



# The Private Law Dimension of the EU Regulatory Framework for Electronic Communications

Evidence of the Self-sufficiency of European  
Regulatory Private Law

Marta Cantero Gamito

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

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European University Institute

**Department of Law**

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This thesis has been submitted for language correction.



## Summary

This thesis examines the contractual dimension of the EU Regulatory Framework for Electronic Communications. In particular, it provides a comprehensive legal analysis of the transformations occurring in private law as a result of the impact of EU telecommunications regulation on private law relationships. While the main focus in the Europeanization of private law has been on the sale of goods, this thesis engages the (concealed) private law dimension accompanying the, almost, all-encompassing sector-related framework that concerns the provision of a Service of General Economic Interest. This thesis scrutinizes the private law implications of the regulation of telecommunications services *from cradle to grave*; i.e. from its making to its enforcement. Hence, it does not only consider substance but also focuses on the institutional and procedural transformations taking place within the sector. Tested against empirical research, the thesis further assesses the *self-sufficiency* of sector-specific legislation as a separate regime of private law serving regulatory functions that operate independently of general contract rules. The thesis concludes by validating that self-sufficiency is actually occurring in view of the results yielded from the foregoing legal and empirical analysis and by providing a normative assessment of the transformation of private law which is taking place as a result of the shift in the focus of European private law from the *failed* European of civil code project to the regulation of areas beyond the core of private law.





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## PART I – SETTING THE SCENE

### Chapter 1 – INTRODUCTION

#### 1. Introduction

This thesis examines the contractual dimension of the EU Regulatory Framework for Electronic Communications.<sup>1</sup> Based on the assumption that the regulation of the telecommunications sector constitutes a sector-specific legal regime, this research looks at the extent to which the EU rules in the field of telecommunications impact private relationships and, most importantly, how this influence contributes to a process of transformation of private law in Europe.

The transformation of private law in Europe seems particularly evident in those areas belonging to the so-called *European Regulatory Private Law*, where the intervention of the European legislator is most obvious as, for example, in the case of Services of General Economic Interest, which constitute a composite of different “free-standing” sectorial regimes. More particularly, this dissertation looks at the extent to which the European legislator is involved in the shaping of a new European private legal order through the regulation of Services of General Economic Interest, which can be viewed in its functioning as *self-sufficient* on account of its institutional, substantive and procedural design that operates under a sector-related rationale. Accordingly, this starting hypothesis is premised on the assumption that the transformation of private law does not take place in an isolated manner; rather it occurs at three different (and interlinked) levels, giving rise to three different layers of transformation that range from the *cradle to the grave* of private law. In this light, it implies that the transformation processes in private law take place at the level of decision-making, substantive law and enforcement.

The purpose of the dissertation is, therefore, to illustrate the main features of these transformations and to demonstrate how the interplay between the different layers paves the way for the functioning of a sector-related regime that utilizes its own categories (*self-contained*) without the use of external resources (*self-sufficient*). In order to substantiate such assumptions, the research has focused on telecommunications regulation as a paradigmatic example.

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<sup>1</sup> The research leading to these Ph.D. thesis has received funding from the Ministry of Education of the Government of Spain under the Programme *Salvador de Madariaga* (Decision EDU/3476/2010) and adjudicated by Decision EDU/2085/2011, Official Gazette, 25.07.2011, n. 177, Sec. III, 82675- 82676 (BOE-A-2011-12835).

## ERPL Project and the Self-sufficiency hypothesis in European Regulatory Private Law

This research is framed within an overall research project that aims at reconstructing an unobserved *tertium genus* of (private) law: *European Regulatory Private Law (ERPL)*.<sup>2</sup> The ERPL project was conceived with the aim of providing a systematic model for the emergence of a set of private law rules that transform the aims of European Private Law from autonomy to functionalism in competition and regulation under a new institutional and procedural design.

European Regulatory Private Law does not fall within the traditional categories of private law. Rather, ERPL constitutes a “European version” of a diluted private law that serves the purpose of the “European Internal Market building project” under a process of *Economisation* and *Politicisation*. Under the Internal Market Programme, private law is no longer exclusively driven by private autonomy and freedom of contract, but used as a *regulatory* tool to build a *competitive* (internal) market (Economisation). This enterprise is being accomplished by new modes of governance that links private law to politics (Politicisation).<sup>3</sup> Labor, consumer law and the sector-specific legal regimes governing the so-called regulated markets (energy, transport, water supply, financial services, postal and telecommunications services) are the areas where these presumptions are most evident.<sup>4</sup>

Against this background, ERPL is composed of three different layers: 1) the sectorial substance of ERPL, 2) the general principles –provisionally termed *competitive contract law*– and 3) common principles of civil law.<sup>5</sup> Based on socio-legal research, the ERPL Project is structured around four parameters that epitomize the interactions between the national legal orders and those regimes composing European Regulatory Private Law: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. Moreover, the ERPL Project examines the developing new order of values upon which ERPL rests, deeply rooted in the concept of *access justice* (*Zugangsgerechtigkeit*).<sup>6</sup>

### Self-sufficiency hypothesis

Self-sufficiency within *European Regulatory Private Law* means that the EU legislature is not only substantively but also institutionally and procedurally shaping its own system of private law.<sup>7</sup> According to this notion of self-sufficiency, different sector-specific legal regimes have emerged concerning different economic sectors and following sector-specific rationales. These regimes

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<sup>2</sup> *European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation* (ERPL project). Prof. Hans-W. Micklitz leads the research under a 60 months European Research Council (ERC) Grant under the European Union’s Seventh Framework Programme (FP/2007–2013) / ERC Grant Agreement n. [269722]. The Project started in October 2011.

<sup>3</sup> Micklitz, H.-W. (2009), “The Visible Hand of European Regulatory Private Law - The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation”, *Yearbook of European Law*, 28(1) 3-59.

<sup>4</sup> *Ibid.*

<sup>5</sup> Micklitz, H.-W. and Svetiev, Y. (2012), “A Self-Sufficient European Private Law – A Viable Concept?”, *EUI Working Papers Law* No. 2012/31. Project description available at <https://blogs.eui.eu/erc-erpl/project-description>.

<sup>6</sup> *Ibid.* On the concept of *access justice* see Micklitz, H.-W. (2011), “Social Justice and Access Justice in Private Law”, *EUI Working Paper LAW* No. 2011/02.

<sup>7</sup> “Self-sufficiency means the whole process of law-making up to law enforcement follows sector specific patterns”, Micklitz, H.-W. and Patterson, D. (2012), “From the Nation State to the Market: The Evolution of EU Private Law”, *EUI Working Papers LAW* no 2012/15., p. 14.



comprise rules ranging from administrative rules to provisions focusing on the private law relationships aimed at accomplishing sector-related goals. Self-sufficiency is, therefore, understood as an *all-inclusive discourse* that encompasses and embraces an entire sector since its birth (law-making) up to its enforcement according to a sector-specific logic.

Furthermore, apart from operating according to the logic of the sector concerned, the *self-sufficient* EU regulatory private law operates with minimal interaction from national private law systems. As such, there is a process of *intrusion and substitution* by which the different EU rules that shape the different sectors, originally aimed at opening former monopolistic industries, are implemented at the national level in isolation; i.e. keeping their *legal sectoriality*. By so doing, Member States do not integrate the contractual dimension of these rules into the systematised national private law regimes.<sup>8</sup> Thus, the sector-specific provisions concerning private law relationships remain outside the systematic national civil regimes –usually embodied in civil codes– and more general rules of private and consumer law.

## 2. Thesis contextualization: Argument and scope

The academic discussions revolving around the Europeanization of private law, and its legislative program, have largely focused on the sale and the supply of goods, whereas the regulation of services has not received much attention, even though the services industry represents more than the 70% GDP of the Union.<sup>9</sup> In particular for the telecommunications industry, the development of digital technology is a crucial aspect for economic growth and employment in the EU. The information and communications technology (ICT) industry is directly responsible for the 5% of the European GDP, with a market value of around EUR 660 billion.<sup>10</sup> Telecommunications services reach more than 90% of European homes.<sup>11</sup> High-speed broadband Internet reaches 62% of the EU's population.<sup>12</sup> This has a substantial impact on the Digital Economy and, most importantly, on the development of online shopping –and with it, cross-border shopping– and online markets.

Given the relevance of the telecoms sector, much has been already written on Telecommunications law.<sup>13</sup> However, as a matter of fact, the interplay between regulation and private law has been largely neglected. And, when it comes to private law, the academic responsiveness to the regulation of the supply of services within regulated markets is impaired as opposed to the attention paid to, and the position occupied by, the regulation of the supply of

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<sup>8</sup> Micklitz, H.-W. (2014), 'The (un)-systematics of (private) law as an element of European legal culture', in Helleringer, G. and Purnhagen, K. (eds.), *Towards a European Legal Culture*, Beck/Hart/Nomos, 81-115.

<sup>9</sup> Services contributed 73.5 % of the EU-28's total gross value added in 2013. Source: Eurostat, Data from May 2014.

<sup>10</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A Digital Agenda for Europe*, COM(2010) 245 final/2.

<sup>11</sup> Digital Agenda Scoreboard 2014.

<sup>12</sup> Ibid.

<sup>13</sup> The most salient examples in European Regulation are: Long, C. (1995). *Telecommunications law and practice*. Sweet & Maxwell; Nihoul, P., & Rodford, P. (2004). *EU Electronic Communications Law & Competition and Regulation on the European Telecommunications Market*; Koenig, C. (Ed.). (2009). *EC competition and telecommunications law* (Vol. 6). Kluwer Law International. Walden, I. (Ed.). (2012). *Telecommunications law and regulation*. Oxford University Press.

goods. In the field of European Private Law, the creation of a European Civil Code has been object of relevant treatment by the literature about European Private Law.<sup>14</sup>

Only some scholars have pointed out already the relevance of regulated sectors for private law, as well as the significance of their regulatory and institutional framework.<sup>15</sup> A comprehensive analysis of the interplay between sector-specific regulation and contract law has been already carried out in the field of Energy services, for instance.<sup>16</sup> For the telecommunications sector, only a certain aspect of telecommunications, interconnection regulation, has been subject to a thorough scrutiny.<sup>17</sup> Yet, while the latter contribution comprises an extensive treatment of the relationship between telecommunications interconnection regulation and contract law, the author does not assess the impact in the configuration of national private law regime under the influence of the telecommunications regime which ultimately stems from EU law. These issues, therefore, require greater attention. Accordingly, this dissertation aims at demonstrating the way in which the regulation of the supply of telecommunications services impinges on private law. Thus, this thesis aims at bridging the gap in the assessment of the interplay between national contract law and EU sector-related provisions concerning private law relationships. What it is innovative, as stated above, is the focus on the transformations in the making, the substance and the enforcement of contract law provisions, which appear to reformulate private law as traditionally conceived; i.e. the private law contained in the 19<sup>th</sup> century codifications guided by private autonomy and freedom of contract.

## 2.1 Thesis argument

Private law in the EU serves a regulatory function.<sup>18</sup> In accomplishing such a role, private law is going through a process of “re-generation”. By focusing on the contractual dimension of telecommunications regulation, this dissertation identifies and investigates how this regulatory function re-shuffles the traditional notion of private law. The main assumption is that the transformation of private law does not take place in an isolated manner; rather it occurs at three different (and interlinked) levels, giving rise to three different layers of transformation. These transformation processes in private law take place at the level of decision-making, substantive law and enforcement.

The underpinning the argument of this thesis can be introduced in the following manner:

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<sup>14</sup> The most prominent examples Hartkamp, A. S., & Hondius, E. H. (Eds.). (2004). *Towards a European civil code*. Kluwer Law International.; Zimmermann, R. (1994). Civil Code and Civil Law-The Europeanization of Private Law within the European Community and the Re-emergence of a European Legal Science. *Colum. J. Eur. L.*, 1, 63. Collins, H. (2008). *The European civil code: the way forward*. Cambridge University Press; Hesselink, M. W. (2004). The politics of a European civil code. *European law journal*, 10(6), 675-697; Legrand, P. (1997). Against a European civil code. *The modern law review*, 60(1), 44-63; Von Bar, C. (2000). *Die study group on a European civil code*.

<sup>15</sup> Micklitz (2008), *supra* n 3; Micklitz, H. W. (2013), “Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse”. *Yearbook of European Law*, 32(1), 266-367; and Cafaggi, F. (2006). *The Institutional framework of European private law*, Oxford University Press and Cafaggi, F., & Watt, H. M. (Eds.). (2010). *Making European private law: governance design*. Edward Elgar Publishing.

<sup>16</sup> Bellantuono, G. (2009), *Contratti e regolazione nei mercati dell'energia*, Il mulino.

<sup>17</sup> Gijrath, S. (2006), *Interconnection Regulation and Contract Law*, dLex.

<sup>18</sup> Cafaggi, F. and Muir-Watt, H. (eds.) (2009), *The Regulatory Function of Private Law*, Edward Elgar Publishing.

i. Law-making

The law-making procedure is a decisive factor in the content and quality of the legal provisions to be produced.<sup>19</sup> A potential transformation of private law, therefore, calls for the examination of the institutional choice and design, particularly where the process of rule-making is understood as “as a dynamic process, in which rules are not simply the result of a single legislative procedure but the outcome of continuing interaction between legal, political, and economic institutions”.<sup>20</sup> This is particularly the case in the making of European Private Law.<sup>21</sup>

From the perspective of law-making, the starting hypothesis is that telecommunications regulation has an impact on the creation of private law. The examination of such proposition requires answering the following questions: How does the law-making process of telecommunications generate law? How does the institutional structure of telecommunications regulation depart from that of (traditional) private law? To what extent does the institutional framework affects the role and function of the contract law provisions provided by telecommunications regulation? This thesis attempts to provide an answer to these questions by scrutinizing the regulatory strategies in the regulatory process at EU and at national levels, encompassing the analysis of the legislative and implementation procedures and the relevance of the actors involved in telecommunications rule-making.

ii. Substantive law

The private law rules contained within telecommunications regulation appear to pursue a broader set of functions *vis-à-vis* the traditional functions of private law.<sup>22</sup> The assumption is that private law in the EU serves regulatory and competitive goals within the broader goal of (internal) market building. Thus, under telecommunications regulation there is an *obligation* to grant access and interconnection to the network infrastructure to alternative operators and to ensure access to all consumers who request it. Accordingly, sector-specific regulation provides for a set of regulatory obligations in wholesale markets, and consumer rights in retail markets that are only applicable to the contractual obligations arising in connection to the specific sector at issue. This claim calls for an examination of the particular sector-related rules concerning private law relationships as opposed to the traditional role and functions of general private law.

In this light, this dissertation examines transformations at the *substantial law level*. Given that there is a tension between the objectives of private/contract law and the regulatory aims of ERPL, it is very important to assess the suitability of contract law to achieve the regulatory goals of telecommunications. To this end, this analysis shows what the aims of telecommunications regulation are, and if and how, it has contributed to the development of a “parallel” (or

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<sup>19</sup> Cafaggi, F. (2006). *The Institutional framework of European private law*, Collected Courses of the Academy of European Law, Oxford University Press.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Micklitz, H. W. (2013), ‘Monistic Ideology versus Pluralistic Reality—Towards a Normative Design for European Private Law’, in Niglia, L., *Pluralism and European Private Law*, 29-51.

“alternative”) private law for regulated markets. Against this background, this thesis also pays attention to the rationale and the implications of a dualist approach (general/sector-specific or horizontal/vertical) concerning the regulation of private relations in the EU.

### iii. Enforcement

The successful application of substantive rules depends on the effectiveness of its enforcement system. Consequently, the analysis of substantive law needs to be accompanied by the scrutiny of its enforcement design. Regarding the enforcement of the sector-related provisions, this thesis starts from the premise that only a few disputes reach the courts.<sup>23</sup> This is due to the fact that, at least in telecommunications, traditional private law adjudication of disputes is moving away from courts to extra-judicial enforcement, giving a significant role to Alternative Dispute Resolution and even administrative enforcement in the form of regulatory adjudication. This raises a question concerning the role (i.e. relative importance) of Alternative Dispute Resolution (ADR) in the enforcement of sector-related rights *vis-à-vis* judicial redress. This question is particularly relevant when it comes to the applicable legal regimes; i.e. are disputes solved under general contract/consumer law or under the applications (and interpretation) of sector-specific rules.

This dissertation provides an answer to the most important questions arising from such an approach towards the enforcement of telecommunications regulation via sector-specific (extrajudicial) dispute settlement. In order to do so, this research shows the different actors and procedures related to the enforcement of the contractual aspects of telecommunications regulation. By so doing, it traces the different outcomes reached by different actors competent in the enforcement of telecoms rules and how the different jurisdictions impact on the role of more general contract law rules and principles *vis-à-vis* sector-related rules?

Thus, this dissertation aims to display the main features of these transformations and to illustrate how the interplay between the relevant layers paves the way for the functioning of a *sector-related* system which runs according to its own categories (*self-sufficient*) and without relying on external rules (*self-contained*).<sup>24</sup> In other words, this thesis tests the self-sufficiency hypothesis via the analysis of the European regulatory framework for telecommunications as evidence of the transformation(s) of private law.

## 2.2 Scope of the thesis

As a consequence of the high level of technical complexity in the electronic communications sector and its nature as a regulated sector of the economy, the telecommunications regulatory regime covers different legal disciplines ranging from administrative law to contract law; standing thereby halfway between public and private law. As a result, the regulation of telecommunications and the

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<sup>23</sup> Micklitz, H.-W. and Svetiev, Y. (2014), “The Transformation(s) of Private Law”, in Micklitz, H.-W. and Svetiev, Y. and Comparato, G. (eds.), *European Regulatory Private Law – The Paradigms Tested*, European Regulatory Private Law Project (ERC-ERPL - 07); *EUI Working Paper LAW* No. 2014/04, p. 69.

<sup>24</sup> Micklitz, H.-W. and Svetiev, Y. (eds.) (2012), “A Self-Sufficient European Private Law - A Viable Concept?”, *EUI Working Papers Law* No. 2012/31, 26-44.

efforts to achieve broad policy goals via sector-specific regulation has blurred the line between public and private law.<sup>25</sup>

In preparing a PhD thesis that concerns telecommunications law, special attention has to be paid to the analysis of the most important issues concerning the telecommunications regulatory scheme. Nonetheless, this thesis leaves aside issues concerning the liberalization of the sector (competition law issues associated with networked industries). The relationship between competition law and other legal instruments is complex. EU Competition law applies across the board to all economic sectors, including electronic communications. Over time competition law and sector regulation converge towards each other such that the frontier between each legal field is becoming blurred. However, divergences remain such that competition law and sector-specific regulation do not fully coincide and should not be confused. Given that in networked industries competition entails that network providers facilitate access to their network to third parties (“regulatory obligations”), the EU legislator has thereby combined public with private law regulatory measures. In this light, the aim of this dissertation is to demonstrate the *lex specialis* character of sector-specific regulation with regard to private relationships. Accordingly, even though competition law provisions play a very significant role in the regulation of telecommunications services, the analysis of competition law has been left aside in the scope of this research.

In addition to the foregoing, this dissertation deliberately excludes the treatment of the enforcement of competition rules. This particularly refers to commitment decisions. The reasons that led to this decision are grounded on the fact that commitment decisions are of a voluntary nature, whereas sector-specific legislation draws on the imposition of *ex-ante* regulatory obligations. As a matter of fact, a more general application of *ex-ante* competition law does not take place generically, but rather under a more case-by-case approach (e.g. mergers and acquisitions concerning telecommunications markets), as opposed to the role performed by sector-specific national regulators on market analysis (Significant Market Power analysis) and the imposition of access and interconnection obligations.<sup>26</sup> This implies that the rationale behind National Regulatory Authorities and sector-specific regulation (in terms of accountability, understood as the justification for the existence of the sector-specific regulation instead of competition to take over) are different to those of competition law.<sup>27</sup> The pursuit of different goals is what justifies the *self-standing* nature of sector-specific regimes *vis-à-vis* more cross-sectorial constructions; i.e. competition law.

Even though telecommunications regulation is more likely to fall within the category of administrative law, it is of major importance to clarify that this dissertation concerns private law and its transformation and, therefore, it deliberately sets aside public law or administrative law

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<sup>25</sup> Bergkamp, L., (2003), *European Community law for the new economy*, Intersentia.

<sup>26</sup> Gijrath, 2006, *supra* n 17, at p. 9

<sup>27</sup> Freeman, J., and Rossi, J. (2012), “Agency coordination in shared regulatory space”, *Harvard Law Review*, 125. See also Larouche, P. (2004), “Legal issues concerning remedies in network industries”, available at [http://papers.ssrn.com/soL3/papers.cfm?abstract\\_id=832025](http://papers.ssrn.com/soL3/papers.cfm?abstract_id=832025).

concerns from its scope beyond specific issues, which require a wider contextualization within administrative law regime as a whole.

Instead, this research focuses only on the private law dimension, i.e. the contractual implications, of telecommunications regulation. Nor does the thesis address issues concerning the financing of universal services as part of the regime Services of General Economic Interest; rather, it focuses on how the EU legislation impacts private relationships through sector-specific legislation.

### 3. Methodology

This thesis provides an overview of the contractual relationships in telecommunications regulation in order to identify the impact of regulation in contractual relationships. Particularly, it tries to identify how the above-mentioned transformations differ from general regimes of private law from its formation to its enforcement. To this end, this research involved examining regulation with a private law focus. This approach, composed of not only a formalist but also a normative analysis, necessarily calls for institutional contextualization.<sup>28</sup> This means translating the *law* into the institutional context. On the basis of the aims of this dissertation, such an approach contributes to a better understanding not only of the main claims, but also of its underpinning dynamics: substantive and institutional. As a result, this dissertation follows a *bottom-up approach*; i.e. looking not only at the legal provisions, but complementing the legal analysis with an examination of different case-studies relevant to understand the functioning of the sector in practice. Essentially, the research conducted complements theoretical constructions with empirical findings.<sup>29</sup> Accordingly, the analytical framework provided herein is coupled with empirical-based research, as a preferred methodological approach.

After introducing the theoretical foundations of the research, three core chapters (law-making, substantive law and enforcement) constitute the cornerstone of the main assumption: the transformation of private law through telecommunications regulation. Different rules have been provided for the private law relationships arising in wholesale markets (B2C) and retail markets (B2C). Different goals and purposes inform the legal provisions and, therefore, in conducting this research, a distinction has been made concerning the substantive rules applicable to B2B or B2C relationships. Such duality is also evident in the procedural system designed for the enforcement of telecommunications regulation. Accordingly, where appropriate, the analysis of the substantial and the procedural rules diverges according to the different market levels at issue. Each of these chapters contains a descriptive aspect displaying the main features of the EU Regulatory Framework for Electronic Communications and two case-studies in both market levels, wholesale and retail, where these features can be perceived.

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<sup>28</sup> Shaffer, G. (2013), “Comparative Institutional Analysis and a New Legal Realism”, *Wisconsin Law Review*, (2), pp. 607-628.

<sup>29</sup> Testing the self-sufficiency hypothesis requires empirical research. Hans-W. Micklitz & Yane Svetiev (eds.) (2012), *supra* n 24, and Svetiev, Y. (2013), “Dimensions of Self-sufficiency”, *EUI Working Papers Law* No. 2013/05 (ECR-ERPL 05).

## Empirical Research

The original contribution of this research lies in the fact that it examines the telecommunications sector beyond the “law on the books”. Thus, on the basis of the legal provisions, the research displayed herein is a (re)construction based on factual evidence drawn from empirical observation. In particular, this dissertation has sought to reconstruct the role of the actors and the procedures involved in telecommunications practice also by way of qualitative empirical research.

The design of the empirical research was built upon a holistic approach, meaning that it concerns the whole legal structure of telecommunications. Despite the empirical results have not yielded a fully systematic outcome, the evidence contributed to the argument of the research according to a process of heuristics and legal hermeneutics. The information gathered via the empirical observation has been subject to a process of socio-legal analysis. To obtain a deeper knowledge of legal hermeneutics, a German sociologist, Dr. Thomas Roethe, has assisted me in contextualizing and interpreting the information gathered via empirical research.

Part of the empirical evidence derives from interviews with practitioners in the telecommunications market. The interviews were conducted with staff members from the National Regulatory Authorities (NRAs), Head of Units from the European Commission, representatives of the Body of European Regulators for Electronic Communications (BEREC), dispute adjudicators, and practitioners, representatives from the national government and the telecommunications industry.<sup>30</sup> The selection of the interviewees was made on the basis of their position as their role within the organization in the case of the NRAs, or the particular status that they hold within the organizations as main actors in the implementation and the application of the EU rules *vis-à-vis* national law, as well as their involvement in particular cases relevant for this research. The interviews were formal and recorded. All the interviews have been entirely transcribed and thoroughly analyzed and interpreted. As they were open-ended interviews, they have provided a very comprehensive understanding of the institutions analyzed, their character, role, functioning and their interaction with each other. Part of this research has been, thereby, shaped by the outcome of the interviews taking account of sensitive or fraught issues that account for where the practical problems reside.

