Article 46), and recognized in CJEU jurisprudence:

> … Member States retain … the power to examine whether the said equipment is fit to be connected to the network in order to satisfy the imperative requirements regarding the protection of users as consumers of services and the protection of the public network and its proper functioning.[100]

The 'essential requirements' obviously differ between telecommunications equipment and services, and have been amended over time to reflect evolving public policy concerns and market conditions:

Telecommunications Equipment[101]	**Telecommunications Services**[102]
1. Health and safety of user and any other person	1. Security of network operations
2. Electromagnetic compatibility requirements	2. Maintenance of network integrity
3. Effective use of radio frequency spectrum	3. Interoperability of services*
4. Interworking of apparatus via the network	4. Data protection*
5. Protection of the network from harm or misuse of network resources	5. Effective use of radio frequency spectrum*
6. Features protecting the privacy of subscribers and users	6. Avoidance of harmful interference*
7. Features ensuring avoidance of fraud	7. Protection of the environment*
8. Features ensuring access to emergency services	8. Town and country planning objectives*
9. Features facilitating use by users with disabilities	
10. Features ensuring that only software that is compliant with the essential requirements can be loaded onto the equipment	

(* conditions imposed under such reasons are only permissible 'in justified cases')

Over the years public policy concerns broadened to encompass the protection of personal data and environmental issues, impacting on the building of network infrastructure, such as mobile transmitters and digging-up streets to lay cable.

[100] Case C-18/88, *Régie des Télégraphes et des Téléphones v GB-Inno-BM SA* [1991] ECR I-5941.

[101] As defined at Art 3 of Directive 2014/53/EU of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment, OJ L 153/62, 22 May 2014.

[102] As defined by Art 1(1) of Directive 90/388 (as amended by Directive 96/19/EC) and Art 2(6) of Directive 90/387.

In the first stages of liberalization, much concern was directed towards the impact on the 'national' (ie incumbent) network of new operators connecting 'unregulated' telecommunications equipment and generating substantial volumes of additional traffic. The network, as a strategic component of Member State economies, was viewed as being vulnerable in a competitive environment. Over time such concerns for the 'national' network have generally proven to be largely overstated.

Incumbent operators have, however, continued to use the terminology of the 'essential requirements' as grounds for imposing restrictive conditions on new entrants. In the UK, for example, BT has used concerns about 'network security' as a justification for requiring separate co-location rooms for operators implementing ASDL at BT's local exchanges, which impacted on operators' timescales and costs for the introduction of competing services. At times, new entrants have expressed concern that national regulatory authorities did not always scrutinize fully the evidence for some of these 'essential requirement' claims.[103]

While the concept of 'essential requirements' continues to be utilized in respect of telecommunications equipment (see Section 4.4.3), its use as a distinct regulatory concept in respect of telecommunication networks and services has disappeared; although some of the elements that comprise the concept continue to be specific EU regulatory objectives under the Framework Directive,[104] and all of the elements comprise conditions that may be attached to an authorization granted by a Member State under the Authorisation Directive.[105]

4.4.3 Telecommunications equipment

Telecommunications equipment encompasses a vast array of hardware, software, and related devices used both within the network, for the conveyance of signals, and at the edges of the network, in devices that enable end-users to initiate and receive communications. In common with all major jurisdictions, Europe has had a distinct regulatory regime for end-user equipment, historically referred to as 'telecommunications terminal equipment'.[106] As such equipment merged with computing, a highly regulated sector became rapidly liberalized and competitive, with

[103] See Commission Communication, 'Sixth Report on the Implementation of the Telecommunications Regulatory Package', COM(2000) 814, 7 December 2000, at p 16 *et seq*.

[104] eg Art 8(3)(b) 'interoperability of services', Art 8(4)(f) 'ensuring that the integrity and security of public communications networks are maintained'.

[105] See Annex at A. 'Conditions which may be attached to a general authorization' and B. 'Conditions that may be attached to rights of use for radio frequencies'. See further Chapters 7 and 8.

[106] Council Directive of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment, 86/361/EEC; OJ L 217/21, 5 August 1986.

the emergence of strong global players, such as Nokia and Ericsson, accompanied by relatively light regulatory intervention.

At the outset, liberalization of the telecommunications terminal equipment market primarily focused on the application of the principle of the free movement of goods, under Articles 34–37 of the TEC. In 1985, for example, the Commission intervened on the basis of Article 37 against Germany in respect of a proposed regulation extending the Bundespost's monopoly over telecommunications equipment to cordless telephones.[107] As with other product areas, mutual recognition was the initial vehicle for the achievement of a 'Single Market'. The first legislative initiative was a Council Directive in 1986 that called upon Member States to implement mutual recognition in respect of conformity tests carried out on mass-produced terminal equipment.[108]

A more comprehensive, and controversial, measure was taken by the Commission in 1988 when it adopted a directive, under Article 106(3) (then Article 86), calling upon Member States to withdraw any 'special or exclusive' rights that may have been granted to undertakings relating to telecommunications terminal equipment.[109] The Directive stated that the only grounds upon which a Member State could restrict or regulate economic operators from importing, marketing, operating, and maintaining terminal equipment was where such equipment could either be shown to have failed to satisfy the 'essential requirements' or the economic operator failed to possess the necessary technical qualifications in relation to the equipment.[110]

The mutual recognition process, first established under the 1986 Directive and extended under a series of measures addressing terminal equipment,[111] comprised a number of inter-linked principles and procedures, which continue to be largely applicable:

- The notification and publication by Member States or the Commission of technical specifications relating to the terminal equipment, commonly referred to as 'type approval specifications';

[107] *Re Cordless telephones in Germany* [1985] 2 CMLR 397. See also Case C-18/88, *Régie des télégraphes et des téléphones v GB-Inno-BM SA* (1991) ECR I-5941, where it was held that Article 30 of the Treaty precludes an undertaking from having the power to approve telephone equipment for connection to the public network without being susceptible to legal challenge.

[108] See n 112.

[109] Commission Directive of 16 May 1988 on competition in the markets of telecommunications terminal equipment, 88/301/EEC; OJ L131/73, 27 May 1988, Art 2.

[110] Ibid, at Art 3.

[111] eg Council Directive 91/263/EC on the approximation of the laws of the Member States concerning telecommunications terminal equipment including the mutual recognition of their conformity, OJ L128/1, 23 May 1991 (repealing 86/361); and Directive 98/13/EC relating to telecommunications terminal and satellite earth station equipment, including mutual conformity recognition, OJ L 74, 12 March 1998 (repealing 91/263).

- Equipment meeting relevant harmonized standards (published in the Official Journal) is presumed to be compliant with the 'essential requirements';
- The establishment of independent 'notified bodies' (designated by Member States[112]) to carry out an *a priori* examination and conformity assessment of a specimen of the proposed equipment with the 'essential requirements', and the issuance of an 'EC type-examination certificate' in relation to the particular piece of equipment;
- Declaration obligations imposed upon manufacturers that (a) all equipment produced is in compliance with the certificate and (b) that such equipment was produced under a quality assured system; and
- The adoption of a 'CE conformity marking' scheme to enable identification of terminal equipment that is suitable for connection to the public telecommunications network:[113]

Figure 4.1 CE conformity marking.

These procedures were simplified under a consolidated regime, which came into force in April 2000, intended to better reflect the 'pace of technology and market development' by making it easier for manufacturers to place products on the market.[114] This was achieved primarily by removing the requirement for equipment to be tested by 'notified bodies' prior to its manufacture. Instead, greater emphasis is placed upon manufacturers documenting their compliance with 'Conformity Assessment Procedures' relevant to the particular type of equipment.

In June 2008, the Commission codified its rules for competition in the markets for telecommunications terminal equipment, replacing the 1988 Directive and

[112] Such designation is now governed by Chapter IV of Directive 2014/53/EU (see n 101). In the UK, there are nine such bodies authorized in respect of 'radio equipment'. For a complete listing, see <http://ec.europa.eu/growth/tools-databases/nando/index.cfm>.

[113] The use of the CE marking is now primarily governed by Chapter IV of Regulation 765/2008/EC of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products, OJ L 218/30, 13 August 2008.

[114] Directive 1999/5/EC, see n 86, at Recital 7.

the subsequent measures amending it.[115] In addition, under the 2009 Reforms 'consumer premises terminal equipment' was brought partially within the NRF, specifically in respect of measures designed to improve access to and use of such equipment by disabled users, such as text relay services.[116]

The 'type approval' regime was again reformed in 2014, with fixed-line equipment being removed from the sectoral regime and placed under generic measures governing all electrical equipment.[117] 'Radio equipment' remains subject to a sectoral regime designed primarily to ensure the efficient use of spectrum and the avoidance of harmful interference, but extending to the other 'essential requirements' outlined in the previous section.[118] In the age of the smartphone, end-users have greater capabilities to modify their devices through the installation of software 'apps'. Concerns that such apps could modify the device and compromise the 'essential requirements' has resulted in a new requirement that users or third parties should only be capable of loading software on to the radio equipment that are demonstrably compliant with the 'essential requirements'.[119] Overall, however, the key elements of the type approval regime remain the same, with the 'manufacturer' being the primary actor responsible for compliance.[120]

4.4.4 Telecommunications services

Initially, the Commission's approach to liberalization focused on the competitive provision of services, rather than network infrastructure over which such services are carried. The Commission's 1990 'Services Directive' was limited only to liberalization of the provision of non-voice telephony services, and did not include 'telex, mobile radiotelephony, paging and satellites services'.[121] However, the 'Services Directive' addressed for the first time the need for objective, transparent, and

[115] Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment, OJ L 162/20, 21 June 2008.

[116] Framework, Art 1(1) and the Universal Services Directive, at Art 23a(2).

[117] Directive 2014/35/EU of 26 February 2014 on the harmonisation of the laws of Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits, OJ L 96/357, 29 March 2014; and Directive 2014/30/EU of 26 February 2014 on the harmonisation of the laws of the Member States relating to electromagnetic compatibility, OJ L 96/79, 29 March 2014.

[118] See n 107 at Art 3. It came into effect on 13 June 2016, although subject to a one-year transitional phase (Art 48).

[119] Ibid, at Art 3(3)(i) and Recital 16.

[120] ie 'any natural or legal person who manufactures radio equipment or has radio equipment designed or manufactured, and markets that equipment under his name or trade mark' (ibid, at Art 2(1)(12)). See also Art 10.

[121] Commission Directive 90/388/EEC on competition in the markets for telecommunications services, OJ L192/10, 24 July 1990.

non-discriminatory licensing, and declaration procedures for operators wishing to enter the market.

In order to be able to enter the market for the provision of telecommunications services, new entrants need to have access to leased transmission circuits from the providers of network infrastructure, traditionally the incumbent operator.[122] The 'Services Directive' therefore required Member States to ensure that requests for leased circuits are met within a reasonable period of time and any increase in charges are justified; partly through an obligation on Member States to inform the Commission of the factors responsible for any increase (Article 4). The use of any leased circuits could not be restricted, although prohibitions on offering simple resale to the public were permissible until 31 December 1992, in order to protect the incumbent's rights in respect of the provision of voice telephony.

Following the CJEU decision to uphold the Commission's right to liberalize the services market, the Commission adopted a series of directives amending the 'Services Directive' to encompass a broader range of telecommunications services: Satellite services;[123] use of cable TV networks;[124] mobile and personal communications;[125] and the 'Full Competition Directive'.[126]

The Full Competition directive required Member States to withdraw all 'exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such services' (Article 1(2)). This removed the 'reserved service' exception that had been granted over the provision of voice telephony services because it was viewed as an integral component in the provision of network infrastructure.

The Full Competition Directive committed the Member States to the 1 January 1998 deadline. This timetable corresponded with the international liberalization process achieved under the Fourth Protocol of the World Trade Organization's (WTO) General Agreement on Trade in Services, to which the Community and Member States were party.[127] Transitional periods were granted to countries

[122] See further Chapters 2 and 8.

[123] Commission Directive 94/46/EC amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L268/15, 19 October 1994.

[124] Commission Directive 95/51/EC amending Commission Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunication services, OJ L256/49, 26 October 1995.

[125] Commission Directive 96/2/EC amending Directive 90/388/EEC with regard to mobile and personal communications, OJ L20/59, 21 November 1996.

[126] Commission Directive 96/19/EC amending Commission Directive 90/388/EEC regarding the implementation of full competition in telecommunications services, OJ L74/13, 22 March 1996.

[127] Council Decision (97/838/EC) of 28 November 1997 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the results of the WTO negotiations on basic telecommunications services, OJ L 347/45, 18 December 1997. See further Chapter 16, at Section 16.4.

considered as having less developed or very small networks: Ireland, Spain, Portugal, Greece, and Luxembourg. Greece was the final EU Member State to fully liberalize its market by 1 January 2001. Full market liberalization was required of the states that have subsequently joined the Union.

The Commission adopted a consolidating directive as part of the NRF, repealing all the previous Commission directives.[128] Article 106 directives could continue to have a role to play in the liberalization of the European broadcasting market, which through convergence may impact on the telecommunications market.

4.5 HARMONIZATION OF THE EU TELECOMMUNICATIONS MARKET

While liberalization initiatives were aimed at opening up national markets to competition, harmonization measures were required to address competition across markets in the EU. Indeed, the first specific EU measure in the telecommunications sector, in 1984, was a Council Recommendation calling for harmonization in respect of technical standards.[129] The Commission has pursued harmonization across a broad range of issues, from technical standards to the applicable tax regime.

The need for common standards is obviously a critical ingredient in the development of a Single Market in telecommunications. At an institutional level, the Commission encouraged the establishment of the European Telecommunications Standards Institute (ETSI), by the Conference on Postal and Telecommunications Administrations (CEPT),[130] in 1988.[131] The introduction of Europe-wide numbers, within a so-called 'European Telephony Numbering Space' (ETNS), was viewed as an important harmonization measure towards the achievement of a Single Internal Market[132], with the ITU allocating a European country code '388'. However, the activities of the ETNS were suspended in 2005.[133] In 1991, a common emergency call number (112) was adopted, and in the following year a common international access code (00).[134] In 2007, the number range beginning with '116' was reserved for

[128] See n 101. [129] See n 2.

[130] CEPT is a body comprising some 48 postal and telecommunications 'administrations' of European Countries, not limited to the European Union: <http://www.cept.org>.

[131] eg Council Resolution of 27 April 1989 on standardization in the field of information technology and telecommunications, OJ C 117/1, 11 May 1989.

[132] Council Resolution of 19 November 1992 on the promotion of Europe-wide cooperation on numbering of telecommunications services, OJ C 318/2, 4 December 1992.

[133] See <http://www.ero.dk/etns>.

[134] Council Decision (91/396/EEC) of 29 July 1991 on the introduction of a single European emergency call number, OJ L 217/31, 6 August 1991; Council Decision (92/264/EEC) of 11 May 1992 on the introduction of a standard international telephone access code in the Community, OJ L 137/21, 20 May 1992. Both measures

the provision of services of social value, such as hotlines and helplines.[135] It was envisaged that further Europe-wide numbers would enable companies to utilize non-geographic European codes for the provision of pan-European services, such as the provision of mobile services. To date, such schemes have failed to materialize, and the Commission proposed its removal from the NRF.[136] This proposal was rejected, however, and the ETNS was retained in the Universal Services Directive, at Article 27(2), and the Commission was tasked with establishing a legal entity to manage and promote the ETNS, similar to that adopted for the '.eu' domain.[137] However, due to lack of demand, the Commission has proposed its removal from the proposed Code.[138]

In the mobile sector, the development of European-wide services has been pursued through the adoption of a series of legislative measures reserving common frequency bands within Member States, most importantly in respect of 2G, 3G, and 4G spectrum.[139] The initiative on 3G can be seen as a particular success story for the EU, facilitating the take-up of GSM as the de facto worldwide standard and placing European telecommunications companies at the forefront of the global mobile industry. The GSM measure has since been amended to enable UMTS services to also use the 900MHz band reserved for GSM, as well as future generations of mobile telephony.[140]

In parallel with the Commission's 'Services Directive' in 1990, the Council adopted a directive, under Article 95 of the TEC, establishing the concept of 'Open Network Provision' (ONP). The so-called 'ONP framework' programme was conceived to provide the regulatory basis for imposing harmonization:

have been repealed under Framework Directive, at Art 26, and are consolidated under the Universal Services Directive at Art 26 and Art 27 respectively.