In addition to the interviews, a second source of empirical research comprises the analysis of particular national examples including Italy, Poland, Germany and the United Kingdom in the field of consumer-related dispute resolution. Methodologically, the selected countries were chosen as representative of the main differences that can be appreciated concerning the different approaches that may be taken when designing the national system of dispute resolution in Europe. Availability of accessible information for empirical research has also played an important role in the design process of the empirical research. Furthermore, this empirical research has involved the

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<sup>30</sup> In this regard, I would like to thank all the people that have been interviewed to make this research possible. All the participants have been very open and frank and they have provided me with an inestimable help and information. Nonetheless, the opinions expressed in this dissertation are the result of the personal opinion and interpretation of its author.

participation in real procedures for the settlement of disputes with consumers, which has provided a rich overview on the functioning of the hereby-displayed mechanisms.<sup>31</sup> Given that this research is based on a bottom-up approach, the information concerning the different national mechanisms has been complemented via qualitative empirical research carried out through a process of interviews and panels with experts in dispute resolution in the telecommunications field coming from the regulatory agencies, consumer platforms, or the business themselves.<sup>32</sup> The conference proceedings and the interviews were recorded, transcribed, analyzed and discussed in order to identify potential conflicts and commonalities. Interestingly enough, such a hermeneutic process yielded the identification of a kind of sector-related *para-legal* (or even *meta-legal*) jargon and customs concerning the functioning of the sector.<sup>33</sup>

The information gathered as a result of the empirical research has been presented following an *integrated approach*; i.e. the text is a coupled combination of parts of the interviews and its interpretation with relation to the legal provisions of the EU Regulatory Framework. Thus, the body of this dissertation is based on both the provisions contained in the EU rules concerning telecommunications and the trends suggested by the empirical observations and the socio-legal analysis.<sup>34</sup>



Figure 1.1: Integrated approach

<sup>31</sup> Participation as a listener at different procedures of compulsory conciliation attempt (tentativo de conciliazione) and hearings for the definition of the dispute (definizione delle controversia) by the Italian regulator (AGCOM, *Autorità per le Garanzie nelle Comunicazioni*, AGCOM) via the delegated Regional Authority for Telecommunications (*Consiglio Regionale per le Comunicazioni*, Co.Re.Com), Co.Re.Com Toscana, Florence, April and May 2014.

<sup>32</sup> *Workshop Private Law and the Telecommunications Sector: National Perspectives on EU Regulation* held in European University Institute (Florence, 7-8 December 2012), organized by Prof. Hans-W. Micklitz (EUI) and Prof. Yane Svetiev (Bocconi/EUI) within the framework of the ERPL Project and funded by the ERC Grant Agreement n. [269722].

<sup>33</sup> This phenomenon has already been identified in different economic sectors, see Bernstein, L. (1992), "Opting out of the legal system: Extralegal contractual relations in the diamond industry". *The Journal of Legal Studies*, 115-157 and Bernstein, L. (2001), "Private commercial law in the cotton industry: Creating cooperation through rules, norms, and institutions" *U Chicago Law & Economics, Olin Working Paper*, (133), Deakin, S. (2006), "The Return of the Guild?: Network Relations in Historical Perspective", *Centre for Business Research, University of Cambridge Working Paper* (322).

<sup>34</sup> This dissertation has sought to assemble the information gathered as a result of the interviews with legal provisions and relevant literature. Since this exercise follows an *integrated approach* where the analysis and interpretation prevails, the reader is kindly invited to pay particular attention to the footnotes, which largely contain pieces of the interviews.



Under this approach, this thesis combines the legal analysis of the provisions contained in the regulatory framework together with the examination of particular case-studies from a socio-legal and empirical point of view. The analysis of case-studies along the different chapters helps to underscore the complexities of the sector. Accordingly, the legal analysis of such cases, combined with the more descriptive aspects, provide a comprehensive overview of the transformations of private law.

#### 4. Thesis structure

The research design is organized in three parts. Part I sets the research and theoretical foundations of the thesis. Following the Introduction, the second chapter contains the theoretical spine of the dissertation. This chapter gives shape to the self-sufficiency hypothesis and further develops the theoretical grounds for each of the three layers of transformation: law-making, substantive law and legal enforcement. Accordingly, Chapter 2 signifies where the transformation is more evident. It also provides the normative yardstick against which the postulates of the self-sufficiency hypothesis are assessed.

Part II (Chapters 3 to 5) provides a more descriptive account of the three pillars upon which the transformation of private law is tested. Taking into account the duality of the approach of the legal framework (wholesale and retail), these chapters provide the legal and factual consequences of the regulatory approach, from a contractual point of view, in both market levels. In this regard, each of these chapters first introduce the analysis of the legal provisions and continues with representative case-studies that better contribute to illustrate the functioning of the sector in practice. This dualism (legal + empirical analysis) helps to bridge the gap between the formal regulatory framework and what is occurring in practice.

Chapter 3 (law-making) explores the transformations operated in the *making* of private law as a result of role of the EU in the regulation of Services of General Economic Interest. As observed in the case of telecommunications regulation, under the *New Governance* approach, the EU legislator has opted for a system of co-regulation while, at the same time, the effectiveness of EU soft-law is increasing. The system has evolved through different interactional (network) levels aimed at a single purpose: harmonization of the Internal Market. It is already in the *making* of telecommunications regulation that private law is instrumentalized in order to serve to the desired regulatory functions. The analysis of the institutional design and the modes of governance become crucial. Accordingly, this chapter reconstructs, from an empirical perspective, the role of National Regulatory Authorities, the impact of the umbrella group (BEREC) and the supervisory tools of the European Commission granted by the sector-specific regulatory framework itself. Here, law-making, implementation and enforcement of the legal provisions are heavily overlapping when it comes to decision-making. These “new” regulatory structures appear to contrast with those belonging to traditional spheres of private law (contract and tort). In addition, the normative design blurs the borders of private law and gives rise to a difficult in terms of defining what is private law and what is regulatory law within telecommunications regulation. Accordingly, this chapter seeks

to answer the question as to the extent to which this *new* model of decision-making implies a shift with regard to traditional methods of law-making in private law.

The first case-study in chapter 3, related to the implementation of price setting in the wholesale market, deals with the implementation of a Commission Recommendation (soft law) on costing methodologies for termination rates. It illustrates a conflict between the national regulator, supported by the European Commission, and the national judiciary in the framework of a procedure for the supervision of the imposition of regulatory obligations in the national markets (so-called procedure of Article 7a Framework Directive). This case contributes to a better understanding of the role of new actors in law-making, the co-regulation procedure, and the interplay between the different actors underpinned by a multi-level governance structure where the EU and the national levels interact. A second case-study, concerns the establishment of retail price ceilings at EU level. Through the analysis of the *Vodafone* case, this chapter addresses the use of Article 114 TFEU, a controversial legal basis for the EU's competence on which to harmonize the regulation of retail prices.

The regulatory approach chosen shapes the substantive law. Hence, at the substantial law level (Chapter 4), this dissertation examines the substantial provisions concerning private law relationships flowing from the EU regulatory framework for telecommunications. The contract law provisions contained in sector-specific regulation are aimed at achieving (sector-specific) regulatory goals, namely, promoting competition, the development of the Internal Market and consumer protection. Consequently, sector-related rights and remedies for private parties must be read in light of those regulatory goals. Against this background, this chapter displays the particular aims (economic and social) concerning private law relationships (access) and the different approaches used for this purpose. Furthermore, and most importantly, this chapter will try to ascertain whether there is a gradual introduction (intrusion and substitution) of new obligations, rights and remedies via sector-specific legislation and how they shape private law relationships beyond general contract or consumer law. In other words, this chapter addresses the implications that this shift at the level of substantive law has when it comes to contractual relationships. The analysis of the "regulatory obligations" to be imposed on relationships arising in wholesale markets (B2B) and the exploration of the two different sets of rights (universal and end-users rights) provided in the regulatory framework for telecommunications is followed by two case-studies that illustrate the interplay of the sector-related regime and general contract and consumer law.

The first case-study addressed in Chapter 4 concerns a relationship arising in the context of the wholesale market; i.e. a relationship between two telecommunications operators. In particular, it is related to the obligation to negotiate interconnection agreements between undertakings that provide electronic communications services on the basis of good faith as required by the sector-specific framework. The second case-study examines a consumer-related dispute where the breach of quality standards in the provision of services gives rise to the emergence of a remedy apparently *endogenous* to the telecommunications sector; in this case, the right to switch for free or contract

termination without incurring a penalty. Accordingly, the implications of the application of sector-specific contract rules as opposed to civil or general consumer rules are brought into relief.

The application and interpretation of the sectorial regime or, otherwise, more general rules will be determined by the institutions and procedures involved in their enforcement. Accordingly, the part of the dissertation in which these transformations are more easily visible is in the analysis of the enforcement of the legal provisions, which is contained in Chapter 5. Once the decision-making process has been analyzed and the different problems identified, it is necessary to look at the way everything becomes materialized. As a matter of institutional choice, the telecommunications legal framework relies on extrajudicial structures for the resolution of sector-related disputes. By analyzing the different enforcement structures utilized in different Member States, this chapter illustrates the relative weight of each one of the different layers that intervene in the enforcement of telecommunications regulation, despite evident national divergences. Such an analysis allows the evaluation of the role of the different extrajudicial mechanism *vis-à-vis* judicial enforcement and contributes to identify whether there is a shift from courts towards extrajudicial and sector-related means of dispute resolution. In addition, the examination of these aspects not only contributes to assess the application of sector-specific rules inside and outside the courts, but also to find out whether there is a process of differentiation in the approach towards enforcement of telecommunications rules as opposed to non sector-related general rules and, if it is so, to grasp – normatively – what are the values transmitted via each of the existing layers for the enforcement of telecommunications regulation, and whether they differ from the “traditional” values of contract law.

For this purpose, this chapter traces the actors involved in the enforcement of telecommunications regulation by examining the procedure for the resolution of a contractual-related dispute in the wholesale market. This case provides an account of way in which the regulatory goals of telecommunications regulation “override” private autonomy. From the perspective of the retail market, the examined case-study (*Alassini*) seeks to balance the shift towards extrajudicial enforcement of consumer-related disputes against the safeguarding of procedural guarantees.

To conclude, Part III gathers the conclusions drawn from the previous analysis and appraises them in view of the normative approach sketched out in chapter 2. Within this conclusive part, Chapter 6 recalls the different transformations. It summarizes and brings together the most salient aspects of the three different components that previously examined (making, substance and enforcement). Returning to the postulates of self-sufficiency, this chapter concludes by validating that self-sufficiency is actually occurring in view of the results yielded from the foregoing legal and empirical analysis. In so doing, this concluding chapter seeks to elucidate the (empirical and normative) drivers that lead to the self-sufficiency of the private law dimension of telecommunications regulation and, more broadly, how it relates to European Regulatory Private Law as a whole.



## Chapter 2 – THEORETICAL FOUNDATIONS.

### The Transformation of Private Law via (the Self-sufficiency of) Telecommunications Regulation

#### 1. Introduction

Fundamental freedoms are a new foundation for private relationships<sup>1</sup> and the EU integration takes place via private law. In this evolution, the “private law society” has turned into a “market society”<sup>2</sup> and so has the State, by turning into a Market-State.<sup>3</sup> Accordingly, this research seeks to identify the transformation of the “law of the market society”<sup>4</sup> that comes from the Market-State, European integration understood as a part of a market-building (transformation) process.<sup>5</sup>

Yet, in this discursive journey, we have to depart from the assumption that “European Union private law is different”.<sup>6</sup> The EU is not (and it will not be) a State, but its ambitions reach all economically relevant sectors.<sup>7</sup> In so doing, according to its nature as a non-state actor, the European Union organizes its *action* in networks.<sup>8</sup> We find that the Internal Market rationale and the promotion and preservation of competition underpin economic (and social) regulation. By these lights, this process is “disintegrating” the classical core of private law and its systemic character undermining “the coherence of private law as a whole”.<sup>9</sup> (Transformed) private law now serves “instrumentalist” purposes.<sup>10</sup> This surrender to the achievement of the overarching objective of the

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<sup>1</sup> See Caruso, D. (2006) "Private Law and State-Making in the Age of Globalization", *New York University Journal of International Law and Politics*, 39, 1–74; and Davies, G. T. (2013), 'Freedom of Contract and the Horizontal Effect of Free Movement Law', in Leczykiewicz, D. And Weatherill, S. (eds), *The Involvement of EU Law in Private Law Relationships* (Studies of the Oxford Institute of European and Comparative Law), Hart Publishing.

<sup>2</sup> Polanyi, K. (1944). *The great transformation: The political and economic origins of our time*. Beacon Press.

<sup>3</sup> Micklitz, H.-W. and Patterson, D. (2012), “From the Nation State to the Market: The Evolution of EU Private Law”, *EUI Working Papers LAW* no 2012/15.

<sup>4</sup> Frerichs, S., & Juutilainen, T. (2014), ‘Rome Under Seven Hills? An Archaeology of European Private Law’, in Börner, S. and Eigmüller, M. (eds.), *European Integration, Processes of Change and the National Experience*. Palgrave Macmillan.

<sup>5</sup> Ibid.

<sup>6</sup> Micklitz and Patterson, supra n 3, at 11.

<sup>7</sup> Ibid.

<sup>8</sup> Joerges, C. (2006). “Deliberative Political Processes’ Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making”, *JCMS: Journal of Common Market Studies*, 44(4), 779-802.

<sup>9</sup> Zimmermann, R. (2008) ‘Comparative Law and the Europeanization of Private Law’ in Reimann, M. and Zimmermann, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, 539–78.

<sup>10</sup> Michaels, R. (2011), ‘Of Islands and the Ocean: The Two Rationalities of European Private Law’ in R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill (eds.), *The Foundations of European Private Law*, Hart Publishing, 139–158. See also Davies, G.T. (2013), supra n 1; and Schmid, C. (2005), "The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code", *European Review of Contract Law*, 1(2), 211-227.

market-building project results in the emergence of different legal frameworks (one for each sector), which encompass public and private law elements, weakening the *clear-cut* distinction public/private law.<sup>11</sup> In the case of regulated markets, private law has not been constitutionalized;<sup>12</sup> rather, a reverse phenomenon has taken place. The liberalization of formerly public services has resulted in a *privatization of public legal regimes* embodied in an economic rationality that contains both (public and private elements) but that cannot be placed into one single categorical box. Against this background, private law has changed (transformed), but so has public law.

In the interaction between the EU and its Member States, new forms of governance are evolving that replace traditional ones. Thus, through the promotion of new instruments of law-making, Member States are gradually losing their traditional “pre-eminence” in the legislative development. For example, under the liberalization wave of former public services, the European Union is gaining a leading role in the law-making process. This intervention –mainly related to the harmonization of the Internal Market– also affects contract law to a certain extent. In this regard, Kelemen employs the expression “*juris touch*”, as a metaphor of the King Midas legend, to illustrate how the European Union transforms almost everything that it touches into law.<sup>13</sup> By so doing, the European legislator regulates not only certain areas concerning the creation of the Internal Market, but interferes in the different national private legal regimes by providing certain rules under sector-specific legislation that concern private law relationships. Moreover, the European process of *legalization* (understood as a process of regulation supply) is increasingly carried out by approaches close to maximum harmonization, which implies less leeway at the national level. This “European preeminence” is also supported by the principle of supremacy of European Union Law, which guarantees the superiority of European law over national law.<sup>14</sup> Furthermore, it has been acknowledged that “Europeanization reduces the importance of the member states and their private law because they must yield sovereignty to the European Union”.<sup>15</sup>

The Europeanization of the last decades has re-designed the institutional setting in which private law is framed<sup>16</sup> giving rise to new regulatory strategies in the European Union.<sup>17</sup> Under this new framework, private law no longer is found in codes, as it used to be the case with national civil codes. Nowadays, private law can be found everywhere; mostly embedded within the regulation of

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<sup>11</sup> If there was ever one, see Kennedy, D. (1981), “Stages of the Decline of the Public/Private Distinction”, *University of Pennsylvania Law Review*, 130, p. 1982.

<sup>12</sup> As understood by Kumm in Kumm, M. (2006), “Who's Afraid of the Total Constitution-Constitutional Rights as Principles and the Constitutionalization of Private Law”, *German Law Journal*, 7, 341.

<sup>13</sup> Kelemen, R.D. (2011), *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Harvard University Press, at p. 19.

<sup>14</sup> This principle has been enshrined by the Court of Justice of the European Union (CJEU) in the case *Costa v. Enel* (C-6/64, [1964] ECR 585). In this case, the Court declared that the laws issued by European institutions are to be integrated into the legal systems of Member States, who are obliged to comply with them.

<sup>15</sup> Jansen, N., & Michaels, R. (2007), “Private Law Beyond the State? Europeanization, Globalization, Privatization”. *Duke Law School Legal Studies, Research Paper* No. 137, at p. 21.

<sup>16</sup> For an analysis of the renewed institutional framework in which European private law unfolds see Cafaggi, F. (Ed.) (2006). *The Institutional framework of European private law*, Oxford University Press.

<sup>17</sup> Ibid. See also Micklitz, H.-W. (2008), “Regulatory Strategies on Services Contracts in EC Law”, *EUI Working Paper Series LAW* No. 2008/06.

certain fields of law. This mutation has implied less well-defined boundaries between public and private law regulation.<sup>18</sup>

This chapter sets the scene for the analysis of the transformation of private law resting on the hypothesis of self-sufficiency of European Regulatory Private Law. There are many examples of *legal hybrids* today.<sup>19</sup> Accordingly, given that transnational law is a central case, Community law or European Union Law is our greatest concern. Within European Union Law, the focus is on Private Law. This chapter develops the theoretical framework behind each of the transformations.

## 2. The postulates of self-sufficiency

The self-sufficiency of ERPL is simply a facet of the self-sufficiency to be conceptualized, examined and substantiated here; the self-sufficiency of sector-specific regulation.

The market liberalization processes of formerly public services have given rise to a vast amount of rules concerning what we now as “regulated markets”. Besides the European regulatory “avalanche”, Services of General Economic Interest (SGEIs) have not been regulated horizontally. Instead, the regulation follows a *sector-specific approach*, resulting in different sectorial (fragmented) regulations. This *verticalization* is due to the functionalist approach pursued by the legislator, who “pigeonholes” legislation according to the service concerned “as to the result to be achieved”.<sup>20</sup> Thus, the different sectors (energy, financial services, telecoms, transport, postal services, etc.) are regulated in a differentiated way, functioning as *watertight compartments*. Under this approach, the regulation of each vertical regime comprises different issues, from the liberalization of the sector, to particular provisions affecting contractual matters. This interference in the private law dimension implies its virtual detachment from the national civil codes and the general European *acquis* of consumer law.

Accordingly, the main assumption is that these different sectors might be considered *free-standing*. They are no longer a mere set of rules established by the European legislator whose enforcement depends largely on the implementation by Member States. Instead, through the meticulous configuration of the Internal Market, the European Union is forging complete systems that do not allow national States much room for *manoeuvre*, insofar as the sectorial regimes themselves contain detailed instructions on how to implement and enforce their legal provisions.

The *autonomy* of these regimes is also based on the assumption that they are *all-inclusive* legal orders,<sup>21</sup> including provisions that range from the actors responsible for national regulation

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<sup>18</sup> Study Group on Social Justice in European Private Law, (2010) “Social Justice in European Contract Law: A Manifesto”, *European Law Journal*, 10, 653.

<sup>19</sup> Tuori, K. (2012), “On legal hybrids” in Micklitz, H.-W. and Svetiev, Y. (eds.) (2012), “A Self-Sufficient European Private Law - A Viable Concept?”, *EUI Working Papers Law* No. 2012/31, 26-44. See also Tuori, K. (2014), ‘On legal hybrids and Perspectivism’ in n Maduro, M., Tuori, K. and Sunkari, S. (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press.

<sup>20</sup> Article 288 TFEU.

<sup>21</sup> See Lindhal, H. (2010), “A-legality: Postnationalism and the Question of Legal Boundaries”, *The Modern Law Review*, 73(1), at p. 32.

and implementation, to enforcement issues, together with the regulation of a number of contractual aspects. Their regulation includes provisions from the decision-making procedure to follow, to particular mechanisms for its enforcement through extrajudicial mechanisms. Further, sector-specific regulation provides for a system of “self-monitoring” by putting in place sector-related supervisory mechanisms in the implementation procedure of EU rules into the national legal systems. Hence, as this dissertation will argue, they are legal orders that are almost entirely developed by European law. As such, these legal regimes are designed in such a comprehensive way that they are potentially capable of “replacing” (and “displacing”) national private legal orders by by-passing the national structures of enforcement.

To conclude, whilst *lex mercatoria* has been assessed as a “self-applying system beyond national law”,<sup>22</sup> herein we try to describe self-sufficiency as a body of sector-related legal practices, capable of not only creating its own norms but also of providing the sufficient basis for decisions. Thus, by relying on its own regulatory (and enforcement) strategies, telecommunications regulation seeks the self-sufficiency of the sector, following an approach of functional differentiation under a sector-specific legal rationality.<sup>23</sup> Such an approach in telecommunications would be best described according to the following features: i) closure of the system; ii) enforcement closes the gap from the perspective of market players; iii) from the perspective of rule and decision-makers, it would be evidence by the existence of (self-referential) sector-specific supervisory mechanisms.<sup>24</sup> This thesis attempts to verify those assumptions in order to determine the self-sufficiency of the private law rules contained in sector-specific regulation to govern private law relationships arising in the context of the sector concerned.

## 2.1 The Bicycle that the EU wants to ride

The EU’s regulatory framework for electronic communications embodies not only substantive law provisions, but also provides guidance on their enforcement and it includes supervisory mechanisms for its implementation. Insofar as substantive law provisions alone do not guarantee effective enforcement,<sup>25</sup> law-making and enforcement can no longer remain detached from each other.<sup>26</sup>

A child who is learning to ride a bike might well illustrate this. The bike symbolizes the EU legal regime. Riding the bike means the functioning of the market at stake under such regime. The child is not, however, skilled (legally competent) yet to ride the bike by herself; i.e. to enforce the rules. She needs *training wheels*. In this metaphor, those training wheels are the Member States, which have to enforce the legislation according to the principle of national procedural autonomy.

<sup>22</sup> Mertens, H.-J. (1997), “Lex Mercatoria: A Self-Applying System Beyond National Law?.” in Teubner, G. (ed.) *Global Law Without a State*, Dartmouth.

<sup>23</sup> Inferring Teubner in Teubner, G. (1993), *Law as an autopoietic system*. Blackwell Publishers, at p. 66. See also Teubner, G., and Fischer-Lescano, A. (2004), “Regime-collisions: the vain search for legal unity in the fragmentation of global law”, *Michigan Journal of International Law*, 25(4), 999-1046.

<sup>24</sup> Translating Teubner’s autopoiesis, *supra* n 23.

<sup>25</sup> Dehousse, R. (2002) “Misfits: EU law and the transformation of European governance” in Joerges, C., & Dehousse, R. (Eds.). (2002). *Good governance in Europe’s integrated market* (Vol. 11), Oxford University Press.

<sup>26</sup> De Visser, M. (2009). *Network-based governance in EC law: the example of EC competition and EC communications law*. Hart Publishing.



According to the bike metaphor, the EU is trying hard in its attempts to learn how to “ride the bike” with the minimum interference of the Member States or, at best, without resorting to “training wheels”. To this end, the EU focuses its efforts on monitoring the proper implementation of the EU regulatory framework for telecoms and introducing, by way of encouragement, an alternative structure for the enforcement of its provisions by surpassing traditional structures (national judiciaries).

At the national level, the features of self-sufficiency become materialized in common standards of practice that are *in-built* in the sector. These values are embedded in the daily practices of the actors involved in the sector (regulators, adjudicators, practitioners, etc.). These actors operate within a (self-referential) sector-related common framework that, in turn, shapes an entire legal process from law-making to enforcement. Against this background, the underlying values of such a framework are distinct from those underpinning the private law contained in the nineteenth century civil law codifications.

## **2.2 A new (commoditized) understanding of *Justice*: Economic (access and non-discrimination), Competition (efficiency), and Social (distributive).**

The liberalization of former public services has proven insufficient to establish fully competitive markets. *Economic regulation*, according to Prosser, involves regulating monopolies by way of controlling prices and monopolies, and *Regulation for competition* is aimed at safeguarding competitiveness.<sup>27</sup> At the same time, *sector-specific regulation* is a fundamental instrument to control market power and to achieve policy goals.<sup>28</sup> This has resulted in complex regulatory regimes.

The regulation of telecommunications services focused, at a first stage, on opening (liberalization) the market to competition. Once competition was established, the aim has been to protect competition. In order for competition to take place in a market, several market players are required. The EU promoted the introduction of players into the market through the prioritization of the *non-discriminatory access* principle. This guiding principle has been embodied in both wholesale and retail markets. The commercial interactions taking place in wholesale (business-to-business, B2B) and in retail (business-to-consumer, B2C) markets have curbed by the access idea. B2B commercial –i.e. contractual– exchanges are restricted by the obligation to grant access to the telecommunications infrastructure and the imposition of other regulatory obligations upon Significant Market Players (SMPs). At the retail level, the supply of the service to end-users is based on the assumption of universal access to basic telecommunications services (universal service).

According to this approach, the underlying notion of justice depends on three different cornerstones: Economy, Competition and the Social. Each of these foundations, give rise to three

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<sup>27</sup> Prosser, T. (1997), *Law and the Regulators*. Oxford University Press.

<sup>28</sup> Geradin, D. (2000), "Institutional aspects of EU regulatory reforms in the telecommunications sector: an analysis of the role of national regulatory authorities", *Journal of Network Industries*, 1.

different notions of (market) justice. *Economic justice* is epitomized in the form of non-discriminatory access to the service.<sup>29</sup> This understanding of justice is based on the access to the market (access justice).<sup>30</sup> *Competition justice* aims at preserving competition in the market by enabling “efficient” interactions among its players. Under a competition approach, justice aims at efficient participation in a fully competitive market. To this end, contract law functions as an enabling tool to put into motion such a market.<sup>31</sup> The State acts as an enforcer of economic efficiency.<sup>32</sup> Finally, *Social justice* pursues the achievement of distributive benefits to those market players “left behind” as a consequence of the liberalization of the market.<sup>33</sup> However, in the telecommunications sector, distributive justice, embodied in the form of universal access and universal service rights, is not provided directly by the State. Instead, the provision of universal service is delegated to telecoms operators designated as universal service providers, who must deliver the service under certain requirements of quality and affordability.<sup>34</sup> Yet, the State also remains an important actor as the *keeper* or guardian of the so-called “social efficiency”, by ensuring that mandatory (universal) services are provided.<sup>35</sup>

The combination of these different dimensions of justice into one single sector, which is already a technologically complex one, results in a multifaceted and intricate regulatory regime that inevitably encompasses a sectorial (and functionally oriented)<sup>36</sup> approach that encompasses regulatory activity, from law-making to its enforcement.

### 3. The layers of transformation

As mentioned above, private law has undergone a transformation in many directions. One such transformation is provoked by the liberalization of formerly publicly provided utilities. In the telecoms sector, the transformation of private law is a function of the *self-sufficiency* of the sector.

Telecommunications services are regulated at the EU level in a comprehensive way. This (more or less) *inclusive approach* covers, in addition, the private law relations that take place among participants of telecommunications markets. Particularly, overarching principles for the telecoms sector such as universal service and (non-discriminatory) access greatly impact not only on the nature of private law but, indeed, imply a transformation of the contractual relations arising from transactions *within* the (self-sufficient) sector. As a result of sectoral self-sufficiency, the generation and resolution of disputes and generation and application of substantive rules usually follows sector-related patterns.

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<sup>29</sup> See Chapter 4 of this Dissertation.

<sup>30</sup> Micklitz, H.-W. (2011), “Social Justice and Access Justice in Private Law”. *EUI Working Paper Series LAW* No. 2011/02.

<sup>31</sup> Micklitz, H. W. (2005), “The Concept of Competitive Contract Law”, *Penn State International Law Review*, 23, p. 549.

<sup>32</sup> Grande, E. (1994), “The new role of the state in telecommunications: An international comparison”, *West European Politics*, 17(3) 138-157.

<sup>33</sup> See Caruso, D. (2014), ‘(Qu’ils mangent des contrats) Rethinking Justice in EU Contract Law’ in G. de Burca, D. Kochenov and A. Williams (eds.), *Europe’s Justice Deficit?*, Hart Publishing.

<sup>34</sup> See Chapter 4 of this dissertation.

<sup>35</sup> Grande *supra* n 32.

<sup>36</sup> Teubner, G. (1996), ‘Global Bukowina: Legal pluralism in the world-society’ in Teubner G. (ed.) *Global law without a State*, Dartmouth, 3-28.

This section briefly sketches what the dissertation scrutinizes in a more thoroughly way; i.e. how regulatory law transforms private law. The manner in which regulatory law has encompassed private law has yielded three different layers of transformation altering the making, the substance and the enforcement of private law with regard to the private law contained in the legal regimes of the so-called regulated sectors. This section aims to assess the impact over the three layers that underpin the self-sufficiency concept: law-making, substance and enforcement. These layers serve as parameters to evaluate the degree of the transformation(s) operating at each level.

### **3.1. Transformation in the making of private law: Rule-making and sector-specific regulatory networks**

The displacement of service provision from the public to the private sphere of telecommunications as a result of the liberalization of the sector has entailed not only substantive but institutional transformations. Thus, the development of the telecoms sector has triggered a visible transformation that affects private law, contract law in particular, in such a way that it is also used as a tool to achieve policy goals, mainly the creation of a Digital Single Market (Connected Continent), promoting competition and protecting users. In so doing, the EU is following a *functionalist approach* (Internal Market as a *finalité* and as an objective) that impacts on contract/consumer law (integration through private law).<sup>37</sup> This “makeover” has been noticeable in the EU Regulatory Framework for Electronic Communications, which has evolved over time. Thus far, there have been 3 different packages of rules. Its evolution is characterised by an initial liberalization goal, but later on, taking into account the legal basis employed for its regulation, the objectives were more focused on harmonization of the Internal Market and consumer protection.<sup>38</sup>

The incorporation of private law provisions in telecommunications has certainly implied a shift in the *traditional approach* of law-making in private law. On the one hand, the role of National Regulatory Authorities (NRAs) has spread out to the field of private law.<sup>39</sup> The EU regulatory framework for telecoms has vested NRAs with competences that have an effect on private law, e.g. price setting in B2B relationships.<sup>40</sup> On the other hand, the Nation-State has a more modest role in terms of law-making. The EU’s lack of specific competences in the field of private law is overcome via the incorporation of national supervisory actors (in this case, the NRAs). A more elaborated expertise to monitor telecoms market seems to be the appropriate institutional choice in terms of regulatory efficiency and effectiveness. Against this background, “(...) [t]o survive the judicial review of such reforms, agencies must often justify the markets values and results of deregulation as simply another form of regulation”.<sup>41</sup> In this regard, empirical

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<sup>37</sup> In the field of consumer law see Schmid, *supra* n 10.

<sup>38</sup> For a deeper analysis on the different generations of EU telecoms rules, see Melody, W.H. (2012), “Viewpoint: The Closing of the Liberalization Era in European Telecommunication”, *Competition and Regulation in Network Industries*, 13 (3) 218-235.

<sup>39</sup> Taggart, M. (2005), “From ‘Parliamentary Powers’ to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century”, *University of Toronto Law Journal*, 55, pp. 575-627.

<sup>40</sup> For particular examples see Ottow, A. (2012), “Intrusion of public law into contract law: the case of network sectors”, *The Europa Institute Working Paper* 03/12.

<sup>41</sup> Sassen, S. (2006), *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton University Press, at p. 176.

evidence appears to verify Niskanen's theory of regulation, by which even though regulatory institutions are supposed to be of an *ad interim* nature until the market has been rolled out, the sector-related structures find no incentive to abolish them or to eradicate sector-specific approaches to regulation once markets are fully competitive. Rather, sector-specific approaches tend to perpetuate "or at best modified".<sup>42</sup>

There is no (formal) hierarchy between the EU and the national levels or any transfer of powers; rather, it is a type of "multilayered institutional structure".<sup>43</sup> However, in order to guarantee that NRAs exert their powers in the EU interest, the Regulatory Framework sets up a system of supervision, giving the Commission policing powers to achieve the intended policy goals.<sup>44</sup> Accordingly, this *networked* institutional setting aims to create a governance network that, by regulating certain aspects concerning private law relationships, becomes a new private law-maker.

The commissioning of NRAs responds to a strategy aimed at securing the liberalization process via institutional design. With a similar object, a process of network-building for cooperation in regulatory matters can be identified as part of the development of the mandate of NRAs. These new modes of governance in the EU are an example of legal transformation.<sup>45</sup> As pointed out by Majone, the delegated functions of rule-making leads to paradoxes of privatization, sub-delegation and issues and problems related to quasi-legislation.<sup>46</sup> In a decentralized model, diagonal conflicts are inevitable as they are inherent to the EU Multi-level system of governance.<sup>47</sup> These diagonal conflicts, and the way they are resolved under the established regulatory structure suggest a significant erosion of national sovereignty.<sup>48</sup>

### 3.2. Substantive transformation: Regulatory objectives and their impact on private relationships

Conventional analyses of private law tend to disregard the transformation of private law beyond its traditional core; that is, contract and tort. At best, they look at the influence of the European *acquis* on national law, mainly via consumer law provisions. Beyond these transformations, sector-specific

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<sup>42</sup> Niskanen, W. A. (1975), "Bureaucrats and politicians", *Journal of law and economics*, pp. 617-643. For an European account, see Möschel, W. (2009), "The Future Regulatory Framework for Telecommunications: General Competition Law instead of Sector-Specific Regulation – A German Perspective", *European Business Organization Law Review*, 10(01), pp. 149-163.

<sup>43</sup> Svetiev, Y. (2012), "W(h)ither Private Law in the face of the Regulatory Deluge", in Micklitz, H.-W. and Svetiev, Y. (eds.), *A Self-Sufficient European Private Law - A Viable Concept?*, *EUI Working Papers Series* Law No. 2012/31, 26-44. See also Hancher, L. and Larouche, P., (2011), 'The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest', in G. de B. P. Craig, ed. *The Evolution of EU Law*. Oxford University Press, 743-779.

<sup>44</sup> Ottow, A. (2012), "Europeanization of the Supervision of Competitive Markets", *European Public Law*, 18(1), 191–221.

<sup>45</sup> Dawson, M. (2011), *New Governance and the Transformation of European Law: Coordinating EU social law and policy*. Studies in European law and policy. Cambridge University Press.

<sup>46</sup> See also Taggart *supra* n 39.

<sup>47</sup> Joerges, C. (2006). "'Deliberative Political Processes' Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making". *JCMS: Journal of Common Market Studies*, 44(4), 779-802. For an empirical evidence of a diagonal conflict in telecommunications regulation see Chapter 3 of this dissertation.

<sup>48</sup> Richardson, J., and Mazey, S. (Eds.). (2015), *European Union: power and policy-making*, Routledge. See also Dawson, *supra* n 45.

regulation has also altered the role and function of private law by introducing rules that concern relationships *inter privatos*.

The policy aims of the telecommunications regime in Europe are to foster competition and the achievement of a single electronic communications networks and services market in Europe. It strives to create and develop a genuine Internal Market for telecommunication in the European Union. The European Commission initiated this market approach in 1987<sup>49</sup>, which continued with the adoption of the Green Paper on Telecommunications<sup>50</sup>, which led to the full liberalization of the sector in 1998.

In opening the telecommunications market, the European legislator has opted for a comprehensive approach. This means that European telecommunications regulation touches contractual issues. The EU is shaping the content of contracts arising in the context of telecommunications regulation. From a substantive point of view, telecommunications regulation encompasses sector-related rules of contract law tailored to sector-specific problems. These sets of rules carry with them a different understanding of “justice”. Efficiency gains relevance at the expense of fairness. The major aim is to achieve the efficiency (competitiveness) of the market (inclusion/exclusion) together with the promotion, and the achievement, of an efficient performance of markets players, both businesses and consumers, with legal design and interventions aimed at remedying market failures.

### **3.3. Enforcing telecommunications rules *via* Sector-specific dispute resolution**

The lack of effective EU’s competence in the enforcement of telecommunications regulation has not prevent the establishment of an alternative way for the enforcement of the EU rules in order to avoid, thereby, putting in place a *crippled* regulatory system. Accordingly, the EU has promoted the use of Alternative Dispute Resolution techniques as a mean to bridge the enforcement gap by way of developing (alternative) procedural principles.

The EU rules concerning telecommunications have established an enforcement design based on the availability of extra-judicial means for the settlement of sector-related disputes, arising in the context of B2B or B2C relationships. Because the civil courts are slow, inflexible, partial, sometimes unreliable or too expensive, particularly when the disputes involve small claims,<sup>51</sup> only few cases related to telecommunications private interactions reach the court. As a matter of fact, the vast majority of cases arising in the context of telecommunications are resolved via out-of-court dispute settlement or through regulatory adjudication. Against this background,

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<sup>49</sup> Communication from the European Commission of July 30, 1987, “Towards a dynamic European Economy: Green Paper on the development of the common market for telecommunications services and equipment”, COM (87) 290.

<sup>50</sup> Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for Regulation - Towards an information society approach, COM (97) 623 final. (Not published in the Official Journal).

<sup>51</sup> Calliess, G. (2011), ‘The Future of Commercial Law: Governing Cross-Border Commerce’ in S. Muller et al. (eds.), *The Law of the Future and the Future of Law*, Torkel Opsahl Academic EPublisher.

disputes rarely reach the (civil) courts.<sup>52</sup> It is only those cases in which there is uncertainty on a point of law, where the case becomes subject to judicial interpretation via judicial adjudication.<sup>53</sup> This implies a shift from the State court system to different means of private and *regulatory* “justice”. Against this background, and given that these alternative mechanisms are developed under their own (sector-specific) rules and rationales, it is reasonable to ask: what is the legal regime applied to sector-related problems, and most importantly, what kind of *justice* is dispensed under these structures and what are its underlying legal values?

#### 4. Liberalization and privatization: the changing role of the State

Technological advances have enabled the rapid development of the way in which telecommunications function. The most important aspect is that the *liberalization* of telecommunications was not only the result of a policy aim, but also the *consequence* of technological innovations.<sup>54</sup> Before privatization, the institutional structure in telecoms was based on two grounds.<sup>55</sup> At a technical level, it worked under a clear-cut distinction between public and private functions. Secondly, in economic terms, the system was grounded on the mono-functional limited use of telecommunications. The technological development of the sector invalidated both assumptions.<sup>56</sup> Technological advances have brought convergence –and inter-operability– to the telecommunications sector, eliminating the boundaries between fixed and mobile telephony and data provision.<sup>57</sup>

In Europe, the liberalization of telecommunications started in the UK. In the rest of the Continent, the European Community drove the liberalization of the sector in the 80s, following the success of deregulation in the UK and beyond Europe (Japan and the United States).<sup>58</sup> Three different packages of telecommunications regulation later,<sup>59</sup> liberalization is no longer top of the agenda and the creation of a Digital Single Market has become the priority in the EU policy for telecommunications.<sup>60</sup>

The re-organization of the State in the achievement of competition, while maintaining social goals, signals the spread of powers among different institutions, special jurisdictions, and

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<sup>52</sup> Micklitz, H.-W. and Svetiev, Y. (2014), “The Transformation(s) of Private Law”, in Micklitz, H.-W. and Svetiev, Y. and Comparato, G. (eds.), *European Regulatory Private Law – The Paradigms Tested*, European Regulatory Private Law Project (ERC-ERPL - 07); EUI Working Paper LAW No. 2014/04, p. 69.

<sup>53</sup> Micklitz, H.-W., (2011), ‘Administrative enforcement of Private Law’, in Brownsword, R., Micklitz, H. W., Niglia, L., & Weatherill, S. (Eds.), *The foundations of European private law*. Hart Publishing.

<sup>54</sup> Grande *supra* n 32.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> OECD, *Convergence between Communications Technologies: Case studies from North America and Western Europe* (Paris: OECD, 1992).

<sup>58</sup> Communication from the European Commission of July 30, 1987, “Towards a dynamic European Economy: Green Paper on the development of the common market for telecommunications services and equipment”, COM (87) 290.

<sup>59</sup> For an analysis of the different stages of the EU regulatory framework for telecommunications in Europe see Chapter 3 of this dissertation.

<sup>60</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe - COM(2015) 192 final*. See also Melody (2012).

administrative authorities' decisions, etc., rather than traditional civil courts and ordinary sources of law.<sup>61</sup> Against this background, private law as a whole is diluted by fragmentary legislation.<sup>62</sup> This is related to the *verticalization* of regulated markets. The regulation of these markets form integral and comprehensive individual regimes. They not only include substantive law provisions, but also encompass certain rules concerning sector-specific law-making and sector-specific law enforcement procedures. Despite the fact that the substantive law core of such regulations concerns private law (contract law/consumer law), such *sector-specific private law* is disconnected from the hard core of private law (fragmentation). Thus, as a result of such fragmentation dominated by sector-specific understandings and the emergence of sector-related actors, verticalization has not only *refurbished* private law, but it is also an explanation of the transformation on the role of the State itself.

The transformation of the State has taken place in different ways and at different levels. Sassen<sup>63</sup> gives the key to understand these transformation process(es).<sup>64</sup> The transformation of private law is closely linked to the transformation of the State. This is particularly visible in utilities regulation. Liberalization of former public services should have caused a re-orientation towards private autonomy. Yet, these services have been framed in the private market as regulated services given their nature as bottleneck facilities. Therefore, despite the “retreat” of the State from the provision of the service by designating universal service operators, the State still plays a considerable (but transformed) role in the institutional design of the telecommunications sector.<sup>65</sup> The need to meet the demands of the “New Social State” triggered this transformation.<sup>66</sup> The inability of the State to be responsible for the market as a whole and to closely scrutinize liberalized markets has resulted in considerable (and inevitable) delegation.<sup>67</sup> Whether directly or via delegated power, the “social re-shuffle” has extended the regulatory competence of the State.

Deregulation, in particular, brought about the decline of role the State in telecommunications as the service as it is no longer publicly provided. Nonetheless, following the development of the sector, the State stands as a key actor in the institutional design of the telecoms industry.<sup>68</sup> Within this design, the State still plays a significant role while State's functions have been (politically) re-defined. Accordingly, there has been a transformation from a Corporate State

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<sup>61</sup> See Shleifer, A. (2012), “The Failure of Judges and the Rise of Regulators”, MIT Press (Walras-Pareto lectures).

<sup>62</sup> “Even today in these marginal areas where social law is encroaching, any sense that the law forms a whole has been weakened by fragmentary legislation, the creation of special jurisdictions, and the increasing number of administrative authorities whose preliminary decisions about private rights so often pre-empt the regular courts: the individual's well-being today commonly depends on decisions of industrial tribunals, housing authorities, and social security offices rather than decisions of the civil courts”, in Wieacker, F. (1995). *A history of private law in Europe with particular reference to Germany*, at p. 439.

<sup>63</sup> Sassen *supra* n 41.

<sup>64</sup> I deliberately speak in plural.

<sup>65</sup> At least in Europe, see Grande, *supra* n 32. See also Bauer, J. M. (2010), “Changing Roles of the State in Telecommunications”, *International Telecommunications Policy Review*, 17(1).

<sup>66</sup> Taggart *supra* n 39; at pp. 585-586.

<sup>67</sup> The key here: “The State is not really doing less; it is doing it differently and often less visibly” (Taggart *supra* n 39, at p. 615).

<sup>68</sup> Grande *supra* n 32.

as a provider of goods and services to its citizens,<sup>69</sup> towards the *Regulatory State*.<sup>70</sup> Thus, the liberalization of formerly monopolized public industries together with the paradoxes of privatization, de-regulation and re-regulation transformed the “Corporate State” and has given rise to the Regulatory State<sup>71</sup>. The different aspects of the the Regulatory State has yielded different patterns that have been grouped in the *Market State*<sup>72</sup> and the *Post-Market State*.<sup>73</sup> Whilst the foundational feature of the Market State is very responsive (and subordinated) to global market dictates, in the interest of establishing and preserving markets, the Post-Market State aims at embedding politics in order to overcome the problems associated with the new decision-making structures; usually its so-called democratic deficit.<sup>74</sup> Yet, given that the EU has embraced liberalization, we should consider whether this is evidence of “post-nationalism”, understood as a term that reflects more what is happening in the EU and the transfer of sovereignty by its Member States instead of a global phenomenon.<sup>75</sup> Accordingly, the next section looks at the implications of liberalization undertaken by a supranational entity –the EU– through a multi-level institutional model of governance.

## 5. Multi-level institutional environment

The “new” Regulatory State has triggered the transformation (redistribution) of powers within the State itself.<sup>76</sup> The growing role of the State was already a consequence of the welfare State, which explains the increase of bureaucracy and hence the inevitable delegation of executive powers.<sup>77</sup> *Complexity* and *technicality* have also pushed the internal redistribution of powers within the State.<sup>78</sup> Thus, oversight functions have increasingly been displaced from the legislature to

<sup>69</sup> See Seidman, H., and Gilmour, R. (1986), *Politics, Position and Power. From the Positive to the Regulatory State*. Oxford University Press.

<sup>70</sup> Grande *supra* n 32.

<sup>71</sup> Majone, G. (1994), “The rise of the Regulatory State in Europe”, *West European Politics*, 17(3) 77-101, and Majone, G. (2010), “The transformations of the regulatory State”, *Osservatorio sull’Analisi d’Impatto della Regolazione*, September 2010. Paper I.

<sup>72</sup> Bobbitt, P. (2002), *The Shield of Achilles: War, Peace and the Course of History*, Knopf. See also Micklitz and Patterson, *supra* n 3.

<sup>73</sup> Micklitz, H.W. and Svetiev, Y. (2014), “The Transformation(s) of Private Law”, in Micklitz, H.-W. and Svetiev, Y. and Comparato, G. (eds.), *European Regulatory Private Law – The Paradigms Tested*, European Regulatory Private Law Project (ERC-ERPL - 07); *EUI Working Paper LAW* No. 2014/04, p. 69.

<sup>74</sup> Majone *supra* n 71. See also Dehousse, R. (2002), ‘Misfits: EU law and the transformation of European Governance’, in Joerges, C., Dehousse, R. (Eds.) *Good Governance in Europe's Integrated Market*, Oxford University Press. As for the normativity of these transformations on the role of State, Somek’s portrays a dystopian system of global/cosmopolist constitutional values. See Somek, A. (2014). *The Cosmopolitan Constitution*. Oxford University Press. Somek’s constitution (3.0) depicts a non-desirable constitution as it undermines democratic processes. Yet, this might be a simplistic (an obvious) assumption, provided that the new structure of the (global) State cannot simply encompass the same democratic process than those associated to the birth of the Nation State. Signalling the inappropriateness of exporting the nation-state institutional forms to the global level, see Ladeur K-H, (2010), ‘The State in International Law’, in Joerges, C. and Falke, J. (eds.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, Hart Publishing, 397-418

<sup>75</sup> Shaffer, G. (2012), “A Transnational Take on Krisch’s Pluralist Postnational Law”, *European Journal of International Law*, 23(2), 565–582.

<sup>76</sup> Sassen *supra* n. 41, see also Slaughter, A. M. (2002), “Global government networks, global information agencies, and disaggregated democracy”, *Michigan Journal of International Law*, 24, 1041; and Slaughter, A. M. (2004), “Disaggregated sovereignty: Towards the public accountability of global government networks”, *Government and Opposition*, 39(2), 159-190.

<sup>77</sup> Taggart *supra* n 39, at 585-586.

<sup>78</sup> Sassen *supra* n. 41, at 171.



specialized government agencies and to the private sector.<sup>79</sup> In the case of telecommunications, this supervisory role has been entrusted to *sector-specific* National Regulatory Authorities as expertise agencies in order to implement liberalization policies and to perform regulatory functions; in other words, to administer European telecommunications regulations.<sup>80</sup>

The emergence of specialized sector-specific bodies implies a sort of compartmentalization of the law according to the policy concerns and expertise. The “motorized legislator” is imbuing all branches of law with policy goals.<sup>81</sup> “Everything is up for grabs politically”.<sup>82</sup> The “law machine” (State) becomes an instrument to achieve policy aims. Regulatory intervention is giving rise to heavily regulated sectors. The telecommunications sector in the European Union is “over-regulated” and it pursues different policy objectives ranging from liberalization, competition, harmonization of the Internal Market, or even consumer protection; i.e. it pursues economic and social goals. In addition, the telecommunications sector in the European Union is configured under a regulatory *network-like approach* of different sector-related National Regulatory Authorities. This, in turn, gives rise to a new set of relationships of interconnection and interaction among the actors involved in the legislative development.

The complexity attached to a networked structure has required the emergence of new forms of decision-making by way of experimental governance. This experimental governance comes hand-in-hand with the sectorialization of legal regimes largely based on expertise and that has brought about «collegial formations». Within these formations, the decisive point is to institutionalize procedures of (in the sense of rational choice) non-rational norms that can be empirically identified therein.<sup>83</sup> In other words, it has fostered the creation of a *club-like behavior* among those belonging to the sector-related regulatory structures. Specialized knowledge and expertise become decisive to “administrate” (create and enforce) the knowledge produced within the sector. Due to that specialized knowledge, this let us say –as a continuation of Ladeur’s taxonomy– *society of networked (but fragmented) knowledge* produces its own goods. In a market that has been opened to free trade (liberalized), the provision of standards (“club goods”),<sup>84</sup> favors *de facto* monopolies of standard-making like that represented by a private association (in telecoms, ETSI). This gives rise to a differentiated (club-like) law-making.<sup>85</sup>

Further, the development of the economy and the subsequent Globalization process has entailed a transformation of the role of the State. The emergence of global markets is the result, and also the origin, of a profound international engagement. In the European arena, this process of internationalization of markets has been cherished as the opportunity to enlarge national markets by

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<sup>79</sup>Ibid.

<sup>80</sup> Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ L 131, 27.5.1988, pp. 73–77.

<sup>81</sup> Kumm *supra* n 12.

<sup>82</sup> MacCormick, N. (1993), “Beyond the sovereign state”, *The Modern Law Review*, 56(1) 1-18.

<sup>83</sup> As signalled by Teubner in Teubner, G. (2004), “Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?” at p. 8, by referring to Sciulli, D. (1992), *Theory of societal constitutionalism: Foundations of a non-Marxist critical theory*. Cambridge University Press.