[135] Commission Decision 2007/116/EC on reserving the national numbering range beginning with '116' for harmonized numbers for harmonized services of social value, OJ L 49/30, 17 February 2007; subsequently amended by Decision 2007/698/EC, OJ L 284/31, 30 October 2007.

[136] Staff Document, see n 28, at 8.2.

[137] See Directive 2009/136/EC, at Recital 42. See also Regulation 733/2002/EC on the implementation of the .eu Top Level Domain, OJ L 113/1, 30 April 2002.

[138] See n 23 at p 19.

[139] eg Council Directive 87/372/EEC on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community, OJ L 196/85, 17 July 1987; Council Decision 128/1999/EC on the coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community, OJ L 17/1, 22 January 1999, and Commission Implementing Decision 2012/688/EU on the harmonisation of the frequency bands 1 920-1 980 MHz and 2 110-2 170 MHz for terrestrial systems capable of providing electronic communications services in the Union, OJ L 307/84, 7 November 2012.

[140] Directive 2009/114/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directive 87/372/EEC on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community; OJ L 274/25, 20 October 2009.

> This Directive concerns the harmonisation of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services.[141]

Reflecting the liberalization process, the scope of the ONP programme was initially limited to issues of access to the network infrastructure and 'reserved services' provided by the incumbent operator. As such, the harmonization framework envisaged the drafting of proposals on ONP conditions across a range of issues of concern to providers of non-reserved services:

- The development of technical interfaces between open network termination points;
- The identification of additional service features;
- Harmonized supply and usage conditions, such as maximum periods for provision and conditions on the resale of capacity; and
- Tariff principles, such as the unbundling of individual service elements.

Such conditions were subject to basic principles concerning the use of objective criteria, transparency, and non-discrimination, whilst any restrictions placed on access would be limited to reasons based on the 'essential requirements'. Subsequent ONP measures were adopted in a number of areas, including the provision of leased lines; packet-switched data services;[142] Integrated Services Digital Networks (ISDN);[143] voice telephony, and interconnection;[144] and universal service.

In 1995, the ONP framework was applied to voice telephony.[145] Under this measure, the national regulatory authorities were given a broad range of obligations to ensure that the provision of 'fixed' voice telephony to users, which included residential customers as well as competing service providers, was under harmonized conditions. Such conditions included the connection of terminal equipment; targets for supply time and quality of service; service termination; user contracts; and the provision of advanced facilities, such as calling-line identification (CLI).

[141] Directive 90/387/EEC on the establishment of the internal market for telecommunications services through the implementation of open network provision; OJ L192/1, 24 July 1990.

[142] Recommendation 92/382/EEC on the harmonized provision of a minimum set of packet-switched data services (PSDS) in accordance with open network provision (ONP) principles; OJ L200/1, 18.7.1992.

[143] Recommendation 92/383/EEC on the provision of harmonized integrated services digital network (ISDN) access arrangements and a minimum set of ISDN offerings in accordance with open network provision (ONP) principles; OJ L/200/10, 18 July 1992.

[144] Directive 97/33/EC of the European Parliament and of the Council on Interconnection in Telecommunications with regard to ensuring Universal Service and Interoperability through Application of the Principles of Open Network Provision, OJ L 199/32, 26 July 1997.

[145] Directive 95/62/EC on the application of open network provision to voice telephony, OJ L321/6, 30 December 1995.

Further market liberalization led to the replacement of the voice telephony directive in 1998, extending certain provisions to mobile voice telephony.[146]

Harmonization between Member State markets has inevitably involved greater complexity and detailed regulatory intervention than that required for the liberalization of national markets. Such detail arises both from the scope of the issues addressed, as well as the imposition of asymmetric obligations on market participants. One feature of the harmonization process is the key role played by the NRAs in implementing and complying with the principles contained in the harmonization measures. Such reliance on NRAs generated, in some instances, new areas of divergence between market conditions and practices in the Member States.[147] This is reflected, in part, by the fact that the Commission pursued considerably more infringement proceedings against Member States under Article 258 of the Treaty, in respect of the harmonization directives, as compared with the liberalization directives.

4.6 'SIGNIFICANT MARKET POWER'

With the extension of the liberalization process to infrastructure as well as services, the Leased Lines Directive was amended to reflect the new environment, introducing *ex ante* regulations for certain telecommunications operators.[148] In particular, Member States were required to designate operators within their national markets who were required to provide the 'minimum set', usually comprising 'organisations with significant market power' (SMP) defined in the following terms:

> … an organisation shall be presumed to have significant market power when its share of the relevant leased-lines market in a Member State is 25 per cent or more. The relevant leased-lines market shall be assessed on the basis of the type(s) of leased line offered in a particular geographical area. The geographical area may cover the whole or part of the territory of a Member State.[149]

NRAs were required to notify the Commission that organizations had been so designated.[150] They also had the discretion to determine that an organization on either side of the 25 per cent figure fell outside the presumption, based on factors such

[146] Directive 98/10/EC on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJ L 101/24, 1 April 1998.

[147] See generally the Sixth Implementation Report, see n 103.

[148] Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in Telecommunications, OJ L 295/23, 29 October 1997.

[149] Ibid, at Art 2(3). [150] Ibid, at Art 11(1a).

as an operator's access to financial resources and its experience in the market. The concept of the so-called 'SMP operator' was subsequently applied in the ONP measures on interconnection and voice telephony, imposing *ex ante* obligations on certain participants in each national market, generally the incumbent.

The SMP concept was recognition that liberalization and harmonization of the telecommunications sector did not simply mean the removal of barriers to market entry and the establishment of a level playing field between participants. The legacy of national incumbents and the particular nature of the sector as a 'network' industry required a more interventionist stance, tipping the playing field to assist new entrants by imposing asymmetric regulatory obligations upon incumbents.

The 25 per cent market share trigger represented a lower threshold than the traditional competition law concept of 'dominance', which has generally been considered to exist somewhere over 40 per cent of market share; although market share is not usually the sole factor in determining market power for competition purposes.[151] The potential discrepancy between the 25 per cent SMP regulatory trigger and the concept of dominance was the subject of much criticism and, indeed, the German government refused to use the 25 per cent trigger for the application of the SMP obligations arguing,

> … if the definitions used in the Directive resulted in a treatment of companies concerned, that is not in line with EC competition law, the question arises whether such a sector-specific special provision is legally admissible.[152]

Justifying the lower threshold, the Commission argued that traditional competition law principles are not adequate to deal with some of the unique features of the telecommunications market; whilst the trigger also reduced the burden upon national regulatory authorities to assess 'dominance' on a case-by-case basis.[153]

However, as a result of the Commission's desire to further deregulate the sector, as well as addressing legitimacy concerns and the EU's commitments under the WTO Reference Paper, the NRF redefines the concept of an operator with 'significant market power' in the following terms, based on CJEU jurisprudence,[154]

> An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to

[151] See further Chapter 10.

[152] Letter from Dr Sidel, German Economic Ministry to Mr Cockborne, DG-XIII, dated 13 July 1998; quoted in Tarrant, A, 'Significant market power and dominance in the regulation of telecommunications markets', (2000) 21(7) *European Competition Law Review* 320–325.

[153] Ibid.

[154] eg Case 322/81 *Michelin BV v Commission* [1983] ECR 3461, para 6.

an appreciable extent independently of competitors, customers and ultimately consumers.[155]

In addition, recognizing the peculiar nature of 'network' industries and the oligopolistic structure of various telecommunications markets, such as mobile, express reference was made to the possibility of two or more undertakings being in a 'joint dominant position in a market', a complex and developing area of EU competition law.[156]

As under the previous regime, NRAs are required to designate operators as having 'significant market power' (Article 14(1)). However, to address the concern about divergent approaches being taken by Member States, the designation procedure is subject to certain harmonization provisions at each stage of the process: market definition, market analysis, and remedies (ie imposition of *ex ante* obligations).

First, the Commission issued a Recommendation on the 18 product and service markets, present at either a retail or wholesale level, in which it considered 'ex ante regulation may be warranted', and to which NRAs are required to give 'utmost account' when defining their national markets (Article 15(3)).[157] This was subsequently revised in December 2007, reducing the number of markets to seven,[158] and again in October 2014, down to four markets,[159] illustrating the progress made towards liberalization.