<sup>84</sup> As Buchanan has put it, see Buchanan, J. M. (1965). “An Economic Theory of Clubs”, *Economica*, 32, February 1965, pp. 1-14.

<sup>85</sup> Majone (2010) *supra* n 71.

way of diversifying into a bigger and supranational market: the (EU) internal market. The management of a single market calls for an intervention aimed at market integration, be it via positive or negative integration.<sup>86</sup> The combination of positive and negative techniques of integration enlarges the array of regulatory options. This means that new regulatory techniques do not find accommodation within the traditional legal taxonomy. Thus, the emergence of new actors has deeply transformed the distribution of (legislative) powers within the State.<sup>87</sup>

This redistribution of powers has entailed a shift of hierarchy. Delegation has yielded a new approach where there are many decision-making centres. Hierarchy is no longer paradigmatic and the “society of networks” is setting aside hierarchy, giving rise to an increasing set of relationships of heterarchical character (networks). In this new panorama, the legal structure of regulation has been heavily altered and the State is not its central actor anymore.<sup>88</sup> It also has an impact in the way law is manifested. The code symbolized the unity (and sovereignty) of the State.<sup>89</sup> The new configuration eschews any codification or systematization attempt. Law sprouts from many sources and practices that do not follow a particular *pecking order*; rather, law derives from different norms and practices where the domestic and the transnational domains intermingle.

Within the process of European integration “[s]overeignty has shifted to the European organs”.<sup>90</sup> But since the EU is not a fully-fledged State, does EU law follow the nation-state pattern of legal *unity* that once characterized the legal order of the Nation-State? Is EU law a legal order? Is EU law *law* at all? The institutional arrangement of the EU hinders the categorization of the EU legal order within our established historical taxonomy –public/private. Can we consider EU law as, in Savigny’s terms, an “organic whole”? Might it be considered a single legal order in an Austinian way given the absence of a single sovereign legislator? If we follow the Kelsenian vision, what would be, at the EU level, the basic norm? These questions trigger us to think not only of the role of the State, but also in terms of sovereignty, recognition, delegation of powers and, most importantly, in terms of validity: validity of the norms coming from the EU, validity of the EU system.

The transformation of the State may be used as a precious chance to re-formulate and to re-think the traditional understanding, to divest from the straitjackets of the previous conceptions and old paradigms when giving shape to the new legal species.<sup>91</sup> What is required is to understand the new forms in which the law takes shape, and what kinds of relationships are coming therefrom and within. In this vein, Ladeur looks at the emergent trend from a historical perspective and, thus, not from a state-centered perspective, rather he looks at the transformation processes and the

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<sup>86</sup> Majone, G. (2009). *Dilemmas of European integration: the ambiguities and pitfalls of integration by stealth*. Oxford University Press.

<sup>87</sup> Dehousse, R. (2002). ‘Misfits: EU law and the transformation of European Governance’, in Joerges, C., Dehousse, R. (Eds.) *Good Governance in Europe's Integrated Market*, Oxford University Press.

<sup>88</sup> Ladeur *supra* n 74. See also Ladeur, K. H. (2002), “The Changing Role of the Private in Public Governance-The Erosion of Hierarchy and the Rise of a New Administrative Law of Cooperation. A Comparative Approach”, *EUI Working Paper Series Law* 2002/09.

<sup>89</sup> Zimmermann, R. (2012) “Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law”, *European Review of Contract Law*, 8, pp. 367–399.

<sup>90</sup> MacCormick *supra* n 82.

<sup>91</sup> *Ibid.*

embryonic transformation of power involving “entangled hierarchies” where the distinction between primary and secondary norms is blurred.<sup>92</sup> In Ladeur’s vision, the role of the State in the “management-needed situation” remains relevant, especially in the field of private law, where somebody has to look after the “rules of the game”.<sup>93</sup> However, in the telecommunications sector, this task has been devolved to the sector-specific regulator. Later, the multilevel governance structure was networked and, thereby, the yardstick is no longer national. Under the configuration of the “supranational multilayered network”, the standards used to assess, for instance, when to intervene or not to intervene and what values need to be balanced, might come from a source outside the State, but if this were the case then the State would be meaningless being simply an instrument subordinated to non-State mandates. Under such conditions, the State would remain a State, but simply because the network still needs to use its sovereignty (substantively and institutionally) for its own ends. The State is, in a way, *instrumentalized* to contribute to the functioning of the network and the achievement of its aspirations.

To conclude, changes in regulatory approaches entail extensive transformations in the making and implementation of regulatory policies. This also calls for new institutional arrangements and the development of new conceptual approaches.<sup>94</sup> In the field of private law, this might well be translated as the emergence of new regulatory structures that transfer the role of regulatory provider from the State to other entities under new forms of experimental governance. At the substantive level, it involves a transformation of the role of private law from autonomy to functionalism.

## 6. Transforming private law: The new role of private law and its regulatory function

While the creation of the Internal Market project has implied the extension of private autonomy beyond national markets, the role of the State as a law-maker has been undermined. Private law has been de-nationalised. Thus, alongside Globalization –in Europe, *Europeanization*–, the role of private law has decreased and it has been instrumentalized,<sup>95</sup> giving rise to the less clear-cut of the distinction between public and private law. Not only has the role of the State been weakened, but also the role of the law itself.<sup>96</sup>

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<sup>92</sup> Ladeur *supra* n 74. Ladeur argues that this evolution into a new logic of networks cannot be analyzed under a “state-centred perspective”, meaning that the evolution has implied the depression of the power of the state parliament or the emergence of a new legal order out of the State. Rather, it should be regarded from an “acentric” perspective that takes into account the different transformation processes, which are taking place outside the State. Here, Ladeur recognizes that there are also internal procedures which “restructure the role of the space”, where he refers to Sassen’s work. To him, the processes that trigger the transformation of the State are not only internal, but they are also taking place at the supranational level. In the same vein, Grande *supra* n 32.

<sup>93</sup> Ibid.

<sup>94</sup> Majone (2010) *supra* n 71.

<sup>95</sup> Micklitz, H.-W. (2009), “The Visible Hand of European Regulatory Private Law--The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation”, *Yearbook of European Law*, 28(1) 3-59.

<sup>96</sup> Smits, J. (2013), ‘Private law in a post-national society: from ex post to ex ante governance’ in Maduro, M., Tuori, K. and Sunkari, S. (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press.

### 6.1. Regulatory role of private law

Without attempting to develop a definition of Private law, it suffices to describe it in its traditional notion. Under the established understanding, the aim of private law is to provide a framework within which private parties interact. Hence, it is the governance mechanism for private transactions. This general notion of private law tends to evoke generalist rules contained in the different national civil codes. Yet, there are also certain rules belonging to specific sectors that govern relations *inter privatos* and still cohabitate with the rules contained in the codes.

Usually, private law does not pursue the achievement of values beyond those aimed at facilitating private actors' transactions. This is a distinctive feature as opposed to other branches of (public) law. However, rules emanating from the European Union, and particularly those enacted under the Internal Market's legal basis (Article 114 TFEU), serve to approximate national rules and to create harmonized markets, but also contribute to a process of market-building. The encompassing, by sector-specific regimes, of what would have been traditionally classified as private law rules means that, now, private law serves these purposes as well. This introduction of rules governing private interactions within the different European directives providing the regulatory frameworks for regulated sectors does not only minimize the traditional idiosyncrasy of private law,<sup>97</sup> but also its systematic character and coherence.<sup>98</sup> Furthermore, European Private Law, which is nothing more than the private law rules contained in the European directives, does not follow any other methodology than to serve to further objectives laid down in those directives. It is functionally oriented.<sup>99</sup> These private law rules contained in sectorial regulatory regimes are what constitute the core of European Regulatory Private Law. Hence, European Regulatory *Private* law, unlike traditional private law, seeks the achievement of certain policy goals beyond private interests. Private law now plays a regulatory function.

Against this background, contract law has been transformed. The rationale of the contract law contained in EU rules is to achieve certain (policy and regulatory) aims, giving rise not to a systematized set of private law rules, but to the regulation of different sectorial regimes according to the (extra legal) objectives pursued.<sup>100</sup> Accordingly, we cannot talk about a "general" contract law in EU law,<sup>101</sup> despite the many initiatives to systematize a single corpus of contract law at European level.<sup>102</sup> What is more, the distinctive feature of this renewed/makeover contract law is that it now pursues (market building) collective goals, exemplified by the guarantee of fundamental freedoms, competition, access to markets, non-discrimination, consumer protection and so on. According to this goal-oriented approach, European private law is based on *regulation* and

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<sup>97</sup> Zimmermann *supra* n 89.

<sup>98</sup> Frerichs and Juutilainen *supra* n 4.

<sup>99</sup> Reich, N. (2006) "A European Contract Law: Ghost or Host for Integration?", *Wisconsin International Law Journal*, 24, 425–70.

<sup>100</sup> Michaels *supra* n 10.

<sup>101</sup> Reich *supra* n 99.

<sup>102</sup> Draft Common Frame of Reference; Principles of European Contract Law, Common European Sales Law, *inter alia*.

competition.<sup>103</sup> Whereas regulation set the foundations for the Internal-market building project (enabling law), competition is the standard by which European private law unfolds. These purposes serve as the basis for EU private law.<sup>104</sup>

Accordingly, contract law understood in EU law terms holds a clearly visible social function, and this *instrumentalization*, together with the changing (and pervasive) role of the “State” –whatever form it takes– implies an alteration of the classical understanding of the distinction between public and private law.

## 6.2 Public/private law division. Ultimate cleavage or new partnership?

If private law has been understood as the center of law and contract law as located at the heart of such center,<sup>105</sup> *European Private Law* requires us to re-think our legal taxonomy. Private law in the European (internal) market cannot longer be considered, paradigmatically, as “by essence systematic, de-contextualized, (...)” enclosing “inter-individual relationships in a hermetic, private, and a-political sphere”.<sup>106</sup> In the 21<sup>st</sup> Century we must understand private law as *something else*.

Teubner attaches private law to “economic rationality” and “market co-ordination” whereas, for him, public law responds to “political rationality” and “hierarchical organization”.<sup>107</sup> By embedding private and contract law rules in sectorial regimes responding to political rationalities, (European) private law becomes also part of, and is attached to, political rationality. Therefore, public and private law are both part of a single project that is connected to the social in its pursuit of collective and public goals that, at the same time, enlarges the regulatory powers of the State.<sup>108</sup>

Does it mean that private law no longer exists or that it now cannot longer survive unless it is integrated in a typically public regulatory structure? We should answer negatively such an assumption. The new features of the private law contained in the EU Directives and Regulations are the result of the (EU Internal) market-building project. Yet, the constitutive nature of the market does not entail that its foundation needs necessarily be private. Rather, the creation of the European private law society requires safeguarding against both private and public actors in the extension of private autonomy beyond national markets.<sup>109</sup> Perhaps, in examining European rules, we should abandon the dualist thinking, which is no more than a vestige of 19<sup>th</sup> Century legal

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<sup>103</sup> Micklitz, H. W. (2005), “The Concept of Competitive Contract Law”, *Penn State International Law Review*, 23, pp. 549.

<sup>104</sup> Michaels *supra* n 10 at p. 155.

<sup>105</sup> The “core of the core” as Kennedy has put it. Kennedy, D. (2006) “Three Globalizations of Law and Legal Thought: 1850–2000”, in D. M. Trubek and A. Santos (eds.) *The New Law and Economic Development. A Critical Appraisal*, Cambridge University Press, pp. 19–73.

<sup>106</sup> Muir Watt, H. (2008) ‘Globalization and Comparative Law’ in M. Reimann and R. Zimmermann (eds) *The Oxford Handbook of Comparative Law*. Oxford University Press, 579–607.

<sup>107</sup> Teubner, G. (1998), “After Privatization? The Many Autonomies of Private Law”, *Current Legal Problems*, 51, pp. 393–424.

<sup>108</sup> Kennedy *supra* n 105.

<sup>109</sup> Frerichs and Juutilainen *supra* n 4 citing Grundmann, S. (2008) “The Concept of the Private Law Society: After 50 Years of European and European Business Law”, *European Review of Private Law*, 16, pp. 553–81.

thought that might not fit in the European (private law) context.<sup>110</sup> We should not, as Schmitt, grieve for the politisation of private law, neither should we accept the idea that constitutional law must necessarily pervade private law within a system of “total constitution”.<sup>111</sup> However, it cannot be disregarded that the underpinning “constitutional” ideas of the EU are present throughout its laws. For instance, it can be seen in the reinforcement of private rights via fundamental freedoms (*Viking* and *Laval*).

This holds true in relation to the way EU law has taken over consumer protection, for instance.<sup>112</sup> Private autonomy and freedom of contract, as two hard-core principles of private law, have been *divested* from the European consumer whose private will is submitted to the goals of the Internal Market.<sup>113</sup> Hence, in EU law, contract law is labelled as contractual “only in name”.<sup>114</sup> That might be the reason why freedom of contract, despite its supposed position as one of the greatest values within of the European Union, it is not explicitly recognized either by the Primary Community Law, or by secondary Community Law.<sup>115</sup>

In fields such as Labour Law and non-discrimination, etc., private law is (clearly) affected by social (political) goals. In the telecommunications sector, it is public law what has been impacted by private law. Because it is the transformation of the service (from public service to market liberalization) what has opened a new sphere where contract law has also found its place, as a necessary tool to put in motion the engine upon which telecoms functioning is built. Accordingly, the sources of this (pseudo) private law, the law-making (and the post legislative guidance) are different than those presiding in the traditional understanding of private law; so is its enforcement. But the question is: is this a “new” law or is it a manifestation of private law? Or rather is it a “privatization”/“marketization” of public law? The latter claim would come from the fact that the different fundamental freedoms “marketization” are central to private law as well (horizontal/direct effect).<sup>116</sup>

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<sup>110</sup> Frerichs and Juutilainen *supra* n 4.

<sup>111</sup> Kumm *supra* n 12. Kumm exposes the implications of the “radiation theory” emanated from the *Lüth* case, both substantively and institutionally. He highlights the Constitutional supremacy to the extent that this idea governs the whole paper. He concludes that “[i]f, in a surprise move, the constitutional legislator were to amend the Constitution and explicitly determine that constitutional rights are also applicable to the relationship between individuals, it would change practically nothing”. (at p. 352). The doctrine of indirect effect (*mittelbare Drittwirkung*) blurs the line drawing exercise public/private law. Constitution as a yardstick gives rise to the constitutionalization of private law. Thus, Kumm describes a State that is politicized but, unlikely to Carl Schmitt, he looks favorably on this (political) turn as a successful way to achieve constitutional justice.

<sup>112</sup> “Consumer protection legislation is an expanding patchwork of public law, sometimes disguised as private law”, Bergkamp, L. (2003) *European Community Law for the New Economy*, Intersentia; p. 568.

<sup>113</sup> See Comparato, G. and Micklitz, H.-W. (2013) ‘Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU’, in U. Bernitz, X. Groussot, F. Schulyok (eds.), *General Principles of EU Law and European Private Law*, Kluwer, p. 121. For an example on the financial sector, see Comparato, G. (2015), “The rationales of financial inclusion in the changing European private law”, *European Review of Contract Law*, 11(1), 22-45.

<sup>114</sup> Brownsword, R. (2008), in Mitchell, C., & Mitchell, P. (Eds.), *Landmark Cases in the Law of Contract*. Bloomsbury Publishing.

<sup>115</sup> Basedow, J. (2008), “Freedom of Contract in the European Union”, *European Review of Private Law*, 16, pp. 901-923.

<sup>116</sup> Fundamental freedoms as an epitome of the (expansion of) freedom of contract principle; see *supra* n 1.

## 7. Towards the self-sufficiency of European Regulatory Private Law?

The transformation processes explained above give rise to a set of questions that re-define the boundaries of private law. In the first place, it is important to determine the nature of European Regulatory Private Law and its interaction with national private law. This section attempts to answer the following questions: How does the latter affect the former? Does this interaction downplay the role of national private law or rather do the supranational and national levels interact? According to this yardstick, we assess whether there is a process of intrusion and substitution and whether we can talk about the self-sufficiency of sector-specific regulation to regulate private law relationships via sector-related rules alone or, if instead, it is rather a complementarity between sector-related and more general rules.

### 7.1. Functional differentiation: Contract law and Regulatory law

The starting hypothesis is that the process of integration via private law is not grounded in a *juridical rationality*. Rather, it is embedded in an instrumentalist rationality that follows the logic of the market-building project, as the core of the European economic constitution.<sup>117</sup>

This process unfolds as part of the bigger and overall process of Globalization as a “multidimensional phenomenon involving diverse domains of activity and interaction including the economic, political, technological, military, legal, cultural and environmental. Each of these spheres involves different patterns of relations and activity”.<sup>118</sup> This results into an array of different and “independent” global spheres that feature “a dynamic of their own as autonomous functional areas which cannot be controlled though the outside”.<sup>119</sup> Globalization occurs, thereby, according to a logic of *functional differentiation*.<sup>120</sup>

#### Autonomy. Functionalism. Competition. Regulation

Another important issue to take into account is how this “metamorphosed” private law affects private autonomy. Competition law approaches by means of private law automatically involve interference with private autonomy. The transformation of private and contract law affect its core: freedom of contract. Mandatory rules weaken parties’ autonomy.<sup>121</sup> Goal oriented private law transforms autonomy into functionalism.<sup>122</sup>

In the process of emergence of new transnational legal orders, Globalization –as a “shift from territorial to functional differentiation on the world level”– does not mean the dominance of a

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<sup>117</sup> Frerichs and Juutilainen *supra* n 4.

<sup>118</sup> Held, D. (1995), *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Polity Press, as signalled by Teubner in Teubner, G. (2004). *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, at p. 10.

<sup>119</sup> Teubner, *ibid.*

<sup>120</sup> *Ibid.* at pp. 10-11.

<sup>121</sup> Smits, J. M. (2011), “Private Law 2.0: On the Role of Private Actors in a Post-National Society”, Hague Institute for the Internationalisation of Law and Eleven International Publishing; Maastricht Faculty of Law.

<sup>122</sup> Micklitz *supra* n 95.

single worldwide legal order; but a new (fragmented) reality.<sup>123</sup> European Regulatory Private Law(s) might well function as an epitome of this, provided that it autonomously defines its boundaries according to different sectors. The State is no longer relevant as a factor of differentiation.<sup>124</sup> Accordingly, territorial jurisdiction “loses steam” in favor of functional differentiation in the definition of legal boundaries.<sup>125</sup>

## 7.2. Intrusion & substitution

External (to the State) efforts to regulate are usually a matter of resistance for national structures, especially when it comes to private law matters.<sup>126</sup> This opposition can take different forms. To Shaffer, outside Europe, such resistance “can neutralize, hybridize, appropriate, and transform international and transnational law in distinct and unanticipated ways, which can lead recursively to new international and transnational lawmaking”.<sup>127</sup>

By way of normative design, the self-sufficiency hypothesis is an attempt to accommodate the emergence of European Regulatory Private Law in the debate about *legal pluralism*. In the world of legal pluralism, the emergence of new legal categories does not imply the exclusion the existing ones. Rather, they coexist at different levels.<sup>128</sup> The new legal categories are intermingled resulting in a plethora of rules of different origins (pluralism of legal sources), belonging to different legal practices (pluralism of legal orders) and shaping different legal systems (pluralism of legal systems).<sup>129</sup> In the EU law, these three dimensions of legal pluralism occur. There is pluralism of legal sources (national legislator/European legislator), pluralism of legal systems and legal practices facilitated by the existence of an own institutional design. All of this is underpinned by the Court of Justice of the European Union advocating in the 60s for an independent EU legal order as a result of the direct effect and primacy principle (*Costa v. Enel* and *Van Gend & Loos* Judgments).<sup>130</sup>

For Micklitz, and in Europe, the self-sufficiency of European Regulatory Private Law is embodied in *Intrusion and Substitution*, as a composite of three elements: “(1) the horizontal and

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<sup>123</sup> Teubner *supra* n 36.

<sup>124</sup> Walker, N. (2008), “Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders”, *International Journal of Constitutional Law*, 6(3-4), 373-396. The pivotal point of Walker’s discourse is that the juristic understanding of sacrosanct state sovereignty, choice of laws and ranking of sources, “is no longer adequate to a world in which the overlap and interconnection between legal orders looks much denser — so much so, in fact, that many new transnational legal forms have emerged in these “in-between” places” at p. 378.

<sup>125</sup> Teubner, Global Bukowina *supra* n 36 and Teubner, G. (2000), ‘Global private regimes: Neo-spontaneous law and dual constitution of autonomous sectors in world society?’, in Ladeur, K. H. (ed.) *Globalization and Public Governance*, Cambridge University Press.

<sup>126</sup> Comparato, G. (2014), *Nationalism and Private Law in Europe*. Hart Publishing.

<sup>127</sup> Shaffer, G. (2012), “Transnational Legal Process and State Change” *Law and Society Inquiry*, 2012; New York University Institute for International Law and Justice No. 2010/4; APSA 2011 Annual Meeting Paper; Society of International Economic Law (SIEL), Second Biennial Global Conference University of Barcelona, IELPO Programme, July 8-10, 2010; Minnesota Legal Studies Research Paper No. 10-28.

<sup>128</sup> Tuori, K. (2014), ‘On legal hybrids and Perspectivism’ in n Maduro, M., Tuori, K. and Sunkari, S. (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*



vertical sectoral rules; (2) the general principles enshrined in the horizontal and vertical sectoral rules; (3) the general principles of civil law”.<sup>131</sup>

The center of gravity has been displaced from the Nation-State, setting aside, in turn, law and politics from the center of the globalization process. Rather, the leading role has been performed by the “autonomous sectors of society” in Mannheim’s terms.<sup>132</sup> Such sectors represent (fragmented/sectorialized) global society. As a consequence, under this new paradigm where political law-making is losing significant in favor of self-regulatory settings, “political theories of law will be of little use in understanding legal globalization”; i.e. the traditional understanding of law and the State (with its usual separation of powers) becomes no longer suitable to explain the interactions within the New World Society. Against this background, global law will emerge from the periphery (living law) rather than from the core legal areas that emanate from State and political institutions.<sup>133</sup> This being so, it is why, for instance, the EU has failed in its attempt to codify its own “European Private Law”, whereas, at the same time –and much more strongly– other branches of EU Law (telecommunications, energy, financial services, etc.); i.e. *European Regulatory Private Law (ERPL)*<sup>134</sup> are growing in importance and have heavily impacted the arena constituting proper complete regimes that possesses its own features. In addition, these sector-specific legal regimes encompass their own institutional design and procedures with regard to law-making and enforcement, in parallel to the Parliament and the courts generally associated to private law.

Such regimes undermine the unity of the existing systematization and erode (intrusion and substitution) the sovereignty of the Nation-State whose monopoly as the sole and exclusionary legislator in private law has been circumvented. Indeed, it happens that, at the same time, privatization (Marketization) has implied a re-alignment of the public-private divide where the legal and normative values of justice have mutated, giving rise to a *functional justice*.<sup>135</sup>

### 7.3. Self-sufficiency or complementarity?

As a result of the transformations mentioned above, theories of legal pluralism will have to focus on communicative networks rather than nation-states.<sup>136</sup> In fact, that is what happens in the case of *ERPL* if we take it as an example of one of the social subsystems of the global society, as described by Teubner.<sup>137</sup> For instance, taking the telecommunications sector as an example to validate Teubner’s claims, one can agree that: 1) the telecommunication sector operates in a “networked borderless context”; i.e. it works as a sort of “club” which transcends territorial boundaries and that result in the emergence of genuine legal forms; 2) as to sources of law, in the telecoms regime, the national legislator (the Parliament) is losing its leading role being replaced by highly specialized and technical instances (National Regulatory Authorities, Standardization bodies, etc.); 3) the

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<sup>131</sup> Micklitz and Patterson *supra* n 3.

<sup>132</sup> Teubner *supra* n 36

<sup>133</sup> Ehrlich (1936), quoted in Teubner’s Global Bukowina, *supra* n 36..

<sup>134</sup> Micklitz.

<sup>135</sup> On this account, see Teubner, G., “Self-Subversive Justice: Contingency or Transcendence Formula of Law?”, *Modern Law Review*, Vol. 72, pp. 1-23.

<sup>136</sup> This is the approach that Ladeur follows later.

<sup>137</sup> Teubner *supra* n 36. .

telecoms sector will remain (by now) functioning independently –albeit closely parallel– to the different emerging sector-specific fields; and finally, 4) its rise linked to its “sector-related nature” rather than its attachment to any particular Nation-State or single identity, confirms the fact that unity will not be a paradigmatic feature of any *global law*, which in turn undermines the unity conventionally attached to private law systems.

Under the new circumstances, *ERPL* would function as one of the “social subsystems of the global society”, giving rise to a new genotype of law, which might be only observed as a “self-organizing process that autonomously defines its boundaries”.<sup>138</sup> And it can only be assessed by observing its legal practices (“second order observation” for Luhmann);<sup>139</sup> that is the reason why *ERPL* and this dissertation follow a “bottom-up” approach. Accordingly, it would be in this empirical observation, where the variation or transformation process (as desired) finds its answers to questions related to law-making and enforcement powers; although it threatens the equilibrium of powers. Only after such observation, one would be able to perceive whether the telecommunications private law rules actually constitute a peripheral and asymmetric self-reproductive legal process.

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<sup>138</sup> Ibid.

<sup>139</sup> Ibid. See also Luhmann, N. (1992), ‘The coding of the legal system’, in Febbrajo, A and Teubner, G. (eds), *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective*, Giuffrè. 145-185.

## **PART II – DESCRIBING THE TRANSFORMATIONS**

### **Chapter 3 – THE TRANSFORMATION IN THE *MAKING* OF PRIVATE LAW VIA EU TELECOMMUNICATIONS REGULATION**

#### **1. Setting the Scene. General overview**

This chapter focuses on the transformations in the making of private law through the regulatory process of telecommunications law in Europe. Following the liberalization of formerly public monopolies in the field of utilities, telecommunications have been regulated at EU level in a comprehensive way. This inclusive approach reaches to the private law relations among participants of telecommunications markets. In particular, the overarching principles for the telecoms sector, such as non-discriminatory and universal access, impact heavily not only the nature of private law, but also imply a transformation in the contractual relations arising from transactions within the sector.

The shift of telecommunications from the public to the private sphere as a result of the liberalization of the sector has entailed not only substantive but also institutional transformations. Internal Market harmonization has been the driver for the rise of “European supervisory powers” in order to ensure proper implementation of EU law in many fields covered by EU competences. In the telecommunications sector, the amplitude of these, largely European, control mechanisms overseeing compliance with sector-specific policy goals interferes with other spheres traditionally belonging to the Member States, such as private relationships. Against this background, this chapter focuses on the making of telecommunications regulation as the epitome of a transformation from parliamentary rule-making to specialized regulatory powers. Moreover, such powers formally function under a networked and decentralized structure while, in practice, –this chapter argues– the network works hierarchically under sector-specific supervisory mechanisms.

More specifically, under the system shaped by the European Regulatory Framework for Electronic Communications, Member States have been required to set up National Regulatory Authorities (NRAs) to oversee the liberalization process. These regulatory bodies perform a key role in the implementation and enforcement of the European legal framework. In this setting, the European Union has shown an enforcement deficit as a result of the National Procedural Autonomy

principle.<sup>1</sup> However, even though the implementation and enforcement of the EU rules depends on the Member States, there is a slow and growing influence by the European Union on the national regulatory activities.<sup>2</sup> This chapter thereby focuses on how the supervisory powers of the EU, which are deeply rooted in the integration process and towards the construction of the Internal Market, are encroaching on national competences on the sly. To this end, this chapter aims at displaying the institutional design of the telecommunications sector in the decision-making process and the implementation of EU rules.

The first part of this chapter addresses the evolution of the Regulatory Framework for Electronic Communications. This section shows how the primary aims of the Regulatory Framework are shifting from liberalization and competition to harmonization of the Internal Market and Consumer protection. The liberalization of the telecommunications sector should have led to its *deregulation* and to the system being governed by general competition and general contract law only.<sup>3</sup> However, further liberalization measures are not (for the time being) envisaged and sector-specific legislation is still being adopted via *approximation legislation*.

Secondly, this chapter focuses on the institutional design of law-making in telecoms and the actors involved. That part seeks to reconstruct, on the basis of the conducted empirical research, the different institutions that participate in the regulation of telecommunications.

Later, by exploring a real case on the implementation of the European legal framework in the field of telecommunications, the chapter provides an answer to the question of the extent to which the new model of decision-making implies a shift with regard to traditional methods of law-making in private law. Here, the nature, role and impact of soft-law are brought forward. In addition, through the analysis of the *Vodafone* case, this chapter also addresses the controversial issue of the EU's *virtual* competence to regulate retail prices.

In summary, by scrutinizing the making process of telecommunications regulation in the EU, this chapter illustrates the new actors and the regulatory strategies that, tangentially, intervene in the shaping of *European Regulatory Private Law* in regulated market.

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<sup>1</sup> Nicolaides, P., Geveke, A., & Den Teuling, A. M. (2003), "Improving policy implementation in an enlarged European Union: The case of national regulatory authorities". *European Institute of Public Administration*; and Nicolaides, P. (2004), "The Political Economy of Multi-tiered Regulation in Europe". *JCMS: Journal of Common Market Studies*, 42(3) 599-618.

<sup>2</sup> Ottow, A. (2012) "Europeanization of the Supervision of Competitive Markets", *European Public Law*, 18(1), pp. 191–221. See also Cseres, K. (2013), "Integrate or Separate Institutional Design for the Enforcement of Competition Law and Consumer Law", *Amsterdam Centre for European Law and Governance Working Paper Series* (2013-01).

<sup>3</sup> Recital 5 of the 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 18.12.2009): "[T]he aim is progressively to reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only. [...]".

## *European Regulatory Framework: From liberalization to Internal Market harmonization (and consumer protection)*

In the regulation of Services of General Economic Interest (SGEIs) –gas, electricity, transport, financial services, telecommunications, etc.–, the European legislator has been engaged in a functional approach that has instigated regulated sectors to become functionally independent. Thus, although the different sectors have followed comparable paths, their regulation has been carried out through a sector-specific approach, resulting in different sectorial regulations.

For the telecommunications sector in particular, liberalization, harmonization of the Internal Market and the application of competition rules have been the cornerstones underpinning the market-opening process and the reform of the sector in order to accomplish the general EU policy goals for telecommunications, being: “to develop the conditions for the market to provide European users with a greater variety of telecommunications services, of better quality and at a lower cost, affording Europe the full internal and external benefits of a strong telecommunications sector”.<sup>4</sup> However, the *de-regulation* of the sector has not resulted in a decrease in the legislation concerned; rather, the creation of the Internal Market for telecommunications has entailed its *re-regulation* and it has actually led to *overregulation*.<sup>5</sup> The vast number of rules encompasses different issues, ranging from the liberalization of the sector, to particular provisions concerning contractual matters.

All the enacted rules contained in the different generations of rules (so-called telecom packages or generations) constitute what has been termed the *EU Regulatory Framework for Electronic Communications*, which provides the basis for the national legislation in the field. To date, three series of rules have come to light:

### *The First package (1980s-2002)*

The European Commission initiated the process of liberalization in the telecommunications sector in 1987, with the adoption of the Green Paper on Telecommunications,<sup>6</sup> which brought the full liberalization of the sector in 1998.<sup>7</sup> At that time, the creation of a *market* was the top initiative of the liberalization aspirations.<sup>8</sup> When telecommunications market was opened to competition under

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<sup>4</sup> Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM (87) 290 final, page 3 (Introduction). For a deeper analysis see Queck, R., de Streel, A., Hou, L., Jost, J., & Kosta, E. (2010), ‘The EU Regulatory Framework Applicable to Electronic Communications’, in L. Garzaniti and M. O’Regan (Eds.), *Telecommunications, Broadcasting and the Internet. EU Competition Law & Regulation* (3rd ed.), Sweet & Maxwell, pp. 3-262.

<sup>5</sup> Thus, for example, there are more than a hundred of different directives, decisions, regulations, recommendations and resolutions concerning telecommunications. Garzaniti, L. and O’Regan, M., *supra* n 4.

<sup>6</sup> Communication from the European Commission of July 30, 1987, “Towards a dynamic European Economy: Green Paper on the development of the common market for telecommunications services and equipment”, COM (87) 290.

<sup>7</sup> Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for Regulation - Towards an information society approach, COM (97) 623 final. (Not published in the Official Journal).

<sup>8</sup> Representative of the European Commission –DG Connect–, Speech at the Florence School of Regulation, October 2012.

Article 86 EC Treaty (now Article 106 TFEU) the European legislator was mainly focused on liberalizing the sector and enhancing competition.

According to the 1987 Green Paper, there were several reasons for commencing the review process: the speed of technological diversification, an expanding range of new forms of access to sources of information, an explosive growth in communications requirements, and the major importance of scale effects through multinational participants. Further, the European Commission also declared that the measures taken by the US and Japan affected the authorities concerned and forced the review process as well.<sup>9</sup> The main purpose of the regulatory adjustment was to create competition and, thus, more cost-efficient services. Additionally, it would stimulate investment and innovation. A final reason was that the Commission considered telecommunications as a sector of vital importance in economic activity and as “the most critical area for influencing the “nervous system” of modern society”.<sup>10</sup>

At that stage, some European companies understood the opportunities provided by the global market and were eager to compete in international trade on an equal basis. The UK was the pioneer in the liberalization process and, in 1984, privatized British Telecommunications. However, not all Member States agreed with the liberalization policy, and the need to reach a consensus entailed a more than a decade of Directives and incentives to Member States to undertake the review process.<sup>11</sup>

The separation of the regulatory and operational functions of the incumbent was a crucial aspect for the liberalization purpose. These functions were formerly performed by the same entity, the incumbent operator. Since this would hinder the introduction of competition, entailing a risk of distortion and discrimination for the new entrants, the EU rules envisaged the creation of bodies independent of the telecommunications organizations for regulatory functions.<sup>12</sup> Thus, as a matter of institutional choice, the reforms included the establishment of what would later be called *National Regulatory Authorities* (NRAs) in order to implement liberalization policies and to perform regulatory functions.<sup>13</sup>

Subsequently, in 1997, the Independent Regulators Group (IRG) was created with the aim of co-operation between the different European regulators. The IRG was formed by NRAs with the purpose of serving as a meeting point or forum to share experiences and points of view amongst its members on issues concerning the development of the telecommunications market in Europe as a result of liberalization.

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<sup>9</sup>1987 Green Paper, *supra* n. 4, p. 2.

<sup>10</sup>*Ibid.*, p. 1.

<sup>11</sup> Melody, W.H. (2012), “Viewpoint: The Closing of the Liberalization Era in European Telecommunication”, *Competition and Regulation in Network Industries*, (13) 3, 218-235, at 221.

<sup>12</sup> Article 7, Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, *OJ L* 192, 24.07.1990, pp. 10-16.

<sup>13</sup> National Regulatory Authorities and their role are analyzed more thoroughly below.

The rapid development of the sector pressed the European Commission to review the first package shortly after its implementation. This new package (2002) was primarily aimed at the convergence of the Regulatory Framework in order to foster the industry's development via technologically neutral and (more) flexible rules.<sup>14</sup> The idea was to put an end to the vertical approach in the regulation of the different services and networks provided within the telecommunications market (for instance, all networks used for the transmission of radio and television programmes). Thus, due to the emergence of a broad range of communications services, the convergence of the ICT (Information and Communications Technology) sector was sought under a renewed *common approach*.<sup>15</sup> Furthermore, once the liberalization machinery had been rolled-out, the second goal was the development of a common market for telecommunications across the European Union. Accordingly, the legal basis for the adoption of this second set of rules was Article 95 EC (now 114 TFEU), aimed at the harmonization of the Internal Market, and consumer protection (Article 153 EC, now Article 169 TFEU). Nonetheless, the second package did not lead to the replacement of all the former rules from the first package. Consequently, this meant a basic dualism: harmonization, on the one hand, and liberalization, on the other.<sup>16</sup>

The new package, consistent with the goal of harmonization and following the mandate of the Framework Directive<sup>17</sup> to contribute to the development of the Internal Market by cooperating with each other and, unlike the IRG, also with the Commission,<sup>18</sup> included the creation of a European body, the European Regulators Group (ERG).<sup>19</sup> The idea of its creation was not only to advise the European Commission, but also to create a sort of *European network of NRAs*. The purpose was to bring together the regulators of electronic communications and to encourage them to take a European perspective when performing their regulatory activities. Shortly after, the ERG started to constitute its activity into study groups and began to issue binding guidelines that served as benchmark exercises on the different regulatory topics. As such, the ERG was created to enhance co-operation and co-ordination between the Commission and the different NRAs by ensuring the proper and uniform implementation of the EU rules in order to ensure a more consistent approach and even though the ERG operated in parallel with the IRG, its main role was to advise and assist the European Commission in consolidating the Internal Market for electronic communications networks and services.<sup>20</sup>

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<sup>14</sup>Braun, J.-D. and Capito, R. (2009), 'The emergence of EC Telecommunications Law as a new Self-standing field within Community Law', in Koenig, C.; Bartosh, A.; Braun, J.D and Romes, M., *EC Competition and Telecommunications Law*, 2<sup>nd</sup> edition, Wolters Kluwer, pp. 41-52 (see p. 48).

<sup>15</sup> For a further analysis see Melody (2012) *supra* n. 11, 223-226.

<sup>16</sup> Braun and Capito, *op. cit. supra* n. 14.

<sup>17</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive).

<sup>18</sup> Article 7(2) and Recital 36 of the Framework Directive as amended by Directive 2009/140/EC and Regulation 544/2009.

<sup>19</sup> Decision of the European Commission of July 29, 2002 establishing the European Regulators Group for Electronic Communications Networks and Services (OJ L 200, 30.7.2002, pp. 38-40).

<sup>20</sup> *Ibid.* Article 3.

### *The Third package (2009-present)*

Around two decades after the first package was launched, some Member States had successfully developed competition in their telecommunications markets, whereas others were still more laggard. This situation, linked to the incorporation of new EU Member States, the Significant Market Power (SMP) of national incumbents and the restricted powers of NRAs, implied a deceleration in the implementation of the second package. The process flowed slower than expected and it required the rules to be amended and adapted to the new circumstances.

The different directives from the 2002 package contained review clauses providing a procedure whereby the Commission would review their functioning no later than three years after its transposition. Thus, the 2006 Review gave rise to the 2009 package or “third generation”. According to the European Commission, the 2009 package was enacted to “substantially strengthen competition and consumer rights on Europe's telecoms markets, facilitate high-speed internet broadband connections to all Europeans”.<sup>21</sup> Although competition had generally developed, this trend was fragmented and there were some countries and markets where competition was still lacking. Therefore, the revised rules were still (very much) based on *ex-ante* regulation.

At the institutional level, the Body of European Regulators for Electronic Communications (BEREC) replaced the ERG.<sup>22</sup> This would provide a forum of discussion between the Commission and the NRAs in order to foster the Internal Market for telecommunications services. Roughly speaking, BEREC is currently the body in charge of ensuring a consistent application of the EU regulatory framework for electronic communications.<sup>23</sup> BEREC is, therefore, established as a meeting point for the co-operation of regulators and, in general, Member States must ensure that the regulators at the national level actively support the goals of BEREC of promoting greater regulatory coordination and coherence.<sup>24</sup>

### *Current situation*

The 2009 Amendment to the Framework Directive (Recital 5) introduces a *sunset rule*. It provides that “the aim is progressively to reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only”. Yet, the evidence suggests that this does not seem to be the path that telecommunications regulation actually follows. In this regard, it has been pointed out that the new agenda did not include any new liberalization measure, any reference to the expansion of competition among providers, or to any orientation concerning the benefits of liberalization within its policy objectives.<sup>25</sup> This means that competition is no longer at the top of the agenda and that further steps

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<sup>21</sup> Press Release, MEMO/09/491, Brussels, 5 November 2009.

<sup>22</sup> This Body was set up by the Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337, 18.12.2009, pp. 1-10. The role of BEREC is analyzed more thoroughly below.

<sup>23</sup> Article 1 BEREC Regulation.

<sup>24</sup> Article 3(3b) Framework Directive.

<sup>25</sup> Melody (2012), *supra* n.11, pp. 226-227.



in this regard are not (at this moment) foreseen.<sup>26</sup> On the discussion about the phasing out of sector-specific regulation, the tendency of regulation to persist provides evidence that competition law will not take over regulation in the long term.<sup>27</sup> As to the harmonization goal, which provides the legal basis for the two last packages of telecommunications regulation, the different telecoms Directives are *re-regulating* the market, in an attempt by the EU legislator to bring closer the already existing national regimes.<sup>28</sup>

Today there have been some developments but there are still persisting bottlenecks that competition law alone cannot address and artificial barriers to market integration. These factors are the reason why market regulation is still needed. In addition, as a matter of fact, as long as telecommunications develops, new markets emerge and they need to be included within the markets to be regulated, and these developments will need to be taken into account in future Recommendations on relevant markets susceptible to *ex-ante* regulation. This may entail that although competition is effectively achieved in some telecommunications markets, regulation will continue to be adopted even once markets are competitive because there exist greater policy aspirations.

The policy aims in the telecommunications sector are found in the 101 actions grouped in the 7 pillars of the Digital Agenda. The Pillar I is the *Digital Single Market*. Single Market paves the way for the actions taken under the Digital Agenda's initiatives. Yet, the harmonization project is not up till now yielding a sufficient outcome towards a Single Market for telecoms. It would require the effective unification of national markets in terms of "network availability and access, spectrum usage and competition rules".<sup>29</sup> This might be one of the reasons why the telecommunications legal regime will remain subject to sector-specific regulation. Furthermore, due to the existence of *deregulatory failures*<sup>30</sup> and despite its envisaged potential integration within competition law, the sectorial approach towards the regulation of telecommunications seems to prevail, it not being by now –in practice– part of a broader horizontal approach.

As things stand, there is a fourth package being discussed in the European Parliament. On this occasion, the legal package does not however consist of Directives, but of a Regulation<sup>31</sup> and a

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<sup>26</sup>Ibid. Melody.

<sup>27</sup> On the "tendency of regulation to perpetuate itself", see Larouche, P. (2004), "Legal issues concerning remedies in network industries"; available at [http://papers.ssrn.com/soL3/papers.cfm?abstract\\_id=832025](http://papers.ssrn.com/soL3/papers.cfm?abstract_id=832025).

<sup>28</sup> As Weatherill has put it: "Directives harmonize national laws in the name of promoting the establishment or functioning of the market –or more pertinently to 're-regulate' it–, in the sense that the EU is not acting as a *de novo* regulator but rather is responding to the pre-existing diverse regulatory choices among the Member States"; Weatherill, S. (2011) Consumer Policy, in Craig, P. and De Búrca, G. (Eds). *The Evolution of EU Law*. New York: Oxford University Press, pp. 743-779. See also Bergkamp, L. (2003). *European Community Law for the New Economy*. Intersentia nv: p. 567.

<sup>29</sup> Parcu, P. L. and Silvestri, V., (2014), "Electronic Communications Regulation in Europe: An Overview of Past and Future Problems", *Utilities Policy*, 31, pp. 246-255.

<sup>30</sup> Recently, a process of deregulation in Poland has failed ([http://europa.eu/rapid/press-release\\_IP-13-100\\_en.htm](http://europa.eu/rapid/press-release_IP-13-100_en.htm)). The European Commission has called the Polish telecoms regulator (UKE) to withdraw its proposal to deregulate conditions under which other operators can access Polish telecom company Telekomunikacja Polska's (TP) broadband network in 11 communes of Poland since –in the Commission's view–, it could have a negative effect on competition in Poland.

<sup>31</sup> Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent - COM(2013) 627.

Commission Recommendation.<sup>32</sup> In taking up this new form, the EU is moving from regulation via Directives towards adopting legislation in the form of a directly applicable Regulation whose main aim is the removal of barriers and enabling the process of building a genuine Single Market for telecoms. Hence, the proposal takes Article 114 TFEU as the legal basis for enacting this *one-size-fits-all* solution. The viability of that project has stalled in the European Parliament and, accordingly, the European Commission has initiated a new strategy for the creation of a genuine Digital Single Market in Europe.<sup>33</sup> This plan foresees the adoption of proposals by the European Commission in 2016 for an entire revision of the current regulatory framework for telecommunications including the particular focus on: “(i) a consistent single market approach to spectrum policy and management (ii) delivering the conditions for a true single market by tackling regulatory fragmentation to allow economies of scale for efficient network operators and service providers and effective protection of consumers, (iii) ensuring a level playing field for market players and consistent application of the rules, (iv) incentivising investment in high speed broadband networks (including a review of the Universal Service Directive) and (v) a more effective regulatory institutional framework”.<sup>34</sup>

## 2. Legal basis. Internal Market approach

Neither the EC Treaty nor the Lisbon Treaty creates specific competences with respect to private law. Nonetheless, this lack of *constitutional backing* has been compensated –and exploited–<sup>35</sup> by the use of the broad purposeful competence to harmonize and safeguard the values underpinning the provision of SGEIs services. In particular, Protocol n.26 of the Treaty provides that the values concerning Service of General Economic Interest include, inter alia: (...) “a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights”. This is required to be read within the meaning of Article 14 TFEU which establishes that the EU as well as the Member States, “each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions”. To this end, it requires the European Parliament and the Council, under the ordinary legislative procedure, to establish those principles and conditions within the limits of the shared competences enshrined in Article 4 TFEU.

By and large, like communications technologies, the Regulatory Framework for telecommunications services –as explained above– has evolved over time, which has resulted in different generations of EU rules in line with the –also changing– policy goals. Liberalization of

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<sup>32</sup> Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment - COM(2013) 5761.

<sup>33</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, 6.5.2015. COM(2015) 192 final.

<sup>34</sup> Ibid.

<sup>35</sup> Weatherill, S. (2006). ‘European Private Law and the Constitutional Dimension’ in Cafaggi, F. *The Institutional Framework of Private Law*, Oxford University Press.

the sector (Article 86 EC Treaty, now Article 106 TFEU) and consumer protection (Article 153 TEC, now Article 169 TFEU) were invoked as the legal basis in past generations of EU telecommunications. Under the current legal framework, the harmonization aspiration in telecoms is intended to ensure equivalent regulatory systems and a consistent application of the European rules in all Member States. The underlying idea is that market players should compete on equivalent terms and for consumers to fully benefit from the liberalization of the market. For this purpose, the EU has recently resorted to Article 95 EC Treaty (now Article 114 TFEU), which enables the Council and the European Parliament, upon a proposal from the Commission, to adopt legislative measures aimed at the establishment and functioning of the Internal Market by harmonizing Member States' laws. By going down this route, the EU legislation in the field of telecommunications services also reveals its reliance on the market. Hence, not only are all the relevant Directives contained in the regulatory framework for electronic communications based on the Internal Market competence of Article 114 TFEU, but also their content confirms their clear market orientation.<sup>36</sup>

Against this background, it can be surmised that while the primary goal of telecommunications regulation was to open up markets, the harmonization aim has become prominent and it is overshadowing the transition to competition. Accordingly, the legal regime for telecommunications seems to now be more committed to the creation of a single market for telecoms rather than liberalization. Hence, although regulatory convergence –i.e. the end of the *ex-ante/ex-post* dichotomy because competition law takes over the regulation of the sector– was expected, the reality shows that the sector-related regime is increasingly deviating firstly from pure market regulation, to now also encompass social regulation (e.g. universal services), and secondly from general contract law when it comes to private law provisions, leading to the creation of specific rules aimed at promoting competition (e.g. access and interconnection) which govern private relationships in line with the EU's mandates.

### **“Approximation legislation” - Goal oriented (purposive) competence?**

The amplitude of the Internal Market legal basis has been already “legitimized” by the Court of Justice of the European Union (CJEU) in the *Tobacco saga*.<sup>37</sup> In the telecoms sector, the use of the Internal Market's harmonization competence and the subsidiarity principle was addressed in the *Vodafone Case*.<sup>38</sup> The Court has also upheld the suitability of Article 114 TFEU to enact provisions aimed at improving the conditions for the establishment and functioning of the Internal Market and the creation of EU Bodies and the regulation of their competences (*ENISA*<sup>39</sup> and *ESMA*<sup>40</sup> cases).

<sup>36</sup> See Rott, P. (2005), "A New Social Contract Law for Public services?—Consequences from Regulation of Services of General Economic Interest in the EC", *European Review of Contract Law*, 3, pp. 323–345..

<sup>37</sup> Case C-376/98 *Germany v. Parliament and Council* [2000] ECR I-8419; Case C- 66/04 *United Kingdom v. Parliament and Council* [2005] ECR I-10553; Case C-380/03 *Germany v. Parliament and Council* [2006] ECR I-11573; Case C-301/06, *Ireland v. European Parliament, Council* [2009] ECR I-00593.

<sup>38</sup>Case C-58/08, *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-04999. See below, section 5.2.

<sup>39</sup> Case C- 217/04 *United Kingdom v Parliament and Council* (ENISA) [2006] ECR I- 3771.

<sup>40</sup>Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*. Not yet reported.

The Internal Market harmonization thereby becomes a powerful tool for the design of the regulatory regime of the telecommunications market in a process of market confidence building.<sup>41</sup>

In order to fulfill the policy expectations for the Internal Market's in the telecoms field –the creation of a European Market for telecommunications–, this sort of *approximation legislation* has contributed to the development of sector-specific supervisory mechanisms via the shaping of an institutional architecture whose machinery is intended to harmonize the different national markets and, eventually, the creation of a Single Digital Market (i.e. integration). Under this harmonizing approach, every measure aimed at achieving the harmonization aim is caught under the approximation legislation umbrella; not only Directives and Regulations, but also EU Recommendations, Decisions and every sort of guidance document or procedure will fall within this category.