Second, when NRAs analyse the defined markets to establish whether any participant has SMP, they should also give 'utmost account' to guidelines concerning the analysis procedure issued by the Commission (Article 16).[160] The intention behind the 'utmost account' provisions is clear; however, the enforceability of such provisions is less certain. When an NRA carries out a market definition, it must do so 'in accordance with the principles of competition law'. The Recommendation sets out three criteria which it considers central to such an analysis:

- The presence of high and non-transitory entry barriers;
- The dynamic state of competitiveness behind entry barriers; and
- The sufficiency of competition in the absence of *ex ante* regulation.[161]

[155] Framework Directive, Art 14(2).

[156] eg Commission decision: Case IV/M. 1524 *Airtours/First Choice* [2000] OJ L 93/01 and Court of First Instance decision: Case T-342/99 *Airtours v Commission* [2002] 5 CMLR 7.

[157] Commission Recommendation (2003/311/EC) of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC, OJ L 114/45, 8 May 2003.

[158] Commission Recommendation (2007/879/EC) of 17 December 2007, OJ L 344/65, 28 February 2007.

[159] Commission Recommendation (2014/710/EU) of 9 October 2014, OJ L 295/79, 11 October 2014.

[160] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165/6, 11 July 2002.

[161] Ibid, at Recital 9.

Where the criteria are not shown to be present, the application of *ex ante* regulation would be considered inappropriate. Following such an analysis, were an NRA to identify a particular market and then to vary that definition to align with a market defined in the Recommendation, it is arguable that the validity of the NRA's final determination could be judicially reviewed.[162]

Once a designation has been made, the NRA must then determine whether to maintain, amend, or withdraw existing obligations (Article 16(2)) or which obligations to impose on the SMP operator to remedy the identified problems. Primacy is given to the wholesale remedies detailed in the Access Directive (Articles 9–13b[163]), with the possibility of imposing remedies at a retail level, where necessary, under the Universal Services Directive (Article 17).[164] Where an SMP finding has been made, an NRA is required to impose at least one of the *ex ante* remedies (Article 16(4)). To ensure harmonization at this stage of the process, the European Regulators Group (ERG), in conjunction with the Commission, adopted a Common Position 'on the approach to appropriate remedies in the new regulatory framework'.[165] This elaborated a typology of 27 potential competition problems based around four market scenarios:

- *Vertical leveraging*: This occurs where a dominant firm seeks to extend its market power from a wholesale market to a vertically related wholesale or retail market.
- *Horizontal leveraging*: This applies where an SMP operator seeks to extend its market power to another market that is not vertically related.
- *Single market dominance*: The problems which may occur within the context of a single market are entry deterrence, exploitative pricing practices, and productive inefficiencies.
- *Termination (Two-way access)*: This relates to the link between price setting in termination markets and in the related retail markets that may be competitive.

Once the competition problem(s) has been identified, the NRAs should follow certain principles in determining the appropriate remedy. First, the decision must be adequately reasoned, with full consideration of alternatives and representing the least burdensome option. Second, where infrastructure competition is not

[162] Under the Communications Act 2003, OFCOM is only required to 'take due account' of the Commission's Recommendation and Guidelines (s 79(2)).

[163] ie transparency (Art 9), non-discrimination (Art 10), accounting separation (Art 11), access to network facilities (Art 12), price control and cost-accounting (Art 13), functional separation (Art 13a), and voluntary separation (Art 13b).

[164] eg retail price caps. [165] ERG (03) 30rev1 (April 2004).

feasible, sufficient access to wholesale inputs should be ensured. Third, where infrastructure replication is feasible, the remedies should assist transition to such a situation, for example through investment incentives. The final principle is that remedies should be 'incentive compatible', in terms of compliance by the designated SMP operator rather than evasion.

The fourth harmonization element in the Framework Directive concerns the notification regime, whereby an NRA is required to notify the Commission, BEREC, and the other Member State NRAs about measures it makes in respect of the SMP process. Two distinct procedures exist: the first applicable to NRA decisions on market definitions and whether to designate an operator as having SMP (Article 7); the second concerning decisions on the imposition of remedies (Article 7a), introduced under the 2009 Reforms. In both cases, comments may be submitted to the notifying NRA on the draft measures, which the NRA is obliged to take 'utmost account' of (Articles 7(7) and 7a(1) respectively). The legal nature of such comments has been subject to challenge by operators dissatisfied with the impact they have had, specifically those of the Commission, on subsequent NRA decisions. The Court of First Instance ruled that such comments did not have a binding effect and, therefore, could not be challenged under Article 263 of the TFEU.[166] In addition, both procedures grant the Commission an exclusive right to issue a standstill notification in respect of a draft measure (Articles 7(4) and 7a(1)), of two and three months duration respectively.

The significant distinction between the two procedures lies in the power of the Commission to require an NRA to subsequently amend or withdraw a decision, where it is considered to create a barrier to the single market or be incompatible with Community law. The Commission has such a veto power in respect of market definition and designation decisions (Article 7(5)(a) and (6)), but not in respect of decisions regarding the imposition of remedies (Article 7a(7)). The reason for the differential treatment lies in the lack of competence that the Commission has to interfere with remedies under national law. With regard to the former procedure, the Commission has to date exercised its veto power on only thirteen occasions; although NRAs generally withdraw decisions that have been challenged by the Commission rather than have them formally vetoed.[167] The Commission may only veto a draft NRA decision where it considers that it would 'create a barrier to the single market or if it has serious doubts as to its compatibility with Community law' (Article 7(4)). As such, Commission approval is also confined to the absence

[166] Case T-109/06—*Vodafone* (12 December 2008) and Case T-295-06 *Base NV v Commission* (22 February 2008).

[167] There have been 105 withdrawals. For an overview of notifications, as of January 2018, see <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>.

of these grounds, so an NRA's market definition is still vulnerable to challenge at a Member State level.[168]

The Article 7 procedures have generated significant criticism and were one of the key areas of the 2009 Reform. First, achieving greater harmonization has proved somewhat illusory, as a significant degree of variation between Member States exists due to specific features of national market structure. Second, the inherent case-by-case analysis required by NRAs has been carried out with widely differing levels of competence, reflecting in part experience and resource issues. In some cases it would appear that those NRAs with least experience and resources most slavishly followed the Commission Recommendation on Markets; while at the other end of the spectrum, some NRAs, such as Ofcom, have elaborated a much more detailed market schematic than the Commission. Third, the notification procedures have themselves proved complex, burdensome, and time-consuming both for the NRAs and the Commission, which led to the process being further streamlined.[169]

4.7 REGULATORY AUTHORITIES

As discussed previously, DG Competition has treaty-based authority to impose behavioural and structural controls on the activities of telecommunications operators, subject to the jurisdictional requirement that the anti-competitive practice 'may affect trade between Member States'.[170] Otherwise, such anti-competitive practices will have to be addressed by the competent authorities within a Member State, whether a specific telecommunications regulator, a general competition authority, or both.

The *ex ante* controls were transposed into national law by the Member States, either through primary or secondary legislation. Prior to the introduction of the NRF, the Commission only exercised a monitoring role based on information supplied by the NRAs through notification and reporting obligations. The Commission's ability to intervene was significantly enhanced under the NRF, with the power to require Member States to withdraw measures in certain circumstances. However, key aspects of EU telecommunications policy continue to be dependent on being appropriately implemented by the NRAs.

[168] eg *British Telecommunications plc v Ofcom* [2017] CAT 17.

[169] Commission Recommendation 2008/850/EC 'on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC', OJ L 301/23, 12 November 2008, which replaced Recommendation 2003/561/EC (OJ 190/13, 30 July 2003).

[170] Since 1 May 2004, jurisdiction is shared with Member States: Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4 January 2003.

One of the central features present in the Member States prior to liberalization of the telecommunications market was the fact that the regulatory institution responsible for regulating the market, often a Ministry of Communications, was usually also responsible for controlling the commercial activities of the incumbent operator. It was recognized that such merged functions would not be appropriate in a competitive market and that independent regulatory authorities for the sector would need to be established.