Against this background, another matter of competence is the issue represented by the delegation of substantive competence to “specialized institutions”.<sup>42</sup> The establishment of National Regulatory Authorities in the telecoms sector to monitor the liberalization of the telecommunications markets is a clear example of the partial integration or integration by sectors that Pescatore speaks of.<sup>43</sup> But in order to get a clear understanding about this, it is necessary to look at the functional competence of such institutions as well as the interplay between the EU, the Member States and the established administrative structures. This might be the result of the nature of the prerogatives reserved to the European Commission with regard to control mechanisms which grant it certain powers aimed at the adjustment of national measures; e.g. via Consultation procedures.<sup>44</sup> The rationale of such procedures responds to the political and legal imperatives set out at EU level.<sup>45</sup>

### 3. Law (and decision)-making procedure and methods

The law-making procedure is a decisive factor in the content and quality of the legal provisions to be produced.<sup>46</sup> A potential transformation of private law, therefore calls for the examination of the institutional choice and design, particularly where the process of rulemaking is understood “as a dynamic process, in which rules are not simply the result of a single legislative procedure but the outcome of continuing interaction between legal, political, and economic institutions”.<sup>47</sup> This is particularly the case in the making of European Private Law.

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<sup>41</sup> Weatherill, S. (2006). ‘European Private Law and the Constitutional Dimension’ in Cafaggi, F. *The Institutional Framework of Private Law*, Oxford University Press.

<sup>42</sup> Pescatore, P. (1974), *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities*, p. 27.

<sup>43</sup> Ibid.

<sup>44</sup> Article 7 and 7a of the Framework Directive. In this regard, see also Curtin (2009), *Executive Power of the European Union. Law, Practices and the Living Constitution*, Oxford University Press.

<sup>45</sup> Pescatore *supra* n 42 at p. 45.

<sup>46</sup> Cafaggi, F. (2006). *The Institutional framework of European private law*. Oxford University Press.

<sup>47</sup> Ibid.

Law-making is generally characterized by several features, *inter alia*, the aim pursued by the legislator, the administrative structure of the entity who is competent to create and enforce the law, the way in which the law-making process is carried out, the instruments employed, and the competence upon which the regulation is based. It is thus appropriate not only to address the procedural design at the level of law-making but also the implications related to the transposition of telecommunications regulation. Such analysis provides the foundation for understanding the transformation in the substance of private law. Accordingly, this section, without deepening into the EU governance debate, briefly sketches the procedural arrangements that are part of the legal framework in which the telecommunications sector unfolds.

### *Multilevel Governance & National procedural autonomy*

The liberalization of the telecommunications via EU's imperatives has impacted the economic and legal framework of the industry. In economic terms, the liberalization of the sector has implied the end of the monopoly regime and the establishment of market competition.<sup>48</sup> For the legal world, liberalization of formerly publicly provided utilities has meant the *de-regulation* of the sector. Within this de-regulatory process, governments have been searching for modes of regulatory control which are "less onerous, more flexible and draw on the knowledge and experience of service providers".<sup>49</sup> In fact, in the law-making process relating to private law the European Union is making use of new regulatory devices as opposed to the traditional ones, e.g. legislative power in the hands of the Parliament. This new approach includes innovative instruments and procedures, such as co-regulation, co-operation or comitology.<sup>50</sup> Co-regulation involves the combination of EU mandatory legislation and non-binding rules arising from private parties and organizations, such as codes of conduct or operating standards.<sup>51</sup> In this regard, Article 33(2) of the Universal Service Directive establishes that "[w]here appropriate, interested parties may develop, with the guidance of national regulatory authorities, mechanisms, involving consumers, user groups and service providers, to improve the general quality of service provision by, *inter alia*, developing and monitoring codes of conduct and operating standards". Co-regulation is thereby characterized by a particular combination of State and non-State regulation. In the Commission's view, co-regulation "combines binding legislative and regulatory action with measures taken by the actors most concerned".<sup>52</sup> As to telecommunications services, Recital 48 of the Universal Service Directive (2002) recognizes that co-regulation could be an "appropriate way of stimulating enhanced quality standards and improved service performance". This has been regarded as part of the so-called *new governance*.<sup>53</sup> Notwithstanding this, the approach chosen has been of a multi-level institutional

<sup>48</sup> Commission Directive 96/19/EC amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (1996 OJ L 74). See Taylor, S. M. (1994). Article 90 and Telecommunications Monopolies. *European Competition Law Review*, 15, pp. 322-322.

<sup>49</sup>Ogus, A. (2009), 'The regulation of services and the public-private divide', in Cafaggi, F. and Muir Watt, H. (eds.) *The Regulatory Function of European Private Law*, Edward Elgar, pp. 3-15.

<sup>50</sup>Micklitz, H.-W. (2008), "Regulatory Strategies on Services Contracts in EC Law", *EUI Working Paper Series LAW* No. 2008/06.

<sup>51</sup>Ibid. p.11.

<sup>52</sup>White Paper on European Governance, COM (2001)428 final.

<sup>53</sup>Eberlein, B., and Kerwer, d. (2004). "New Governance in the European Union: A Theoretical Perspective", *Journal of Common Market Studies*, 42(1) 121-142.

design where co-regulation is not actually widely used beyond the participation of stakeholders as interested parties. For telecoms regulation, regulatory powers are allocated at EU level leaving a certain degree of regulatory scope to the Member States via the national regulators.

In the European telecommunications panorama, National Regulatory Authorities (NRAs) play a key role in the law-making process. Harmonization at European level requires detailed regulatory interventions and the national regulators are, among many other competences, responsible for the implementation of the principles contained within the harmonization measures. NRAs were introduced in the EU legislation with the full liberalization.<sup>54</sup> But that time, legislation only required Member States to ensure the availability of an independent body to perform the allocation of frequencies and surveillance of usage conditions.<sup>55</sup> In order to carry out their obligations, they have been given broad regulatory powers and instruments to intervene in the market. However, NRAs shall be independent from market players and separate from the rest of the national administration.<sup>56</sup>

As to private law concerns, NRAs can intervene, for instance, in the contractual relationships between undertakings for the use of the network (wholesale contracts) or in the provision of the service to end-users (retail market) in the telecommunications sector. Particularly at the wholesale level, the legislative framework gives way to decision-making on a case-by-case basis as opposed to general (ready-made) solutions, especially when it comes to the imposition of regulatory obligations.<sup>57</sup> In short, under the current regulatory design NRAs may impose regulatory remedies in those cases where: i) there are high and non-transitory entry barriers; ii) there is a lack of effective completion; and iii) competition law alone is not enough to palliate such situation.<sup>58</sup> The national telecoms regulator may then choose from the provided *menu of remedies* the most suitable for the case at stake. The described system calls for the principle of national procedural autonomy. Yet, this scheme is monitored by the European Commission, which may review the imposition of those remedies by the NRA via a consultation procedure in the interest of a uniform application of the European Regulatory Framework.<sup>59</sup>

Therefore, telecommunications regulation takes places as a two-level system; the EU-and the Member States. The hitherto three regulatory packages for electronic communications have mainly consisted in Directives, which means a certain degree of procedural autonomy for the Member States and the national regulators. However, European regulation has gradually intervened

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<sup>54</sup> Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192, 24.07.1990, pp. 0-16.

<sup>55</sup> 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, 29.10.1997, pp. 23-34. However, they were not called *National Regulatory Authorities* as such; this name was allocated only later

<sup>56</sup> Framework Directive establishes in its Article 3(2) that “Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organizations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control”.

<sup>57</sup> For an extensive analysis of the available regulatory obligations, see Chapter 4 of this thesis.

<sup>58</sup> This is the so-called *Three-criteria test*, further analysed in Chapter 4.

<sup>59</sup> Article 7a of the Framework Directive. For a deeper analysis see Section 4.2 of this Chapter.

in national market regulation, curtailing the leeway of the national regulator. The deviation from the European legal framework is somehow *corrected*. Hence, supervisory and monitoring mechanisms by the European Commission can strongly influence the discretion of the national regulator.<sup>60</sup> Under this configuration, the principle of national procedural autonomy plays little (if any) role given that the Commission enjoys significant influence in the national decision-making process and therefore the autonomy principle “can no longer be automatically assumed”.<sup>61</sup> This *small shift of hierarchy* has already been endorsed by the CJEU by claiming that even though NRAs are independent from state control, they are still subordinated to the policy objectives of the EU regulatory framework.<sup>62</sup>

In addition to this, the *co-operation* between NRAs is emphasized in the regulatory framework in order to achieve a genuine and consistent market for telecommunication in Europe.<sup>63</sup> At the top of the NRA network is BEREC.

Comitology is also part of the telecommunications regulatory framework. The Communications Committee (Cocom), established under the Framework Directive<sup>64</sup>, replaced the Advisory Committee on the implementation of Open Telecommunications Network Provision (ONP) and the Licensing Committee which were set up under the 1998 regulatory package for telecommunications. The Cocom assists the Commission in carrying out its executive powers under the regulatory framework. It exercises its functions through 'advisory', and 'regulatory with scrutiny' procedures in accordance with the Comitology Regulation.<sup>65</sup>

In the configuration process of a genuine Internal Market of telecommunications, the establishment of common standards is also decisive. Standards play an important role in the telecommunications industry. They are important to ensure the harmonized provision of electronic communication services. According to the Framework Directive<sup>66</sup>, Article 17(2) establishes that Member States shall encourage the use of standards for the provision of services, technical interfaces and/or network functions, to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users. Standardization serves as a basis for encouraging the harmonized provision of electronic communications networks, electronic communications services and associated facilities and services.<sup>67</sup> As a result, an integral part of the EU policy is to achieve the Lisbon goals through better regulation and the simplification of the legislation. In this regard, the Framework Directive establishes that Member States shall encourage

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<sup>60</sup> Kerber, W., and Wendel, J. (2014), “Regulation of network sectors in the EU: A federalist perspective”, *Joint Discussion Paper Series in Economics*, Universität Marburg. No. 22-2014.

<sup>61</sup> Lavrijssen, S. A. C. M., and Ottow, A. (2012), “Independent Supervisory Authorities: A Fragile Concept”, *Legal Issues of Economic Integration*, 39, p. 419.

<sup>62</sup> Case C-424/07 *European Commission v Germany* [2009] ECR I-11431. Paras. 89ff.

<sup>63</sup> Recitals 36 and 37 and Article 3(4) Framework Directive.

<sup>64</sup> Article 22.

<sup>65</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers (OJ L 55, 28.02.2011, pp. 13-18).

<sup>66</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009.

<sup>67</sup> Article 17 Framework Directive.

the implementation of standards and/or specifications adopted by the European Standards Organizations.<sup>68</sup> These European Standards Organizations are listed in the Framework Directive: European Committee for Standardization (CEN), European Committee for Electrotechnical Standardization (CENELEC), and the European Telecommunications Standards Institute (ETSI). The Commission encouraged the establishment of ETSI in 1988<sup>69</sup> and the Institute has since contributed to EU law by producing many harmonized standards to be used in the enforcement of European Directives. For example, ETSI developed the GSM<sup>TM</sup> standard, which reached 2.5 billion mobile connections.<sup>70</sup>

It is not only the aforementioned actors that are taking part of the law-making process; the broader landscape includes also trade and consumer associations that are engaged in legislative development. For example, Article 33 of the Universal Service Directive<sup>71</sup> sets out that NRAs are required to take into account the views of end-users, consumers and telecommunications service providers. To this end, Member States are responsible for ensuring that NRAs establish a proper consultation mechanism to guarantee that the interests of these stakeholders are properly taken into account.

#### 4. Institutional design & institutional analysis

The institutional design in the electronic communications sector includes the involvement of different –mainly sector-specific– actors at both the European and the national level. Their interaction epitomizes the highly debated issue of network governance.<sup>72</sup> Electronic Communications in Europe are regulated under a de-centralized model. Under this regime, National Regulatory Authorities are in charge of monitoring national telecommunications markets,<sup>73</sup> underpinned by a European system of supervision of the implementation of the European regulatory framework. Accordingly, and mostly drawing on the empirical analysis conducted, this part tries to deeply scrutinize the actual competences of these actors in the telecommunications field and, more importantly, their operating relationships.

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<sup>68</sup>Article 17 Framework Directive.

<sup>69</sup>Council Resolution of 28 April 1989 on standardization in the field of information technology and telecommunications (OJ C 117/1, 11.05.1989). For a more detailed analysis see Walden, I. (2009). *European Union Communications Law*. in I. Walden (Ed.), *Telecommunications Law and Regulation*. New York: Oxford University Press, pp. 167-209.

<sup>70</sup>More info available at <http://www.etsi.org/WebSite/AboutETSI/GlobalRole/Ourglobalrole.aspx>.

<sup>71</sup> As amended by the 2009 Package.

<sup>72</sup> For network governance in Electronic Communications see De Visser, M. (2009). *Network-based governance in EC law: the example of EC competition and EC communications law*, Hart Publishing.

<sup>73</sup> Communication from the Commission of November 10, 1999, "Fifth Report on the Implementation of the Telecommunications Regulatory Package", COM(1999) 537, 9. See Geradin, D. (2000), "Institutional aspects of EU regulatory reforms in the telecommunications sector: an analysis of the role of national regulatory authorities" *Journal of Network Industries*, 1, p. 5 and Garzaniti, L. and O'Regan, M. (Eds.) (2010), *Telecommunications, Broadcasting and the Internet. EU Competition Law & Regulation* (3rd ed.), Sweet & Maxwell.



#### 4.1 Network approach: Instruments and participants

On the other hand, the European Commission drives *coordination* at EU level via the Article 7 and 7a procedures<sup>74</sup> and the enactment of recommendations or decisions for the harmonized application of the regulatory framework in view of fulfilling the regulatory objectives enshrined in Article 8 of the Framework Directive.<sup>75</sup> By way of example, the European Commission has taken part in the law-making process by making extensive use of soft law measures, both formal Recommendations<sup>76</sup> that have no binding legal force and informal guidelines and notices.<sup>77</sup> These measures are aimed at enhancing harmonization within the Internal Market, providing a point of reference of good practices for national regulatory authorities.<sup>78</sup>

In addition to the above, the regulatory design fostered the cooperation among the different European regulators in order to achieve a harmonized European market for telecommunications.<sup>79</sup> This cooperation has culminated in BEREC, which has replaced the former ERG. BEREC is made up of a Board composed of the heads of the 27 NRAs and is assisted by a permanent office (hereinafter, the Office). The Office is a Community Body managed by a Management Committee in which all NRAs and the Commission are represented. The Office is partially funded by the Community.<sup>80</sup> It provides a forum of discussion between the Commission and the NRAs in order to foster the Internal Market for telecommunications services. Further, BEREC is the body responsible for ensuring a *consistent* application of the EU regulatory framework for electronic communications.<sup>81</sup> BEREC is, therefore, intended to be a meeting point for the co-operation of regulators. It represents a further step concerning the former ERG towards a more formal organization endowed with the authority to issue opinions that NRAs are required to observe. Thus, for example, according to the Framework Directive (Article 3), Member States shall ensure that NRAs utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets.<sup>82</sup>

To this end, and also with the aim of avoiding potential conflicts of interests, the EU legislation required NRAs to be separated from the rest of the national administration (legislative and executive powers).<sup>83</sup>

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<sup>74</sup> Framework Directive.

<sup>75</sup> Article 19 Framework Directive.

<sup>76</sup> As for example the Commission Recommendation 2005/698/EC on accounting separation and cost accounting systems under the regulatory framework for electronic communications, OJ L 266, 11.10.2005.

<sup>77</sup> For instance, Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector (OJ C 233, 06.09.1991).

<sup>78</sup> See Chapters 1 & 2 in Walden, I. (Ed.). (2012). *Telecommunications law and regulation*. Oxford University Press.

<sup>79</sup> Recitals 36 and 37 and Article 3(4) Framework Directive.

<sup>80</sup> See Article 11 BEREC Regulation.

<sup>81</sup> Article 1 BEREC Regulation.

<sup>82</sup> Additionally, as is established in the BEREC Regulation, NRAs and the Commission shall take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC.

<sup>83</sup> Thus, for example, the Framework Directive establishes in its Article 3(2) that “Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organizations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control”.

## *National Regulatory Authorities*

NRAs were introduced in the EU legislation with the full liberalization,<sup>84</sup> and they have been defined as the “body or bodies charged by a Member State with any of the regulatory tasks assigned by the specific Electronic Communications Regulatory Framework”.<sup>85</sup> Their introduction has been the answer to (and the justification) to the *institutional deficit* of the Europeanization project.<sup>86</sup> Thus, while regulation required the establishment of regulatory authorities, institutional aspects were mostly neglected. Most crucially, the legislation proved rather vague which regard to the essential legal requirements that such institutional shift would actually demand.<sup>87</sup> Most of these regulatory authorities were established in the national systems in the late nineties. The existing disparities among the different institutional traditions of the Member States made difficult the adoption of a *one-size-fits-all* approach in Europe, as opposed to federal regimes like in the US, Australia or Canada, where regulatory tasks have been entrusted to a federal telecommunications regulator. This has implied a decentralization of the implementation and enforcement of the EU regulatory framework. This decentralized approach has contributed to a greater manifestation of the principle of subsidiarity.

The process of liberalization has implied that regulated sectors now embrace contractual relationships and, consequently, it is not surprising that the significant role of NRAs had also meant its involvement within the private law realm. Thus, in order to carry out their obligations, they have been given broad regulatory powers and instruments to intervene in the area of private law. For instance, in the contractual relationships between undertakings for the use of the network (wholesale contracts) or in the provision of the service to end-users (retail).

### *What functions do NRAs perform?*

NRAs’ responsibilities are mainly to apply the regulatory rules to individual cases, as an intermediary step between legislation and regulatory decisions. However, their intervention has an impact beyond the individual case. The execution of such responsibilities must be aimed at achieving the policy goals for telecommunications. In line with the regulatory principles of the European telecommunications legal framework, the role of NRAs is to ensure that regulation is *effectively implemented*. Yet regulation is not only about competition, but also about the development of the Internal Market and the protection of EU citizens. More specifically, Article 8(2), (3) and (4) of the Framework Directive requires National Regulatory Authorities:

- i. To promote competition in the provision of electronic communications networks and services by (*inter alia*): ensuring users, including disabled users, derive maximum benefit

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<sup>84</sup> Article 7, Dir 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192, 24.07.1990, pp. 0010 – 0016.

<sup>85</sup> Article 2(g) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), OJ L 108, 24.4.2002, pp. 33-50.

<sup>86</sup> Majone, G. (2000). The credibility crisis of Community regulation. *JCMS: Journal of Common Market Studies*, 38(2), 273-302.

<sup>87</sup> Prosser, T. (1997). *Law and the Regulators*. Oxford University Press.

in terms of choice, price, and quality; guaranteeing that there is no distortion or restriction of competition in the electronic communications sector; encouraging efficient investment in infrastructure and promoting innovation; and, finally, encouraging the efficient use and ensuring the effective management of radio frequencies;

- ii. To contribute to the development of the Internal Market by (*inter alia*): removing obstacles to the provision of electronic communications networks and services at a European level and encouraging the interoperability of pan-European services; ensuring that there is no discrimination among undertakings' treatment in the provision of networks and services; and finally, cooperating among them and with the Commission;
- iii. To promote the interest of EU citizens by (*inter alia*): ensuring access to universal services; ensuring a high-level of protection of consumers when it comes to the supplier-consumer relationship; contributing to ensuring a high level of protection of personal data and privacy; promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services; addressing the needs of specific social groups, in particular disabled users; and ensuring that the integrity and security of public communications networks are maintained.

a. Contribution to the development of the Internal Market

In order to achieve the proper application of the Regulatory Framework, a requirement of co-operation and co-ordination among the different NRAs was put in place. Thus, pursuant to Article 7(2) Framework Directive, NRAs have to cooperate between one another *and* with the Commission in order to guarantee the consistent application of the Regulatory Framework (e.g. BEREC).<sup>88</sup>

b. Facilitating competition (B2B dimension)

By liberalizing the sector, the European Union seems to rely on a *market-based approach*. However, the market alone is not enough to manage the transition process to competition and, as a result specific (*ex-ante*) regulation was considered necessary. Thus, unlike the competition rules, the establishment of a *sector-specific* regime allows the implementation of certain policy goals such as “effective competition”.<sup>89</sup>

Artificial barriers, market failures and the persistence of bottlenecks are problems that need to be tackled by NRAs. As mentioned previously, to put an end to markets that are not effectively competitive, NRAs shall conduct market analyses to detect if specific markets are not competitive and, if any fall into this category, shall impose *regulatory remedies* on the operator that has Significant Market Power (SMP).

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<sup>88</sup> The mechanisms for a consistent application of the EU Regulatory Framework are the subject of further analysis below.

<sup>89</sup> De Streeck, A (2010). ‘Interaction between the Competition Rules and Sector-Specific Regulation’, in L. Garzaniti & M. O’Regan (Eds.), *Telecommunications, Broadcasting and the Internet. EU Competition Law & Regulation* (3rd ed.), London: Sweet & Maxwell, pp. 3-262, (see in particular p. 867).

In the business-to-business dimension, NRAs are also responsible for the resolution of disputes between undertakings.<sup>90</sup> The legislator has opted for out-of-court dispute settlement given that it is an extra-judicial mechanism.<sup>91</sup> This resolution of disputes between undertakings is considered to be an “additional form of regulatory intervention”.<sup>92</sup>

c. Consumers (and citizens) protection (B2C dimension)

The promotion of the interests of the EU citizens (access to universal services, consumer protection, privacy, etc.) cannot be achieved by competition tools alone; there are also social (non-economic) policy objectives that pursue the public interest. Accordingly, they stand out from the competition approach, since these goals are not competitive in essence. In any case, when it comes to consumer issues, NRAs are also empowered to intervene in the retail market (imposing quality requirement if appropriate, etc.) and ensure the implementation of the EU rules, for instance: pursuant the mandate of Article 8(4) b, NRAs shall ensure “a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved”.

*National Regulatory Authorities: A reconstructed concept*

NRAs are formally defined as the bodies charged with the performance of regulatory functions in the telecommunications sector. In practice, they are public agencies functioning at a detached level from the Government. The main feature of NRAs’ performance is its independence and the two last generations of European rules have introduced a set of measures reinforcing the independence of NRAs.<sup>93</sup> National regulators must be legally, functionally, institutionally and structurally independent from operators and service providers. Given that especially at the beginning of liberalization some Member States still maintained ownership of their formerly public undertakings, such Member States must ensure the institutional and structural separation from the rest of the administration.<sup>94</sup> As a component of their required market impartiality, NRAs should have adequate resources –financial and human– to carry out the tasks assigned; i.e. sufficient independent and administrative capacity.<sup>95</sup> The safeguards of the *de jure* impartiality of the

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<sup>90</sup> Framework Directive, Articles 20 and 21.

<sup>91</sup> See Chapter 5 of this thesis.

<sup>92</sup> Walden, I. (2012). Telecommunications Law and Regulation: An Introduction. in I. Walden (Ed.), *Telecommunications Law and Regulation*. (Fourth Edition) New York: Oxford University Press, p. 17 citing the UK Competition Appeal Tribunal in the case *T-Mobile, BT, H3G, C&W, Vodafone & Orange v Ofcom* [2008] CAT 12, at paras. 89 and 94.

<sup>93</sup> Thus, the Framework Directive establishes in its Article 3(2) that “Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organizations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control”. See also Recital 11 Framework Directive.

<sup>94</sup> Article 3(2) and Recital 11 of the Framework Directive.

<sup>95</sup> The independence of agencies from the government has already been already challenged by the Commission in the field of data protection: Case C-518/07 *European Commission v Federal Republic of Germany*, [2010] ECR I-01885 and Case C-614/10 *European Commission v Republic of Austria*, [2012] ECR I-0000.

regulator also require *de facto* independence. Yet, complete isolation is not a guarantee of independence: Communication with the government is needed.<sup>96</sup>

Notwithstanding this, the independence of NRAs is being questioned by several factors. First, the operators fund NRAs, for the most part. This is very important provided that it is the way NRAs claim to safeguard their independence.<sup>97</sup> Secondly, the appointment of their Management Boards, whatever form they takes (e.g. Commission, Board of Directors, etc.), generally rests in the hands of the competent Ministry. This necessarily implies that the Government enjoys a certain degree of power within the regulator. Third, there are currently merger processes taking place, whereby some NRAs merge into one single *mega-regulator* at national level. This has been the case of the Netherlands or Spain, amongst others.<sup>98</sup> Mega-institutional merger projects are the result of the merging of the telecommunications, energy and competition national authorities into a single supervisory body. These institutional mergers, which result from political choices, have also cast doubts on the independence of the regulator.<sup>99</sup> On this last point, according to the personal view of one member of BEREC, authorities' mergers may jeopardise the independence of the authority.<sup>100</sup> He considers that the merging process may be very attractive from a theoretical point of view, but it is a project very difficult to implement because of the degree of expertise that regulated sectors require.<sup>101</sup> To this agent, the merging of several NRAs into a single body "is not a valid option". He claims:

"it theoretically enhances more cost-efficiency but on the other hand every regulatory needs it specific expertise. So, merging everything together is not a valid option because, first of all, you cannot find a valid board to manage this authority because it needs experts for everything. So, it is a pharaonic position. But that is my personal opinion".<sup>102</sup>

Technicality and expertise are again at the heart of the telecommunications sector whose identity is often justified on the basis of its level of complexity. It is also clear that *they* (i.e. people who belong to the telecommunications sector) do not feel comfortable having outsiders *sneaking into*

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<sup>96</sup> "You cannot simply say: 'Sorry, I cannot talk to you cause I am independent'". Former Chairman of a European NRA.