4.7.1 National Regulatory Authorities (NRAs)

Under the 'Equipment Directive' the Commission required that the requirements imposed by the directive be 'entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector'.[171] The interpretation of this provision has been the subject of a significant amount of CJEU case law, primarily because those bodies entrusted with the responsibilities under the Directive did not generally have the necessary technical expertise to carry out the required examinations and tests on terminal equipment. Regulators tended, therefore, to be dependent on the incumbent to carry out such activities on their behalf, which gave rise to plenty of scope for abuse. As a consequence, the CJEU was required to clarify that Article 6,

> must be interpreted as precluding the application of national rules which prohibit economic agents from, and penalize them for, manufacturing, importing, stocking for sale … terminal equipment without furnishing proof, in the form of a type-approval or another document regarded as equivalent, that such equipment conforms to certain essential requirements … where there is no guarantee that a test laboratory responsible for technically monitoring the conformity of the equipment with the technical specifications is *independent from economic agents offering goods and services in the telecommunications sector*.[172]

The 'Services Directive' reiterated the need for Member States to ensure that 'a body independent of the telecommunications organisations' carried out the regulatory functions.[173] What this formulation does not adequately address is the issue

[171] Commission Directive (88/301/EEC) of 16 May 1988 on competition in the markets of telecommunications terminal equipment; OJ L131/73, 27 May 1988, at Art 6. This position had previously been taken by the Court of Justice in *GB-Inno-BM*, see n 100.

[172] See *Thierry Tranchant and Téléphone Store SARL* [1995] Case C-91/94, ECR I-3911, [OJ 96/16/6]. See also *Procureur du Roi v Lagauche & Others, Evrard* [1993] Cases C-46/90 and C-93/91, ECR I-5267, [OJ 93/C316/3]; *Ministere Public v Decoster* [1993] Case C-69/91, ECR I-5335, [OJ 93/C332/7]; *Ministere Public v Taillandier-Neny* [1993] Case C-92/91, ECR I-5383, [OJ 93/C338/6].

[173] Commission Directive (90/388/EEC) of 28 June 1990 on competition in the markets for telecommunications services; OJ L192/10, 24 July 1990, at Art 7.

of regulatory independence from the government as owner, in part or whole, of the incumbent operator.

Where a government is concerned to maintain the value of its stake in the incumbent, with an eye to some form of future asset divestiture, then it has a natural incentive to inhibit the emergence of competition into the market. Phased divestiture of the government shareholding, as has occurred in most Member States, extends this dependency relationship over a longer period of time. Privatization will generally have a direct impact on government borrowing, which in an era of austerity will be of critical importance to a government. Even post-divestiture, particularly in the short term, a government may show continued concern in the performance of the 'national champion's' share price, as new shareholders among the general public represent future electorate.

The issue of independence from government, as owner of the incumbent, was first addressed within the context of the ONP initiative. Initially, indirect reference is made to the need to conform to the 'principle of separation of regulatory and operational functions'.[174] Direct reference was subsequently made to the establishment of a 'national regulatory authority' (NRA) 'legally distinct and functionally independent of the telecommunications organisations'.[175] However, it is not until 1997 that the issue of independence from government becomes the subject of a specific legislative provision:

> In order to guarantee the independence of national regulatory authorities:
> - national regulatory authorities shall be legally distinct from and functionally independent of all organisations providing telecommunications networks, equipment or services,
> - Member States that retain ownership or a significant degree of control of organisations providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.[176]

In addition, the decisions of an NRA must be capable of being appealed by any affected party to 'a body independent of the parties involved' (Article 5a(3)). Under the NRF, the concept of independence through structural separation has been extended to include local authorities that retain 'ownership or control' over

[174] Council Directive 92/44/EEC, of 5 June 1992, on the application of open network provision to leased lines, OJ L165/27, 19 June 1992, at Recital 14.

[175] See Council Directive 95/62/EC, of 13 December 1995, on the application of open network provision to voice telephony, OJ L321/6, 30 December 1995, at Art 2(2).

[176] Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in Telecommunications, OJ L 295/23, 29 October 1997: at Art 1(6), inserting Art 5a into Directive 90/387/EEC.

operators and are involved in the granting of rights of way.[177] In the UK, such a provision would have been applicable to Hull City Council, which had a controlling shareholding in Kingston Communications until 2007.

Another aspect of the position of any regulatory authority is that such a body must be given the resources to carry out its assigned tasks. The effectiveness of a regulator depends to a considerable degree on the resources made available to it. This issue was indirectly addressed through the recitals of some of the ONP measures. Initially reference is simply made to an authority having 'the necessary means to carry out these tasks fully';[178] although this was subsequently elaborated,

> whereas the national regulatory authorities should be in possession of all the resources necessary, in terms of staffing, expertise, and financial means, for the performance of their functions.[179]

To meet this objective, the NRA must either look to government or the regulated industry for the necessary resources. In an era of public sector spending restraint, sufficient resources from government must always appear doubtful. In terms of the providers of telecommunications networks, equipment, or services, one source of income is through the operation of the licensing regime. However, under the Authorisation Directive, NRAs are only permitted to charge fees that cover 'the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme' and related matters (Article 12(1)(a)), effectively a form of cost-accounting obligation placed on the regulator rather than the regulated, which clearly emphasizes the need to minimize the costs of regulation.

Member States have adopted a diversity of models in establishing regulatory institutions, some granting regulatory tasks to the national legislature,[180] while others disperse regulatory tasks among a number of separate institutions, which is seen as significantly weakening the exercise of such powers. Regulatory dependency on the incumbent for the provision of information, as well as expertise, continues to be perceived as a problem by some new entrants in a number of jurisdictions. In terms of resources, the main reported problem is the retention of staff in such a fast moving well-remunerated employment market, which can lead to over-reliance on seconded personnel from operators including the incumbent.

[177] Framework Directive, at Art 11(2).

[178] See Council Directive 95/62/EC, at Recital 10.

[179] Directive 97/51/EC, at Recital 9.

[180] See Case C-389/08, *Base NV and others v Ministerraad* (6 October 2010), where it was held that a determination that the provision of universal service was an 'unfair burden' for a designated undertaking (see further Section 4.8) could be made by the national legislature, provided it met the 'requirements of competence, independence, impartiality and transparency' stipulated in the Framework and Universal Services Directives.

In the Commission's 1999 Communications Review of the regulatory framework, it continued to express concern in respect of a number of areas of NRA activity:

> 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 co-operation between sector specific and general competition authorities and iv) requiring transparency of decision making procedures at a national level.[181]

To address these concerns, the NRF consolidated existing provisions on regulatory independence,[182] and sets out in some detail both the obligations of national regulatory authorities in the regulation of the provision of electronic communications networks and services,[183] as well as the manner in which such functions should be carried out, including obligations to consult. However, the Commission's review of Member State implementation of the NRF highlighted ongoing concerns about NRA powers and resources, independence, and appeals.[184] As a consequence, the 2009 Reforms impose further detailed provisions on how Member States must ensure the independence, impartiality, and transparency of an NRA, by requiring that they have 'adequate financial and human resources';[185] do not seek or receive instructions from any other body in relation to the day-to-day performance of its obligations; only permit NRA decisions to be suspended or overturned by the designated appeal body,[186] and limiting the circumstances under which the head of the NRA can be dismissed.[187]

Member States are required to publish procedures for consultation and cooperation between different NRAs, particularly competition and consumer law authorities.[188] In the UK, for example, the Office of Communications (Ofcom) exercises certain functions concurrently with the Competition and Markets Authority in

[181] See 'The 1999 Communications Review', see n 10, at section 4.8.3.

[182] Framework Directive, at Art 3(2).

[183] Ibid, at Chapter III, 'Tasks of National Regulatory Authorities'. In Case C-424/07, *Commission v Germany* (3 December 2009), it was held that German law that excluded certain 'new' markets from regulation was an unlawful limitation of the NRA's discretion.

[184] eg see 13th Implementation Report, at p 10 *et seq*.

[185] Framework Directive, at Art 3(3). In Case C-240/15, *AGC v ISTAT* (28 July 2016), it was held that this obligation does 'not preclude … provisions for limiting and streamlining the spending of public administrative authorities'.

[186] Framework Directive, at Art 3(3a). In Case C-560/15, *Europa Way v AGCOM* (26 July 2017), it was held that annulment by the Italian legislature of a selection procedure for radio frequencies being carried out by the NRA was precluded.

[187] Framework Directive, at Art 3(3a). In Case C-424/15, *Garai v Administración del Estado* (19 October 2016), it was held that Art 3(3a) precluded dismissals from the NRA that resulted from a merger of regulators without rules designed to protect the independence of the NRA.

[188] Framework Directive, at Art 3(4).

respect of competition law and consumer protection issues,[189] as well as advising the Office of the Information Commissioner in respect of the enforcement of the communications privacy regulations.[190]

It is also a requirement that any NRA decision be capable of appeal to an independent body, with the 'appropriate expertise';[191] although the decision of the NRA should stand unless the appeal body decides otherwise, in order to prevent operators using the appeals mechanism to delay compliance with an obligation. Despite this provision, the Commission found that judicial practice in the Member States continued to involve the routine suspension of regulatory decisions.[192] To address this, the 2007 reform proposals suggested strengthening the provision in respect of interim measures, stating that such measures may be granted only 'if there is an urgent need to suspend the effect of the decision in order to prevent serious and irreparable damage to the party applying for those measures and the balance of interests so requires',[193] which reflected established CJEU jurisprudence.[194] However, concerns about interference in national judicial procedures meant that the final provision simply states that the NRA decision 'shall stand, unless interim measures are granted in accordance with national law' (Article 4(1)). Furthermore, Member States are required to collect information on the occurrence of appeals and the granting of interim measures in order to inform the Commission (Article 4(3)).

In the exercise of their regulatory functions, the NRAs must take 'all reasonable measures' to ensure that certain fundamental objectives are met:

- 'Promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services' (Article 8(2));
- 'Contribute to the development of the Internal Market' (Article 8(3)); and
- 'Promote the interests of the citizens of the European Union' (Article 8(4)).

Inevitably, these principles may, in particular situations, be in conflict or require different courses of action from which the NRA will be obliged to choose.[195]

[189] Communications Act 2003, s 370 (functions under Part 4 of the Enterprise Act 2002) and s 371 (functions under the Competition Act 1998).

[190] ie Privacy and Electronic Communications (EC Directive) Regulations 2003, at r 33. See further Chapter 13.

[191] Framework Directive, Art 4.

[192] 2006 Review, Staff Document, see n 28 at 5.3.2.

[193] Proposed Directive amending the Framework Directive, at Art 2(4).

[194] See, for example, Order of the President of the Court of First Instance of 30 April 1999 [1999] ECR II-1427.

[195] See *R v Director General of Telecommunications (Respondent), ex parte Cellcom*, [1999] ECC 314, with respect to reconciling the principles contained in the Telecommunications Act 1984, s 3(2).

A final aspect of NRA responsibility concerns their role in intervening and resolving disputes between market participants. Under pre-NRF, NRAs were required to make decisions in respect of disputes between undertakings, such as interconnection arrangements. However, the speed of NRA decision-making is seen as a potential barrier to entry in some jurisdictions. Inexperience, insufficient powers, and appeal procedures often resulted in significant delays, which usually disadvantaged the market entrant. The Framework Directive therefore imposes an obligation upon NRAs to reach a binding decision within four months.[196]

The centrality of Member State NRAs in the regulation of the electronic communications sector continues to be a defining feature of EU law and regulation. National divergences in NRAs as institutions and personalities would seem an inevitable outcome of the unique historical, political, and juridical characteristics of the various Member States; as much as they are a result of market differences in each national market. However, the expression of these differences impacts on the realization of a single market for the electronic communications sector and, as such, is the concern of the Commission. Striking a balance between independent NRAs and a harmonized EU regulatory approach remains an ongoing challenge.

4.7.2 European regulatory bodies

One proposal to address issues of NRA independence and harmonization of decision-making between Member States has been the establishment of a European regulatory authority to take responsibility for aspects of the regulatory regime. After funding two separate studies,[197] the Commission decided, at the time when the NRF was being developed, that there was an insufficient case for the establishment of a European telecommunications authority. However, in the course of the 2006 Review, the Information Society Commissioner, Viviane Reding, called for the establishment of a European Communications regulator,

> For me it is clear that the most effective and least bureaucratic way to achieve a real level playing field for telecom operators across the EU would be to replace the present game of 'ping pong' between national regulators and the European Commission by an independent European telecom authority that would work together with national regulators in a system similar to the European System of Central Banks.[198]

[196] Framework Directive, at Art 20.

[197] Report by NERA and Denton Hall, 'Issues Associated with the Creation of a European Regulatory Authority for Telecommunications' (March 1997); also 'Report on the value added of an independent European Regulatory Authority for telecommunications' (September 1999).

[198] Speech of Viviane Reding, 'From Service Competition to Infrastructure Competition: the Policy Options Now on the Table' at ETCA Conference, Brussels, 16 November 2006.

Subsequently, as part of the 2007 Reform Proposals, the Commission proposed the establishment of the European Electronic Communications Market Authority,[199] although with nothing like the independence and exclusive decision-making powers of the European Central Bank, as called for by Commissioner Reding, which indicated the controversial nature of the proposal in terms of the division of powers between Member States and the EU institutions. The final adopted measure established the Body of European Regulators for Electronic Communications (BEREC) to replace the existing body representing the NRAs, the European Regulators Group.[200] The BEREC is not a regulatory authority in any sense, being neither a Community agency, nor having legal personality.[201] As such, the BEREC has no decision-making powers per se, but simply exercises an advisory function, being consulted and delivering opinions on various draft measures emanating from NRAs under Article 7 and 7a and the Commission, under various provisions.[202] The Commission has proposed establishing BEREC as EU agency, to strengthen its role in the development of a single market for telecommunications.[203] However, despite these proposed reforms, there continues to be institutional asymmetry in the regulation of the electronic communications sector in the EU, in stark contrast to the concurrency and co-existence of Member State and EU competition authorities.

Under the current regime, the Commission is assisted in the process of developing policy and legislative and regulatory measures, by a range of advisory committees, representing Member State governments as well as the NRAs. Under the pre-2003 Regime, the Commission was primarily advised by the 'ONP Committee' and the 'Licensing Committee',[204] and an ad hoc group composed of the regulatory authorities in the Member States.[205] Under the NRF, the Commission currently has the following bodies to advise it, in addition to the BEREC:

[199] Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, COM(2007)699 rev 2.

[200] Commission Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services, OJ L 200/38, 30 July 2002.

[201] See n 39, at Recital 6.

[202] Ibid, at Art 3(1). BEREC was given additional tasks to draft guidelines for the implementation of the obligations of NRAs on open internet access, under Regulation 2015/2120, at Art 5(3).

[203] Proposal for a Regulation establishing the Body of European Regulators for Electronic Communications, COM(2016) 591 final, 14 September 2016.

[204] Established under Directive 90/387, Art 9, and Directive 97/13/EC on a common framework for general authorizations and individual licences in the field of telecommunications services, OJ L 117, 7 May 1997, Art 14, respectively.

[205] Established by the Commission under Council Resolution of 17 December 1992 on the assessment of the situation in the Community telecommunications sector, OJ C 2/5, 6 January 93.

- The 'Communications Committee' (Cocom), composed of representatives of the Member States;[206]
- The 'Radio Spectrum Committee', composed of Member State representatives,[207] as well as a 'Radio Spectrum Policy Group';[208]
- The 'Telecommunications Conformity Assessment and Market Surveillance Committee' (TCAM), to assist the Commission in respect of telecommunications equipment and comprising Member State representatives.[209]

Each of these institutions plays a role in the formulation of future EU policy in the communications sector. The BEREC, in particular, is best placed to promote a greater degree of harmonization in the implementation of the NRF. To date, BEREC, and its predecessor the ERG, has not proved very effective in carrying out this role'. One of the problems was that the ERG sought consensus before adopting any final common positions on issues, which, given the inevitable divergence of experience, attitude, and interest between 27 NRAs, proved problematic.[210]

To effectively monitor and lobby these different bodies, as well as the Commission Directorate-Generals, industry players have also established a range of EU-wide representative bodies and associations, such as the European Telecommunications Network Operators' Association (ETNO).[211]

4.8 UNIVERSAL SERVICE

One key area of ongoing concern of Member States towards the policy of market liberalization has been the ability to preserve and pursue the potentially conflicting public policy objective of 'universal service': the provision of access to telecommunications services for all the state's citizens. In many jurisdictions, the belief that the telecommunications market was one of natural monopoly was closely allied with this need to ensure 'universal service'.

Article 106(2) of the TEC recognizes that undertakings may be entrusted 'with the operation of services of general economic interest' and that the competition rules may be not be applicable to such undertakings where they 'obstruct the

[206] Framework Directive at Art 22. See further <https://ec.europa.eu/digital-single-market/en/communications-committee>.