<sup>97</sup> Interview with a BEREC High representative. Brussels, 14.03.2013: "If we are financed by the market, then, we should have the administrative capacity, the financial capacity to conduct studies, etc. If the fees are going to State budget, then, the regulators should rely on the State budget. If there are budget cuts, then, the regulators won't have the possibility to have the right personnel, to have the right expertise, to have the right available funds to conduct all sort of studies, etc. So, we need to conserve and enforce our independence rather than going the other way round".

<sup>98</sup> "The DBA in Denmark, ACM in the Netherlands, CNMC in Spain, AKOS in Slovenia, and RÚ in the Slovak Republic were created as a result of restructuring or of mergers between various previous authorities (e.g. competition authorities, telecommunication regulator, consumer authorities)", Commission Staff Working Document, Implementation of the EU regulatory framework for electronic communications – 2014, SWD(2014) 249 final.

<sup>99</sup> Cseres, K. (2013) 'Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law'. *Amsterdam Law School Research Paper* No. 2013-03; Amsterdam Centre for European Law and Governance Research Paper No. 2013-01. Available at: <http://ssrn.com/abstract=2200908>.

<sup>100</sup> Interview with a BEREC High Representative, Brussels, 14.03.2013.

<sup>101</sup> In this regard, the BEREC has issued a statement on the independence of NRAs where it states that it is "with great disquiet that BEREC notes the emergence in some Member States of initiatives which would have the effect of transferring responsibility for some regulatory tasks away from NRAs to become direct Government functions. This worrying trend, in contrast to both the letter and the spirit of the sector Directives, puts at risk the results achieved by independent regulators under the current institutional framework in relation to the promotion of competition and consumer protection in the electronic communications markets".

<sup>102</sup> Interview with a BEREC High Representative, 14.03.2013.

their party.<sup>103</sup> As a way of example, BEREC Chair is convinced that “the Spanish project pertained to take away the responsibilities of the regulators and to give it to the Ministry”.<sup>104</sup> BEREC is willing to take actions in this regard “by trying to convince the Governments that if they plan to merge regulators or take away responsibilities, this is not the right move, and by using also the colleagues from the Commission by doing that there is the possibility of infringements of EU law”.<sup>105</sup> Again, this is a very strong statement which might suggest that they will take measures (as a threat to the national executives) against Government plans in order to preserve their independence.

In the same vein, the European Commission is very concerned to any attempt to impede the independence of NRAs because “that is at the very heart of the EU regulatory approach”.<sup>106</sup> In addition, the Commission believes that the system works because there are independent authorities that carry out independent market analyses and it is the major pillar for the success of the Regulatory Framework in the EU.<sup>107</sup> As a result, the Commission is “actively concerned” about any form of limiting the independence of NRAs.<sup>108</sup> In this regard, the Commission considers that independence is affected as a result of the economic crisis as long as Member States are restructuring the Administration for budgetary reasons. In the Commission’s view, Member States are *sophisticated* in developing new structures that would limit the independence of NRAs. In these cases, it is more difficult for the Commission to find out whether it actually impedes NRAs to carry out their tasks under the Regulatory Framework.<sup>109</sup>

Forth, and together with the above, in their relationship with the Government, the high degree of technicality of the sector leads to a situation in which NRA’s officials are regularly asked to provide advice for the Government.<sup>110</sup> It also has implications for the independence of the regulator.<sup>111</sup> In this regard, it is noteworthy (or, at least, irritating) that a Principal Consultant in an NRA openly admits that he can advise something to the regulator that he is working for, whereas, at the same time, he admits to advising something completely different to the Government on the same issue.<sup>112</sup> It also happens that there are *informal contacts* between the Governments and the regulators. And, more importantly, when developing advisory functions or representing the State in

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<sup>103</sup>Interview with a BEREC High Representative. Brussels, 14.03.2013: “Our position, overall, is that the regulators giving less to the responsibility of the Government is very positive for the State to have independent regulators to oversee the proper function of the market, rather than try to merger with others and invalidate the regulator. That is the point”.

<sup>104</sup>Interview with a BEREC High Representative. Brussels, 14.03.2013.

<sup>105</sup>Ibid.

<sup>106</sup>Head of Unit - DG CONNECT - European Commission, Speech at the Florence School of Regulation, October 2012.

<sup>107</sup>Ibid.

<sup>108</sup>Ibid.

<sup>109</sup>Ibid.

<sup>110</sup>“This is a common practice all over Europe”. Interview with a BEREC High Representative. Brussels, 14.03.2013.

<sup>111</sup>Interview with a BEREC High Representative. Brussels, 14.03.2013: “Every action that is removing either personnel or funds or administrative measures and the possibility for the NRAs to do their work affects our independence and administrative capacity”.

<sup>112</sup>Interview with the Principal Consultant at ANACOM, Portuguese NRA and former Chair of the End-Users Working Group at BEREC, 18.10.2012, Florence: “For instance [...], from time to time I am required by the Foreign Office, for instance, to participate in meetings with other Governments. So, it is at the level of the EU, and there I have to tell them: well, if you are asking advice from me I will say, I will recommend this position to the Government, but if I am required to provide an advice to the regulators, for the purpose solely of regulatory functions, I could advice something completely differently”.

the international context, the distinction between the regulator and the Government might be not so obvious. In particular, when it comes to policy issues –i.e. those matters that are not purely regulatory–, there are some tensions,<sup>113</sup> and the authority is required to “cooperate more actively”.<sup>114</sup> The fact that there are some tensions entails that it might not be a smooth relationship and, therefore, it can be seen as a sort of *rivalry* between the regulator and the Government. Any interference or instruction, either formal or informal, in the performance of the regulator may also be regarded as impairment to its independence. In addition to that, the Government is also responsible for the annual assessment of the regulator and it is on this assessment that the continuance of the authority is decided. This point highlights the delicacy of the subject insofar as the Government is not only able to exert some kind of power over the NRA, but also to decide on its survival.

After the discussion about the independence of NRAs in the above paragraphs, one may wonder what independence actually means. Roughly speaking, being independent usually implies freedom that comes as a result of not being accountable to anybody. However, independence also has its limits. For instance, in case of infringement proceedings, Member States are required to instruct the national regulator, if appropriate.<sup>115</sup> This can be regarded as a limit to independence as long as Member States are mandated to guide NRAs on the EU direction.<sup>116</sup> According to a representative of the Commission: “Independence must have its limits! It is the only way that the Commission can control the NRAs because the NRAs cannot act independently of all national legal considerations or EU law considerations. There must be a limit to that”.<sup>117</sup>

The present chapter seeks to highlight the relevance of the role of NRAs *vis-à-vis* the role of the legislator in the traditional sense, i.e. the parliament. The issue at stake here concerns the possibility of entrusting NRAs’ responsibilities to the national legislator. Before the 2009 review of the European regulatory package, there was no specific legal provision limiting such allocation. The ambiguity of the legislation led to conflicting case law on the matter. The European court maintained divergent positions concerning the institutional autonomy of the Member States concerning the distribution of the regulator’s responsibilities. Thus, whereas in the Spanish<sup>118</sup> and Belgian<sup>119</sup> cases, the court allowed the plurality of authorities and the distribution of regulatory powers between the regulator, the parliament and the concerned Ministry, in the case of Germany,

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<sup>113</sup> Interview with the Economic Expert at OPTA, Florence 18.10.2012: “Within BEREC itself, the body [...], the board is a collection of NRAs which are all independent. So, they don’t want to have Ministries on the table. So, there are some tensions there, that’s true”.

<sup>114</sup> Interview with a Principal Consultant at ANACOM, Portuguese NRA and former Chair of the End-Users Working Group at BEREC, 18.10.2012, Florence: “So, we do not receive directions when we are simply exerting core regulatory functions, but we can be asked to cooperate more actively with regard to public policies”.

<sup>115</sup> Head of Unit - DG CONNECT - European Commission), Speech at the Florence School of Regulation, October 2012.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid. Speech at the Florence School of Regulation, October 2012.

<sup>118</sup> Case C-821/07, *Comisión del Mercado de Las Telecomunicaciones v Administración del Estado* [2008] ECR I-1265.

<sup>119</sup> Case C-389/08, *Base NV and others v Ministerraad* [2010] ECR I-09073. Para. 106: “[...] it has already been held that the principle of non-regulation of new markets provided for in Paragraph 9a(1) of the TKG limits the discretion of the NRA under Articles 15(3) and 16 of the Framework Directive. The limitation of the NRA’s discretion to submit ‘new markets’ to a definition and to a market analysis necessarily involves a failure to comply in certain circumstances with the procedures provided for in Articles 6 and 7 of the Framework Directive”.

it decided that the national legislator cannot limit the regulator's autonomy granted by the European regulatory framework.<sup>120</sup>

This interplay between the national legislature and NRAs also gave rise to the question as to which of them is assigned the balancing of the different objectives of the Community regulatory framework. In this regard, the CJEU<sup>121</sup> –following the opinion of Advocate General Maduro<sup>122</sup>– has submitted that it is clear from the provisions contained in Article 8(4) of the Access Directive, Article 17(2) of the Universal Service Directive and Article 8 of the Framework Directive that:

“NRAs are required to promote the regulatory objectives referred to in Article 8 of the Framework Directive when carrying out the regulatory tasks specified in the common regulatory framework. Consequently, (...) *it is also for the NRAs, and not the national legislatures, to balance those objectives when defining and analysing a relevant market which may be susceptible to regulation*”.<sup>123</sup>

To this end, the Court has also acknowledged that a national provision giving priority to one particular regulatory objective limits NRAs discretion in a manner incompatible with the EU Regulatory Framework.<sup>124</sup> In addition, it can be drawn that where the national legislation imposes more restrictive conditions than those provided for in the Framework Directive, it constitutes an infringement of the European framework and restricts NRAs sphere of action.<sup>125</sup>

On occasion of the 2009 review of the European telecoms regulatory framework, the European legislator opted to put an end to the ambiguity surrounding the allocation of regulatory functions. Recital 13 of the amendment Directive (Better Regulation Directive) states:<sup>126</sup>

“The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for *ex-ante* market regulation or for resolution of disputes between undertakings is *protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it*. Such outside influence makes a *national legislative body unsuited to act as a national regulatory authority* under the regulatory framework (...)”.<sup>127</sup>

In connection to the above, the European court has recently decided that, within the institutional frame of the telecommunications sector, public entities that are not the sector-specific regulator cannot perform regulatory tasks assigned to the NRA. Such cases particularly concern the

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<sup>120</sup> Case C-424/07, *European Commission v Federal Republic of Germany* [2009] ECR I-11431.

<sup>121</sup> In the Case C-424/07, *European Commission v Federal Republic of Germany*, [2009] ECR I-11431 (See paragraphs 90-92).

<sup>122</sup> Delivered on 23 April 2009 (See paragraphs 61-64).

<sup>123</sup> Ibid. Para. 63. Emphasis added.

<sup>124</sup> Ibid. Paras. 93 and 94.

<sup>125</sup> Paras. 90-100.

<sup>126</sup> Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 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, 18.12.2009, pp. 37–69.

<sup>127</sup> Emphasis added.



imposition of retail tariffs for services falling within the scope of the regulatory framework for telecommunications.<sup>128</sup>

Therefore, it may be concluded that national legislators cannot interfere with regulatory functions. This limitation of the national autonomy of the State can be translated in an alteration of the traditional sources of private law from the parliament to sector-specific actors. Following the analysis of national institutional autonomy, this section moves now towards the role of the main supranational actors in the EU (BEREC and the European Commission) and how the European institutional design impacts on the national procedural autonomy principle and in the procedure of judicial review of regulatory decisions.<sup>129</sup>

### *BEREC*

In between the EU and the national level, a network of national regulators appears as a platform for coordination and cooperation among the different NRAs to ensure that they act consistently with the European regime: the Body of European Regulators for Electronic Communications, BEREC. This body was created in 2009, as part of the third telecoms package.<sup>130</sup>

The establishment of a European regulator for telecommunications was debated for several years. Its creation was proposed already in the nineties.<sup>131</sup> The original proposal was rejected in the review that led to the second package.<sup>132</sup> However, the Framework Directive imposed on NRAs the duty to cooperate in the interest of the Internal Market.<sup>133</sup> This cooperation started via informal meetings, namely through dinners and lunches among the regulators in Europe. It evolved towards think-tank groups, workshops, etc., held around particular issues such as local unbundling.<sup>134</sup> The technical cooperation evolved and the creation of the Independent Regulators Group (IRG) became a reality in 1997. At that time, there were a number of working groups where regulators could discuss very freely and openly the technical problems that were affecting them. The IRG “followed a practical approach concerning how the different problems were affecting the national markets and what solutions, if any, were found somewhere else in Europe. It was, more or less, like a forum where to agree an informal common standing to prepare conversations with the EU

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<sup>128</sup> Case C-518/11, *UPC Nederland BV v Gemeente Hilversum*. Para. 55: “[...] the directives which make up the NRF must be interpreted as precluding, from the expiry of the deadline for their implementation, an entity such as that at issue in the main proceedings, which is not a NRA, from intervening directly in retail tariffs in respect of the supply of a basic cable package”. In the case concerned, the entity is the municipality of Hilversum (The Netherlands).

<sup>129</sup> On the latter, see Section 5.1 of this chapter.

<sup>130</sup> Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (Text with EEA relevance). OJ L 337, 18.12.2009, pp. 1–10.

<sup>131</sup> “Report on Europe and the Global Information Society: Recommendations of the High-level Group on the Information Society to the Corfu European Council”. Bulletin of the European Union, Supplement No. 2/94. [follow up to the White Paper] (so-called the “Bangemann Report”).

<sup>132</sup> The original proposal was rejected as it was considered that it would provide insufficient added value to justify the costs. See *Towards a new framework for electronic communications infrastructure and associated services. The 1999 Communications Review*. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. COM (99) 539 final, 10.11.1999. In particular, pp. 9–10.

<sup>133</sup> Article 7(2) 2002 Framework Directive.

<sup>134</sup> Interview with a Principal Consultant at ANACOM, Portuguese NRA, 18.10.2012, Florence.

Commission”.<sup>135</sup> For instance, in situation where the European Commission was preparing draft legislation or communications concerning specific issues, the regulators convened and amongst themselves prepared joint positions.<sup>136</sup>

The EU Commission showed some interest in the activities of the IRG and its agenda, and it proposed a first attempt for the creation of a European regulator. In the 1990s, the Commission tried repeatedly to establish a European body, but the Member States discarded such option.<sup>137</sup> This project having failed, a compromise solution was sought. Then, the second *best choice* for the Commission was the creation of the ERG –established by the 2002 regulatory package–, a simply amalgam of NRAs which, unlike the IRG, included the participation of the EU Commission. In short, the ERG was basically the IRG plus the Commission<sup>138</sup> which acted as chair under this configuration, but did not enjoy voting capacity.<sup>139</sup> The idea was to promote a collaborative approach among the NRAs and the Commission and the NRAs themselves based upon new or soft governance standards. This project was not as successful as expected and it again raised debate about the creation of a European regulatory authority with the 2006 regulatory review process. The establishment of the Electronic Communications Market Authority (EECMA) was proposed,<sup>140</sup> however this envisaged plan did not pass the cost-benefit analysis of the impact assessment by the Commission, and it also encountered some political problems.<sup>141</sup> Furthermore, the internal procedures and voting systems associated with the creation of a proper European Authority would have displaced the decision-making power from the Member States, via the NRAs, to the European level, amounting to a “significant European supranationalisation of regulatory decision making”.<sup>142</sup> The national governments, supported by the NRAs, objected to this institutional (and power) shift. Also the European Parliament and the European Council of Ministers contributed to divest such project as it implied *putting against the wall* the subsidiarity principle. Among the contentious issues, one of the most important was the designation of the body.<sup>143</sup>

Finally, with the 2009 package, the ERG was formally replaced by BEREC. The BEREC is not a European agency, which means that it does not have the traditional characteristics of an EU agency. Instead, BEREC performs two roles. On the one hand, it is the Board of Regulators (BoR) consisting of the Heads of the 28 National Regulatory Authorities; on the other, it is the BEREC Office (“the Office”) which is a European entity based in Latvia (Riga). The BEREC Office is a Community Body managed by a Management Committee in which all NRAs and the European

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<sup>135</sup> Interview with Principal Consultant working in ANACOM for more than eighteen years holding different positions including participation as representative of Portugal, *inter alia*, in the Independent Regulators Group (IRG), the International Telecommunications Union (ITU), the Communications Committee (Cocom), the OCDE, and the BEREC, where he has served as Chair of the Expert Working Group “End-Users”.

<sup>136</sup> Interview with a Principal Consultant at ANACOM, Portuguese NRA, 18.10.2012 Florence.

<sup>137</sup> Simpson, S., (2011), “ ‘New’ Governance in European Union Policy Making: Policy Innovation or Political Compromise in European Telecommunications?”, *West European Politics*, 34(5), pp. 1114-1133.

<sup>138</sup> Interview with a Principal Consultant at ANACOM, Portuguese NRA, 18.10.2012 Florence.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid at 1121.

<sup>142</sup> Ibid at 1122.

<sup>143</sup> Discussions revolved around whether the new body should be call “Body of European Regulators in Telecom” (BERT) or, as considered by the Council, “Group of European Regulators in Telecoms” (GERT).

Commission are represented. The Office assists the Board of Regulators (BoR). Therefore, BEREC functions as a *bicephalous body*, the Board of Regulators and the Office. The Commission, the EFTA Surveillance Authority, the heads of the NRAs from the EFTA States and from the States that are candidates for accession to the EU, also participate in the work of BEREC at a high level.

Officially, BEREC pursues the same objectives as the NRAs, as set out in Article 8 of the Framework Directive.<sup>144</sup> It is also intended to contribute to the achievement of fair competition by way of consistent regulation throughout the Internal Market for Telecommunications. To this end, BEREC provides advice to its members (i.e. NRAs), the European Commission, and assists the European Parliament and the European Council on issues related to the application of the EU Regulatory Framework. By and large, it tries to “achieve a harmonized application of the Framework”.<sup>145</sup>

As described by a Head of Unit of the EU Commission, BEREC is an “advisory body consisting of regulators and giving guidance to the European Commission and other European institutions on important regulatory issues”.<sup>146</sup> Nonetheless, its assigned role of contributing to the Internal Market is considered to be not fully achieved under its current structure.<sup>147</sup>

#### *BEREC'S Tasks*

The objectives and functions of BEREC are established in the BEREC Regulation,<sup>148</sup> its ultimate goal being to stimulate the harmonized application of the EU Regulatory Framework. Another objective is to advise the European Commission on general matters of the development of the EU Regulatory Framework, and also in individual cases where the Commission is interfering with the national regulators, i.e. within Article 7 of the Framework Directive procedure.<sup>149</sup>

Others main functions of BEREC involve: participating in consultations under a single market consultation procedure (Article 7 of the Framework Directive); giving opinions on cross-border disputes; disseminating best practices; assisting NRAs; advising the Commission, the European Parliament and the Council; assisting the institutions and the NRAs in their relations with third parties; delivering opinions on draft recommendations and/or guidelines on the form, content and level of detail to be given in notifications; consultation on draft recommendations on relevant product and service markets; delivering opinions on draft decisions on the identification of transnational markets; consultation on draft measures relating to effective access to the emergency call number 112 and the effective implementation of the 116 numbering range; delivering opinions on draft decisions and recommendations on harmonization; and delivering opinions aiming to

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<sup>144</sup>Article 1(3) of the BEREC Regulation.

<sup>145</sup>Interview with the Economic Expert at OPTA, Florence 18.10.2012.

<sup>146</sup> Interview with Head of Unit ‘Regulatory Coordination & Users’ - DG CONNECT, EU Commission, 14.03.2013, Brussels.

<sup>147</sup>Interview with Head of Unit ‘Regulatory Coordination & Users’ - DG CONNECT, EU Commission, 14.03.2013, Brussels.: “[...]But it is a cooperation forum for regulators which has its role in contributing to the Internal Market but under the current structure, to my view, it does not fully meet this role”.

<sup>148</sup>Articles 2 and 3 of the BEREC Regulation.

<sup>149</sup>Interview with the Economic Expert at OPTA, Florence 18.10.2012.

ensure the development of common rules and requirements for providers of cross-border business services.<sup>150</sup>

As a result of both its position as the guardian of the EU Regulatory Framework and its composition as the meeting point of the different regulators, BEREC has to accommodate the needs of the 28 NRAs. This is due to the fact that, in the end, NRAs are the ones who have to implement the legislation and BEREC has to monitor the implementation through the process of Article 7 and Article 7a of the Framework Directive.<sup>151</sup>

When it comes to its relationships with the NRAs and the national Governments, being essentially a collection of NRAs and taking into account that not all NRAs are vested with the same tasks and functions, it may so happen that the issues addressed by BEREC touch upon some matters for which some NRAs are not competent. The discussions in BEREC are, thus, broader than the specific functions performed by NRAs at the national level. For instance, OPTA (former Dutch NRA) is not empowered in the field of spectrum issues, although some discussions within the BEREC are about spectrum issues or net neutrality. These matters concern policy, however, the BEREC “does not want politicians sitting around the table”.<sup>152</sup> It is in these (potentially political) cases where a national Ministry could express some concern for the matter and signal its desire to being involved in one way or another. Accordingly, the distinction between the regulator and the Government is “quite clear” at the national level; whereas, at the European level, “is not that clear-cut”.<sup>153</sup>

As for funding, the BEREC Office is financed by a subsidy from the European Union and by financial contributions from Member States or from their NRAs made on a voluntary basis.<sup>154</sup> This characteristic way of funding –i.e. partially funded by the EU– in conjunction with the fact that the BEREC is required to issue opinions to support the EU Commission’s position on the basis of Article 7 procedure or not, might jeopardize its impartiality in the individual cases considered.<sup>155</sup>

### *Functioning of BEREC*

BEREC has a Chair and four Vice-Chairs appointed by the Board of Regulators from its members for a term of one year.<sup>156</sup> In order to ensure the continuity of BEREC’s work, the BEREC Rules of Procedures establish that the BEREC Chair must serve as Vice-Chair the year prior to her/his Chair mandate as well as the following year.

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<sup>150</sup>Article 3 of the BEREC Regulation ; see also [http://berec.europa.eu/eng/about\\_berec/tasks/](http://berec.europa.eu/eng/about_berec/tasks/).

<sup>151</sup>Interview with a BEREC High Representative. Brussels, 14.03.2013.

<sup>152</sup>Interview with the Economic Expert from OPTA, Florence 18.10.2012. The interviewee has participated as representative of OPTA within the BEREC Expert Working Groups for several years.

<sup>153</sup>Interview with the Economic Expert at OPTA, Florence 18.10.2012.

<sup>154</sup>Article 11 of the BEREC Regulation.

<sup>155</sup>Article 4(1) para. 3 BEREC Regulation: “The members of the Board of Regulators shall neither seek nor accept any instruction from any government, from the Commission, or from any other public or private entity”.

<sup>156</sup>Article 4(4) BEREC Regulation.

The work of BEREC is organized into different Expert Working Groups (“EWGs”) which provide support to BEREC’s work.<sup>157</sup> These EWGs work on specific topics according to the BEREC Working Plan.<sup>158</sup> The Working Plan is adopted by the Board of Regulators at a Plenary Meeting.<sup>159</sup> The Plan usually follows a *bottom-up approach* because the process takes into account different opinions which are asked of the Working Groups’ Chairs, the NRAs, and the European Commission. As a result, the draft agenda evolves over the time. There is also a public consultation stage where different interest groups can submit their opinions and suggestions. After this public consultation, a finalized document is approved.<sup>160</sup> The issues to be dealt with in the Expert Working Groups can also arise on an *ad-hoc* basis in case BEREC has been requested for advice or opinions by the EU institutions.<sup>161</sup>

An additional Working Group is the Contact Network, which assists the Board of Regulators. The Contact Network is composed of senior representatives of the NRAs participating in BEREC, and representatives of the EU Commission and the EFTA Surveillance Authority.<sup>162</sup> This specific Working Group is in charge of ensuring the coordination of the proposals to be considered by the Board of Regulators and the BEREC Office Management Committee.

The Board of Regulators meets four times a year. These are the “Plenary Meetings”. The EU Commission must be invited to all plenary meetings of the Board of Regulators.<sup>163</sup> Extraordinary Plenary Meetings may take place at the initiative of the BEREC Chair in consultation with the Administrative Manager, or by requirement of at least one third of the Board of Regulators’ members.<sup>164</sup>

Since the overall aim is to achieve a consistent and harmonized application of the Regulatory Framework, the regulators have to agree on a specific approach in order to achieve that aim. Accordingly, the different Expert Working Groups develop several projects in different topics (e.g. net neutrality, Next Generation Access, end-user issues, etc.). In practice, since it is complex for each NRA to participate in all the EWGs, there are smaller groups –where the real work takes place– which start working on a particular approach and develop draft proposals.<sup>165</sup> This means that not all the 28 member representatives actively participate in all the EWGs. Rather, and mostly

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<sup>157</sup> Article 4(7) BEREC Regulation.

<sup>158</sup> Currently, there are 12 EWGs grouped by different topics: Benchmarking EWG; BEREC-RSPG Cooperation EWG; Convergence and Economic Analysis EWG; Framework Implementation EWG; End-User EWG; International Roaming EWG; Net Neutrality EWG; Next Generation Networks EWG; Remedies EWG; Regulatory Accounting EWG; Termination Rates EWG; Evaluation of BEREC and BEREC Office EWG.