[207] Decision No 676/2002/EC of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the European Community, OJ L 108/1, 24 April 2002, at Art 3. See further <https://ec.europa.eu/digital-single-market/en/radio-spectrum-committee-rsc>.

[208] Commission Decision 2002/622/EC establishing a Radio Spectrum Policy Group, OJ L 198/49, 27 July 2002, as amended by Commission Decision 2009/978/EU, OJ L 336/50, 18 December 2009. See further <http://rspg-spectrum.eu>.

[209] Directive 99/5/EC, at Art 13. [210] See n 172, at 3.1. [211] See <https://etno.eu>.

performance, in law or in fact, of the particular tasks assigned to them': the so-called 'public service defence'.[212]

The initial liberalization process envisaged under the 1987 Green Paper was not seen as greatly disturbing the policy of universal service, since the provision of voice telephony (as a 'reserved service') and network infrastructure remained with the national incumbent operator. However, the issue came to the forefront of EU telecommunications policy with the Commission's 1992 telecommunication review, which proposed extending the liberalization process from services to network infrastructure.[213] The endorsement of this policy by the Member States was therefore qualified by the need to protect universal service, as noted by the European Parliament:

> … the process of liberalization has to be accompanied by maximum protection of the universal service … especially that of weaker consumers and that of peripheral and disadvantaged countries and regions.[214]

In response, the Commission adopted a Communication addressing the importance of protecting universal service in a liberalized environment and outlined some of the key issues that comprise a policy on universal service.[215]

The legislative framework for the European Union's policy on universal service was initially set out in the ONP Voice Telephony Directive (95/62/EC), which detailed the various tiers that comprise the policy. First, a basic voice telephony service must be offered and provided on request without discrimination to all users. Second, this service must be supplied under certain harmonized conditions, including the quality of service, provision of information to consumers, and billing procedures. Third, certain advanced voice telephony facilities, such as caller line identification (CLI), should be made available. Subsequent measures addressed mechanisms to achieve the objectives of universal service, which were then consolidated under the NRF in the Universal Services Directive.

As a regulatory concept, the 'universal service obligation' (USO) continues to comprise a number of different elements:

- The provision of certain services throughout the Union;
- Provided to a certain quality;

[212] See Taylor, SM, 'Article 90 and telecommunications monopolies', (1994) 15(6) *European Competition Law Review* 332 *et seq*.

[213] Commission Communication to the Council and European Parliament, '1992 Review of the situation in the telecommunications services sector', SEC(92) 1048, 21 October 1992.

[214] European Parliament Resolution of 20 April 1993 on the Commission's 1992 review of the situation in the telecommunications services sector; OJ C 150/39, 31 May 1993.

[215] Commission Communication to the Council and the Council and European Parliament, 'Developing universal service for telecommunications in a competitive environment', COM(93) 543, 15 November 1993.

- Available 'to all end-users in their territory, independently of geographical location'; and
- At an affordable price.[216]

The regulatory challenge is to achieve this social policy objective without distorting competition between market participants, the objective of liberalization.

Of the specified services, the fundamental requirement is the provision of a connection at a fixed location. This connection may be wireline or fixed wireless, but does not extend to the provision of mobile telephony. The connection must enable access to 'publicly available telephone services', which means 'a service made available to the public for originating and receiving, directly or indirectly, national or national and international calls through a number or numbers in a national or international telephone numbering plan' (Article 2(c)). The additional services include directory enquiry services and directories (Article 5), the provision of public pay telephones (Article 6), and special measures for disabled users (Article 7). Member States are given the right to mandate services beyond this minimized harmonized list, to reflect different national conditions and the principle of subsidiarity, such as ensuring that schools have internet access (Recital 46). However, such services are not part of the USO and may not be funded through the imposition of a 'compensation mechanism involving specific undertakings' (Article 32).

What comprises this list of features within the concept of the USO needs to evolve over time to reflect the pace of technological and market developments. Under the 1999 Communications Review, consideration was given to extending the scope of the USO connection from 'narrowband' to include the provision of 'broadband services', but it was dismissed as premature in terms of market development and potentially detrimental to competition. Internet connectivity was referred to in the Universal Services Directive, with an obligation on Member States to ensure the provision of a 'connection' with the ability to support data communications 'at data rates that are sufficient to permit functional Internet access' (Article 4(2)).[217] Recently, the Commission has proposed that the obligation be in relation to 'functional internet access services', defined by reference to 'a dynamic basic list of online services usable over a broadband connection', while removing certain legacy services, such as public payphones and directory enquiry services.[218]

[216] Universal Services Directive, Art 3(1).

[217] The provision of an Integrated Services Digital Network (ISDN) connection is expressly excluded from the concept of the universal service 'connection' obligation (Recital 8). Under the pre-2003 regime, Germany included such connections within its USO regime.

[218] 2016 Proposal, at Part III, Title I. Member States would have the option to retain these legacy services, if the need could be demonstrated.

The Universal Services Directive also provides for a process of periodic review of the scope of 'universal service', to be carried out by the Commission. Reviews were carried out in 2005,[219] 2008,[220] 2011,[221] and in 2015 as part of the 2016 Proposal. The 2009 Reforms, however, contained no significant amendment to the definition. The reviews consider a range of factors, such as whether the majority of consumers use the specific service and whether 'non-use by a minority of consumers result in social exclusion' (as provided for at Annex V). As noted already, the scope is likely to expand soon, to reflect the status of the internet as the ubiquitous communications platform, although the entry of the twelve Accession States delayed somewhat the raising of the threshold.

In respect of the second element of USO, quality, Member States must ensure that all designated operators publish information regarding their performance against certain parameters (Article 11(1)), addressing such matters as the supply time for initial connection, fault repair time, and complaints concerning the correctness of bills (Annex III). NRAs may also set additional quality of service parameters in respect of the provision of services to disabled end-users and consumers (Article 11(2)). NRAs may set and monitor performance against certain targets, with the right to take measures where an operator persistently fails to meet such targets (Article 11(4)–(6)). These measures are supplemented by the general consumer-related measures in Chapter IV of the Universal Service Directive, which impose transparency obligations on operators (Article 22) and, following the 2009 Reforms, the ability for an NRA to set minimum requirements (Article 22(3)).[222]

In terms of 'affordability', the cost of access is as critical an element as the actual provision of a connection. Under the Universal Services Directive, NRAs may require designated operators to offer tariff options or packages targeted specifically at those on low incomes or with special social needs (Article 9(2)). In addition, common tariffs, such as geographic averaging, may be imposed, or price caps (Article 9(3)–(4)). In reality, geographic averaging was a traditional mechanism for funding the USO, which has been retained in all Member States.

The NRAs have the right to designate which operators are required to ensure provision of the 'set' of services (Article 8(1)). While in most Member States the obligation will primarily lie with the incumbent operator, as markets become fully competitive USO may be imposed on a number of operators, including the provision of different service elements by different operators in different geographical

[219] Commission Communication 'on the review of the scope of universal service in accordance with Article 15 of Directive 2002/22/EC', COM(2005) 203, 24 May 2005.

[220] COM(2008) 572 final, 25 September 2008.

[221] COM(2011) 975 final, 23 November 2011.

[222] See further Chapters 9 and 15.

areas. Indeed, in a fully competitive market, operators may perceive positive benefits in being designated as having USOs, and therefore Member States are required to ensure that 'no undertaking is a priori excluded from being designated' (Article 8(2)).

In addition to designation, an NRA may also impose certain obligations upon those operators determined as having SMP on particular retail markets (Article 17). In contrast to the obligations imposed under the Access Directive,[223] NRAs have certain flexibility in respect of the nature of the regulatory controls placed on retail services, but could for example include retail tariff controls (Article 17(2)). However, such retail remedies should only be imposed where wholesale remedies under the Access Directive would not prove effective (Article 17(1)(b)). Controls over the provision of a minimum set of leased lines and carrier selection and preselection were available remedies under the 2002 Universal Service Directive, but were withdrawn by the 2009 Reforms.

Defining the scope of universal service enables regulators to determine the costs associated with its provision and, therefore, mechanisms for ensuring that adequate and appropriate financing is present within a competitive market. The Full Competition Directive was the first to address the issue of the cost of universal service and related funding mechanisms. In particular, the burden could only be placed upon undertakings providing 'public telecommunications networks', ie transmission infrastructure, rather than all telecommunication service providers.[224] This contrasted with the position adopted in the United States, where '[e]very telecommunications carrier that provides interstate telecommunications services' is required to contribute.[225] EU companies felt such an approach effectively meant that EU network providers were subsidizing US operators supplying services into the EU. As a consequence, the Universal Services Directive provides that funding mechanisms levied on operators should be shared between providers of electronic communication networks and services (Article 13(1)(b)).

The Full Competition Directive also addressed the need for incumbent operators to rebalance their tariffs in order to reduce the burden of universal service. Within the broader debate on universal service, the issue of rebalancing has been one of the most politically sensitive issues for Member State governments to tackle. Historically, incumbent operators have cross-subsidized the cost of installation (ie line rental) from future call revenues, particularly long-distance and international. This approach was partly justified on the grounds of ensuring universal service. Indeed, the CJEU has recognized that the performance of such tasks of

[223] See further Chapter 8 at Section 8.4.2.

[224] Directive 96/19/EC, Art 6, inserting Art 4c into Directive 90/388/EC.

[225] 47 USC §254(d).

'general economic interest' (under Article 106(2)) may involve cross-subsidization between service elements and could justify the restriction of competition in the profitable market sectors.[226] However, with market liberalization the incumbent was required to remove such cross-subsidies as potential barriers to entry, and to move towards cost-based tariffs. The consequence for customers is that they will often experience significant price rises in line rental and local call charges, whilst the cost of international and long-distance calls falls.[227] However, the price rises may impact on government policies, particularly inflation targets, as well as being unpopular with the electorate. Therefore to counter any potential reticence at Member State level, the Full Competition Directive mandated that:

> Member States shall allow their telecommunications organisations to rebalance tariffs taking account of specific market conditions and of the need to ensure the affordability of a universal service. (Directive 96/19/EC, Article 6)

The term 'universal service' is supposed to have been originally coined by Theodore Vail, Chairman of AT&T, in 1907;[228] although the concept he was promoting was that of universal interconnection, rather than universal access. However, there is an important relationship between network interconnection and the promotion of universal service. If an operator is providing elements of a universal service policy, such as full national network coverage, and also has an obligation to interconnect to any new entrant operator, then the former operator may be placed in a disadvantageous competitive position. In the absence of a regulatory obligation to provide such services, the operator would inevitably withdraw from the provision of any uneconomic universal service elements. This connection was recognized by the Council in its 1994 Resolution on universal service,[229] and was given explicit recognition in the Interconnection Directive.[230]

Under the Interconnection Directive, where a Member State determined that meeting any universal service obligations represents an unfair burden upon an operator, the Member State could establish a mechanism to share the net cost. However, new entrants inevitably have concerns that any compensation mechanism may operate as a barrier to market entry, benefiting the incumbent. Calls have therefore been made for the cost of universal service, as a social policy

[226] Case C-320/91 *Corbeau* [1993] ECR I-2533, at para 17 *et seq*.

[227] See Sixth Implementation Report, see n 103, at p 27. See further Chapter 2, at Section 2.11.

[228] Stated by Garnham, N, 'Universal Service', Melody (ed), *Telecom Reform* (Technical University of Denmark, 1997) at 207.

[229] Council Resolution of 7 February 1994 on universal service principles in the telecommunications sector, at 'Recognises' (e).

[230] See n 144.

objective, to be borne by governments through general taxation, rather than imposed on operators.

Responding to such concerns, the Universal Services Directive states that Member States shall decide to fund any unfair burden resulting from the provision of the universal service obligation either by introducing a mechanism for compensating the designated undertaking 'from public funds' or by sharing the cost between providers of electronic communication networks and services.[231] Governments have unsurprisingly, not enthusiastically embraced the former option, although the 2016 Proposal would make this the only option. The latter may be in the form of a separately administered scheme, such as a 'universal service fund'; or the levy of a supplementary charge. To date, most Member States have deemed that the provision of universal service is not an unfair burden on the incumbent;[232] while of those that have, only France, the Czech Republic, and Romania have a fully operational compensation transfer scheme.[233]

As with many aspects of telecommunications regulation, a key issue is the determination of 'net costs' involved in meeting the universal service obligations, ie the additional costs attributable to the obligations. The Universal Services Directive details the means by which such cost should be calculated, specifically through the identification of those services provided, or categories of persons served, 'at a loss or provided under cost conditions falling outside normal commercial standards'.[234] Any revenues accruing from the service should be incorporated into the calculation of net cost on a 'forward-looking' basis, since revenues from line rentals, call charges, interconnection, and international transit charges may, over the lifetime of the customer, render a service economic. In addition, the NRAs should take into account any market benefits, both tangible and intangible, which accrue from the provision of universal service, such as the perception of ubiquity in the marketplace.

An alternative proposed mechanism for determining the net cost of 'universal service' is through the operation of public tenders or auctions. Under such an approach operators would be asked to bid for the level of public subsidy that they would require in order to meet the 'universal service' obligation or specific elements of it. The bidder requesting the lowest subsidy would then be 'awarded' the obligation under a service agreement.[235]

[231] USD, at Art 13(1).

[232] See, for example, Ofcom Statement, *Review of the Universal Service Obligation*, March 2006, at p 3.

[233] See 15th Implementation Report, COM(2010) 253 final/3, 25 August 2010, at p 13.

[234] Universal Services Directive, at Art 12 and Annex IV, Part A.

[235] See further Chapter 2, at 2.12.2.

To date, Member State experience would not appear to reflect the historic concern shown towards the threat posed by a competitive market to the provision of universal service. Instead, the perception of universal service provision is in the process of being transformed from a burden into an opportunity for market players.

4.9 FUTURE DIRECTIONS

This chapter has attempted to examine the development of European Union communications law over the past thirty years. As the third distinct phase of development, the 2003 Regime inevitably raises the question whether it will be the final phase of regulatory evolution or whether a fourth, fifth, or even sixth phase can be envisaged.

The NRF embodies a range of different regulatory initiatives. Perhaps the most significant and revolutionary of which is the idea that a single regulatory regime or framework should govern all forms of communications infrastructure and services, irrelevant of the content being communicated. Such an idea is based on current technological and market developments, generally referred to as convergence, which, although reflecting reality to an extent, also anticipates a process that has a long and unpredictable way to go. A truly converged environment may enable the removal of certain legacy regulatory concepts, such as the 'must-carry' obligation in relation to broadcasting, and yet it may require others to be extended, such as the scope and nature of universal service.[236] In addition, as the provision of network becomes a commodity, bundled into the cost of the content being transmitted, the bright line between carriage and content may become either more problematic or an irrelevant or meaningless regulatory distinction.

A second objective of the NRF was to move from *ex ante* regulatory intervention towards *ex post* reactive regulation. The rationale being that with the successful introduction of competition, traditional market mechanisms will control anti-competitive practices, with traditional competition law rules operating as a backstop against abusive practices and situations. This is the model that operates in the information technology sector, whether successfully or not, and was viewed as an inevitable consequence of both liberalization and convergence. However, during the consultation on the 1999 Review, new entrants made it very clear that the current market was not yet sufficiently competitive and was unlikely to be in certain market segments for some time to come, if ever. Hence the NRF continues

[236] The 2016 proposal retains 'must-carry', but does amend the USO.

to include a broad range of *ex ante* measures. While we can anticipate a further withering away of such measures, most commentators recognize that the unique features of the communications sector, as a networked industry, is likely to mean and require a base level of proactive regulatory intervention for the foreseeable future.

A unique feature of European Union communications law is the parallel pursuit of the objectives of liberalization and harmonization. National electronic communications markets continue to exhibit a high degree of variation, both in terms of market development, as well as regulatory structures and intervention. The NRF attempts to address the worst of the variability and inconsistencies, through greater Commission oversight. However, issues of subsidiarity and Member State political manoeuvring have prevented this process from going as far as wanted by the Commission. We can therefore anticipate a continuing struggle between the Commission and the Member State NRAs over the theory and practice of regulating the electronic communications sector, which may simply be an inevitable outcome of the European project, rather than being specific to the sector.

Finally, the prospective departure of the UK from the EU may have unexpected consequences for the future direction of EU telecommunications law. While the implications for UK law are considered in the previous chapter (see Section 3.4.6), it is worth noting that the UK has been one of the strongest voices in support of liberalization since the beginning, as well as one of the first to fully privatize the national incumbent and establish a converged regulator. The UK's departure might, therefore, enable the more conservative Member States to have greater sway over the pace of future reforms.