<sup>159</sup> Article 14 of the BEREC’s Rules of Procedures.

<sup>160</sup> Interview with the Principal Consultant at ANACOM, Portuguese NRA and former Chair of the End-Users Working Group at BEREC, 18.10.2012, Florence.

<sup>161</sup> Interview with the Economic Expert at OPTA, Florence 18.10.2012.

<sup>162</sup> The Contact Network is chaired by a representative of the Chair of the Board of Regulators. The 2013 BEREC Contact Network Chair is Dr. Minas Karatzoglou from the Hellenic Telecommunications and Post Commission (EETT).

<sup>163</sup> Article 4(8) BEREC Regulation.

<sup>164</sup> Article 4(2) of BEREC Rules of Procedures.

<sup>165</sup> The more active or passive involvement of the NRAs in the different EWGs does not correspond to the Member States’ size. Rather, following the BEREC Annual Working Plan, the NRAs individually decide where to play a more active role and vice versa depending on the subjects to be dealt with (Interview with Economic Expert at OPTA).

depending on the topic to be addressed, there are smaller groups which really take the lead.<sup>166</sup> Once the draft is ready, it is consulted into wider groups. It goes to the Board of Regulators, which discusses and finally approves it with a consensus of the 28 members.<sup>167</sup> Usually, before it is finally adopted, there is a public consultation phase.

The output of the different EWGs may take different shapes, such as Common Positions,<sup>168</sup> Opinions,<sup>169</sup> Guidelines,<sup>170</sup> Reports,<sup>171</sup> etc. These *products* –as one interviewee designates them– do not have a binding nature, but an advisory one.<sup>172</sup> However, under the Article 7 Framework Directive procedure, market analysis decisions have to be notified to the European Commission and, in those cases where the Commission finds *serious doubts* concerning the decisions by the NRAs, BEREC is requested for advice. This formal advisory role performed by BEREC is carried out by a group of experts from the different NRAs, with the exception of the ones involved in the procedure. This procedure gives rise to a sort of *peer-pressure* or disciplining factors, in so far as the other NRAs are the ones which assess their fellow NRAs performances: “your colleagues are reviewing what you are doing”.<sup>173</sup>

With regard to the transparency of its activities, currently there is a more transparent approach for dealing with interest groups, as well as with regard to the issues that are included in the BEREC Agenda.<sup>174</sup> As for the participation of the civil society in BEREC’s activities, more transparency has been provided. The different groups of interest are now informed about what it is discussed in the BEREC meetings as a result of the publication of its Agenda and the holding of Public Debriefings following the Plenary Meetings where the outcomes of those quarterly meetings are presented<sup>175</sup> and also published on its website. However, in spite of this, there are still some

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<sup>166</sup> In this regard, it would have been very enlightening for this research to get access to one of the working sessions of the EWGs or to the Plenary Meetings. However, civil society is not allowed to attend those meetings. Apart from the BEREC’s members, only *observers* are allowed to attend Plenary Meetings. The observer status is only granted to the EU Commission, NRAs from the European Economic Area (EEA) States and from those States that are candidates for accession to the European Union, as well as other experts and observers that the BEREC may invite to attend the meetings (Article 4(2) and (3) BEREC Regulation). “BEREC’s Policy is, in general, very strict towards accepting external observers”, BEREC Contact Network responsible. Upon my requests to attend to any of the BEREC’s activities as observer, I was informed that due to confidentiality requirements associated with the documents discussed, all similar requests were rejected in the past.

<sup>167</sup> Whereas the different Expert Working Group reach consensus among their members, the Board of Regulators in the BEREC operates on the basis of a voting system. The voting system (Article 9 and 10 of the Rules of Procedures of the BEREC Board of Regulators) requires the approval by two-thirds majority of its members.

<sup>168</sup> For instance, the last Common Positions (CPs) on wholesale local access (WLA), wholesale broadband access (WBA) and wholesale leased lines (WLL) at the BEREC Plenary on 7 December 2012.

<sup>169</sup> As an example, the contentious BEREC Opinion on Commission draft Recommendation on non-discrimination and costing methodologies, BoR (13) 41.

<sup>170</sup> BEREC Guidelines on the application of Article 3 of the Roaming Regulation -Wholesale Roaming Access, BoR (12) 67.

<sup>171</sup> As way of example, the BEREC Report on the Implementation of the NGA-Recommendation, BoR (11) 43.

<sup>172</sup> Interview with the Economic Expert at OPTA, Florence 18.10.2012.

<sup>173</sup> Interview with the Economic Expert at OPTA, Florence 18.10.2012. As a matter of fact, the BEREC agrees with the EU Commission in most of the cases so far: “it happens, in most of the cases so far, that the BEREC agrees with the problems that the Commission has with the notifications”.

<sup>174</sup> Interview with the Principal Consultant at ANACOM, Portuguese NRA and former Chair of the End-Users Working Group at BEREC, 18.10.2012, Florence.

<sup>175</sup> I had the possibility to attend to the Public Debriefing of the BEREC 14<sup>th</sup> Plenary Meeting held in Brussels the 14<sup>th</sup> March 2013. The Public Debriefing consists of a first part where the BEREC’s Chair presents, very briefly, the main outcomes of the Plenary Meeting and a second half devoted to Questions & Answers where participants are allowed to

practices which distance civil society from BEREC activities<sup>176</sup> and, as a result, the BEREC is considered to be hardly accessible for groups of interest. It is also regarded as a kind of *secret club* despite the formal procedures put in place.<sup>177</sup> To put an end to such situation, and boosted by the number of requests by the interested parties on their willingness to join the BEREC in a permanent forum, the BEREC put in place a Contact Network. This platform is intended to be an on-going process where the results of every meeting will be evaluated in order to determine whether to take into account the concerns expressed by the stakeholders or not.<sup>178</sup> In addition to that, the stakeholders' participation will be subject to the fulfillment of certain criteria.<sup>179</sup> The Contact Network tries to be a structured and organized channel of communication between the BEREC and the different groups of interests. The idea was to create a Committee of senior representatives whose mandate goes beyond the one-year Chairs' mandate. This Committee is composed by 3 or 4 Heads of the NRAs with the purpose of organizing the Stakeholders Dialogue.

Finally, the European Commission carries out the monitoring of the organization<sup>180</sup> and the European Parliament issues its opinion on the evaluation report prepared by the Commission.<sup>181</sup>

### *European Commission*

In relation to telecommunication, within the Commission the *Directorate General for Communications Networks, Content and Technology* (also known as DG CONNECT) is responsible of electronic communications. This DG is in charge of managing the EU's Digital Agenda. Within DG Connect there are, amongst others, three Units which deal with the European Regulatory Framework for Electronic Communications at Directorate B: Electronic Communications Networks & Services. More specifically, these are Unit B1 (Regulatory Coordination & Business), Unit B2 (Regulatory Coordination & Users), and Unit B3 (Regulatory Coordination & Markets).

The EU Commission performs two main actions with regard to telecommunications. On the one hand, it monitors the implementation of the Regulatory Framework in the different Member States. Units B1, B2 and B3 are in charge of this surveillance. These Units look after the proper implementation of the legal framework into the national law "as it should be" and, also make sure that the rules are being implemented properly (i.e. in line with EU law).<sup>182</sup> If this were not the case, the EU Commission would *step in* to the implementation process. It would then be at its discretion whether to pursue further actions. To this end, the European Commission carries out different

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raise questions, if needed. Remarkably, sitting in the Head table they were the 2013 BEREC Chair, the Contact Network Chair and the Head of the IRG Secretariat.

<sup>176</sup> During the Public Debriefing of the BEREC 14<sup>th</sup> Plenary Meeting held in Brussels the 14<sup>th</sup> March 2013, the major concern expressed by attendees during Q&A was the access of stakeholders to BEREC's activities.

<sup>177</sup> Interview with a stakeholder (Belgian Company providing platform networks for telecommunications' operators). Brussels, 14.03.2013.

<sup>178</sup> BEREC High Representative, following a question by a representative from the European Broadcasting Union within the Public Debriefing of the 14<sup>th</sup> Plenary Meeting held in Brussels the 14<sup>th</sup> March 2013.

<sup>179</sup> BEREC High Representative. This is the reply to one question concerning the process for the participation in the Dialogue. However, he did not specify what these requirements will be.

<sup>180</sup> See Article 25 of the BEREC Regulation.

<sup>181</sup> Ibid.

<sup>182</sup> Interview with Head of Unit 'Regulatory Coordination' - DG CONNECT, EU Commission, 14.03.2013, Brussels.

follow-up actions aimed at eliminating possible deviations from the EU rules. Where the European Commission considers that Member States are not applying the EU Regulatory Framework, it may initiate infringement proceedings. However, this is a last *resort remedy*. First, the Commission tries to cooperate with Member States in a *pro-active* way; i.e. they try to resolve any issues and problems prior to any formal proceedings and, to achieve this, the EU Commission is in “regular contact” with Member States, Member States authorities, and with the stakeholders.<sup>183</sup> NRAs are often engaged in a pre-notification stage with the EU Commission in order to see whether the proposed measures would cause problems with EU Law. In order to execute such a collaborative approach, the Commission has a Desk Office for each Member State consisting of officials who follow-up the national process.<sup>184</sup>

Taking into account that the monitoring process is “very resource consuming”, the Commission identifies some *priority areas* and follows a *horizontal approach* looking at general issues country by country; e.g. the Commission decides to look at how independent NRAs are following the EU mandate in practice.<sup>185</sup> This *ex-ante* approach to the monitoring of the implementation of the EU rules makes it easier for the Commission to anticipate problems. As for the topics to be identified as priority areas, they “can be anything”.<sup>186</sup> This is a very strong statement which implies that the European Commission enjoys definite leeway to scrutinize any area of the Regulatory Framework and the accomplishment of the required actions at the national level; i.e. the Commission enjoys *police powers* to monitor the implementation process.

In addition, and linked to its monitoring role, the European Commission also reports on the regulatory and market developments in the context of the Digital Agenda Scoreboard on an annual basis.<sup>187</sup> This coverage means an additional possibility for the Commission to recognize weaker points to be discuss also with the Member States’ authorities and the stakeholders, as well as giving it the chance to identify some regulatory issues which may, then, fit into the Commission’s policy development.<sup>188</sup>

In addition, Unit B2 is in charge of policy developments in aspects related to end-users and the legal framework and these responsibilities “may entail a number of issues” in practice.<sup>189</sup> Currently, Unit B2 is working on Universal Service issues, with one of its focus areas being the elaboration of guidance on how the Universal service rules as laid down in the Universal Service Directive should be applied in the broadband context.<sup>190</sup> This Unit also works on Net Neutrality, providing guidance in this area on issues such as transparency, switching, and traffic management.

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<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid. The Scoreboard assesses the progress of the policy targets of the Digital Agenda in each Member State. The Scoreboard can be consulted here: <http://ec.europa.eu/digital-agenda/en/scoreboard>.

<sup>188</sup> Interview with Head of Unit ‘Regulatory Coordination’ - DG CONNECT, EU Commission, 14.03.2013, Brussels.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.



Finally, Unit B2 is in charge of revising Roaming rules and following-up on the implementation of any changes.<sup>191</sup>

A consistent application of the EU Regulatory Framework is the cornerstone of the European Commission's work in the telecommunications sector. The Commission has different instruments to achieve that aim. The so-called Article 7 procedures enable the Commission to ensure a consistent application of the legal framework in the Member States.<sup>192</sup> Under the Article 7a procedure, the Commission wanted to have veto powers, but it did not get them in the legislative process. However, the new package of EU rules has reinforced this procedure and now empowers the Commission to issue *harmonization Recommendations* in order to ensure a higher level of consistency between Member States in the application of the European legal framework.<sup>193</sup> The Commission can issue such recommendations where it finds that NRAs' performance may create a barrier for the internal market.<sup>194</sup> In addition, the Commission is allowed to issue a Decision (although it has not yet done so) obliging regulatory authorities "to do something, not only [recommend] it".<sup>195</sup> Although this power has not yet been used, through these Decisions the European Commission would not only be entitled to recommend, but also compel, regulatory authorities to take action in the issue concerned.<sup>196</sup> It is intended as a process for double-checking at the EU level, however the wording of Article 7a introduces legal language that does need to be clarified by the courts over time.<sup>197</sup> That might be the reason why the European Commission has not yet chosen to make use of this mechanism.

As for the internal procedures and functioning within the European Commission, the different Units dealing with the Regulatory Framework for Electronic Communications coordinate their efforts. This implies that they pursue their enforcement policy consistently in both units.<sup>198</sup> In other words, that means that Unit B1 (dealing with business concerns) and Unit B2 (looking after consumer issues) should develop a *common approach*. The reason for that might be that, in the end, regulatory interventions in the B2B domain are ultimately aimed at achieving a genuine competitive market for electronic communications and this is a mediate goal to increase consumer welfare.

As one might anticipate, the European Commission is much more interested in policy issues. Particularly, Heads of Unit are not fully aware of the actual problems that the telecommunications sector faces because the performance of such position does not involve any

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<sup>191</sup> Ibid.

<sup>192</sup> Further explained below.

<sup>193</sup> Article 19(1) Framework Directive, ("Harmonization procedures").

<sup>194</sup> Ibid.

<sup>195</sup> Head of Unit - DG CONNECT - European Commission, Speech at the Florence School of Regulation, October 2012. See Article 19(3) let. a, Framework Directive.

<sup>196</sup> Head of Unit - DG CONNECT - European Commission, Speech at the Florence School of Regulation, October 2012.

<sup>197</sup> "It will be necessary to wait until the Court looks at to this because it says that the Commission requires the NRA to do something, and requiring to do something is more than recommending. So, we have to see how this works before the Courts", Head of Unit - DG CONNECT - European Commission, Speech at the Florence School of Regulation, October 2012:

<sup>198</sup> Interview with Head of Unit 'Regulatory Coordination & Users' - DG CONNECT, EU Commission, 14.03.2013, Brussels.

knowledge of the market performance in practice. This observation might expose a flaw in the regulation-making system insofar as some measures are proposed from Brussels without considering their actual outcomes (e.g. the challenges of implementing the one-working-day portability). It is the understanding of the present author that desk offices do not work to overcome such deficiencies, but rather to *control* that the EU rules are being effectively implemented. Nonetheless, it is important to highlight, that this *ex-post* approach significantly contributes to policy development by enabling the identification of problems and their frequency. In the Commission's view, "the market-based approach recognizes that it is not the EU Commission who knows best what is happening in the markets of the Member States, it is the NRAs because they are on the spot, they carry out the market analyses, they know the companies, whereas if the EU Commission would do market analyses consistency could be easily achieved".<sup>199</sup>

Finally, it must be said that the goal of creating a true Internal Market for Telecommunication has not yet been fully achieved and there are still very fragmented markets. There might be several reasons leading to this situation, and "maybe [...] the way we regulate telecoms markets on a national basis [...] is one important impediment to the Internal Market and probably in the future we have to look again and how these obstacles can be removed".<sup>200</sup> This can be translated as the European Commission seeking greater powers to properly implement the EU aspirations and to achieve a real Internal Market for Telecommunications.<sup>201</sup> Notably, the Commission is not afraid to say so: "We also try as the Commission to gain more powers because there must be an additional possibility to work toward consistent regulatory approaches in Europe".<sup>202</sup> With the 2009 review of the Regulatory Framework effective as of May 2011, the European Commission has acquired extended investigation and suspension powers on regulatory remedies (e.g. harmonization Recommendations).

In its relationship with other DGs within the Commission, DG Connect is in constant dialogue with DG Justice and DG Sanco, especially in working areas where there are common interfaces (e.g. consumer issues).<sup>203</sup> By way of example, DG Sanco is currently working on the European Consumer Agenda and there are some actions that are envisaged to enhance the transparency of electronic communications services. In this regard, overlapping is not regarded as a concern given that sector-specific legislation, i.e. the regulatory framework for telecoms, prevails.<sup>204</sup>

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<sup>199</sup> Head of Unit - DG CONNECT - European Commission, Speech at the Florence School of Regulation, October 2012.

<sup>200</sup> Interview with Head of Unit 'Regulatory Coordination & Users' - DG CONNECT, EU Commission), 14.03.2013, Brussels.

<sup>201</sup> Interestingly, following that interview –just one day later (15<sup>th</sup> March 2013)–, the European Council required the European Commission to tackle remaining obstacles so as to ensure the completion of a fully functioning Digital Single Market by 2015 and to adopt concrete measures in order to establish the single market in Information and Communications Technology as early as possible. Conclusions from the European Council 14/15 March 2013 (EUCO 23/13), available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/136151.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/136151.pdf). The interviewee answered positively to the question whether this would imply further powers for the European Commission.

<sup>202</sup> Head of Unit - DG CONNECT - European Commission), Speech at the Florence School of Regulation, October 2012.

<sup>203</sup> Interview with Head of Unit 'Regulatory Coordination' - DG CONNECT, EU Commission, 14.03.2013, Brussels.

<sup>204</sup> Ibid.

### *Relationship between the BEREC and the EU Commission & “Utmost Account”*

As has been mentioned, the European Commission has become interested in the collaborative activities amongst the different NRAs. Since the European coordination activities were commenced by NRAs, the Commission has sought to take a more active role in the IRG activities and to control its agenda for regulatory issues. This resulted in the EU Commission gaining a seat in BEREC.<sup>205</sup> However, it only enjoys observer status, and therefore does not have a vote in the Plenary Meetings of the Board of Regulators.<sup>206</sup> In addition, the European Commission participates in the BEREC’s Expert Working Groups. By so doing, the Commission learns, firsthand, about the positions of BEREC and the NRAs where particular issues are concerned. It also provides the Commission with the possibility to express its views and positions already at an early stage of BEREC’s work.<sup>207</sup> The role of the European Commission within the different Expert Working Groups is a reflection of its position within the Board of Regulators; i.e. the European Commission is an observer enjoying full participation, but it does not have vote.<sup>208</sup> Nevertheless, the European Commission is a full member of the BEREC Management Committee and the management of the BEREC Office where it has vote.<sup>209</sup>

To put it clearly, the active participation of the European Commission in BEREC’s activities depends on the nature of the issues to be deal with. Thus, the Commission enjoys full *participation rights* and has a say in administrative issues. However, when it comes to regulatory affairs, the Commission is *sitting in the corner*. From that position it is allowed to witness the decision-making process, but not take part in it. Whereas the Commission claims that this position is useful for learning about the positions of the NRAs and BEREC at the early stage of the regulatory process, this *ubiquitous presence* seems to suggest that it might also be used to exhibit its authority.

The relationship between the BEREC and the European Commission is “formally articulated though the participation and the constant interaction by the Commission sending to the BEREC legislative documents, mostly soft law instruments like Communications, Recommendations, etc.”.<sup>210</sup> This reference to “constant interaction” seems to suggest that the European Commission is regularly guiding the work of BEREC by delivering documents and resorting to soft law mechanisms. By so doing, the Commission tries to put in place a certain *modus operandi* for BEREC to act in accordance with its aspirations. This unidirectional relationship is counterbalanced by an unclear formulation: *utmost account*.

According to Article 3(3) of the BEREC Regulation, the European Commission shall take the *utmost account* of any opinion, recommendation, guidelines, advice or regulatory best practice

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<sup>205</sup> Article 4(8) BEREC Regulation: “The Commission shall be invited to all plenary meetings of the Board of Regulators”.

<sup>206</sup> Interview with Head of Unit ‘Regulatory Coordination’ - DG CONNECT, EU Commission, 14.03.2013, Brussels.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Interview with a BEREC High Representative. Brussels, 14.03.2013.

adopted by BEREC. But what does utmost account mean? According to a BEREC's representative it means that "the European Commission has to be in the position to integrate the BEREC's opinions in their Recommendations".<sup>211</sup> There is not legal or formal obligation on the Commission to take into account all of BEREC's positions; i.e. the Commission is not bound by BEREC. Furthermore, the BEREC understands that the Commission, as a policy-making body, has to *push forward* some measures. It is a "dynamic approach that heavily relies on BEREC to produce high-quality work and expertise that the Commission has to take it into consideration".<sup>212</sup> Consequently, the European Commission has to take into account BEREC's opinions, mostly because it provides the expertise as in the case of the NRAs for the national Governments. In practice, BEREC's positions on a particular issue, as an advisory body, may have an impact into the proposals or drafts prepared by the Commission. Then, the Commission assesses the potential impact and comes to the conclusion whether to take into account BEREC's opinions or not. The Commission can disagree and not modify the proposals, and "this is still taking utmost account".<sup>213</sup> However, in those cases, the Commission will have to justify and explain its decision, because taking utmost account implies that the Commission cannot freely deviate of the BEREC's opinions and that it needs to justify it on the basis of a proper assessment.<sup>214</sup>

*Utmost account* may then be defined as a method that *proselytizes* BEREC's opinions as the benchmark or the guiding light for the regulatory approach undertaken by the European Commission and the National Regulatory Authorities. Utmost account would, thereby, function as a counterbalance to the influence of political instances in regulatory affairs. Translated into the legislative process, this implies that the European Commission and national Governments, when legislating, are accountable to BEREC as long as they are required to justify themselves where they deviate from the designed path.

The interplay between BEREC and the European Commission has been hitherto "very positive" according to BEREC.<sup>215</sup> In this regard, it is satisfied with its own performance and declares that the European Commission is also pleased with its work.<sup>216</sup> In addition, pursuant to Article 25 of the BEREC Regulation, an independent evaluation has recently taken place.<sup>217</sup> This evaluation reported that the BEREC is "the most appropriate [body] to regulate telecommunications across Europe through the members".<sup>218</sup> This is also the institutional view of

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<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Interview with Head of Unit 'Regulatory Coordination' - DG CONNECT, EU Commission, 14.03.2013, Brussels.

<sup>214</sup> Ibid. For a practical example, see the case-study analyzed below (section 5.1).

<sup>215</sup> Interview with a BEREC High Representative. Brussels, 14.03.2013: "So far, the interaction is very positive, the Commission is very happy with the work of BEREC".

<sup>216</sup> Interview with a BEREC High Representative. Brussels, 14.03.2013.

<sup>217</sup> Article 25 BEREC Regulation: "Within three years of the effective start of operations of BEREC and the Office, respectively, the Commission shall publish an evaluation report on the experience acquired as a result of the operation of BEREC and the Office. The evaluation report shall cover the results achieved by BEREC and the Office and their respective working methods, in relation to their respective objectives, mandates and tasks defined in this Regulation and in their respective annual work programmes. The evaluation report shall take into account the views of stakeholders, at both Community and national level and shall be forwarded to the European Parliament and to the Council. The European Parliament shall issue an opinion on the evaluation report".

<sup>218</sup> Interview with a BEREC High Representative. Brussels, 14.03.2013.

BEREC. However, this position does not match with the Commission's views, or at least the viewpoint of one of its Heads of Unit, who instead finds that the fact that the BEREC is composed of the national regulators hinders the possibility to take a genuine *European approach* or to pursue the Internal Market properly.<sup>219</sup> Thus, taking an *unadulterated* Internal Market approach is considered to be a "big challenge" for the BEREC under its current structure. This is due to the fact that the BEREC when issuing decisions under Article 2 or 3 of the BEREC Regulation –either upon the request by the European Commission or at its own initiative– is not really accountable to anybody, despite the importance of its role as an advisory body.<sup>220</sup>

#### *A marriage relationship or a turf war?*

The European Commission is constantly *nagging* the BEREC (and, therefore, the integrant NRAs) to operate in a certain way, whereas the BEREC, for its part, is pretty convinced that it is performing its responsibilities appropriately. To date, although it is not a very tortuous cohabitation, the collaborative relationship seems to be coming to an end. This can be seen through the case of the process behind the recent European Commission's Draft Recommendation on consistent non-discrimination obligations and costing methodologies.<sup>221</sup> Pursuant to the European legal framework, the regulatory process requires BEREC to issue an Opinion responding to the Commission's proposal.<sup>222</sup> According to BEREC, "BEREC and the Commission agree that the implementation of this Recommendation be followed very closely in a dedicated network between the Commission and BEREC, so that the practical impacts of the Recommendation, notably the impact on investment and competition, can be monitored and any unanticipated consequences managed in a timely and cooperative manner".<sup>223</sup> However, BEREC's opinion in this case,<sup>224</sup> in contrast to the usual practice, does not fully share the Commission's approach as the best model to foster investment. BEREC shows concern about the particular measures proposed and in particular it considers that "the EU wide application of the recommended costing methodology will not guarantee that prices will converge to the target range and could in practice lead to prices which fall outside the target (...). It may thus lead to the opposite effect to what the draft Recommendation was intended to achieve, i.e. disincentivising instead of encouraging NGA (Next Generation Access) investment". The national regulators left a meeting with the European Commission in Brussels with the belief that "the Commission considers the Recommendation to be de facto binding law".<sup>225</sup> The European Commission may take into (utmost) account the BEREC's position or not. Be that as it may, it is evident that there are some divergences between these two institutions. Whether the BEREC has supported the Commission more than the national regulators

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<sup>219</sup> Interview with Head of Unit 'Regulatory Coordination' - DG CONNECT, EU Commission, 14.03.2013, Brussels.

<sup>220</sup> Ibid.

<sup>221</sup> Draft Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.

<sup>222</sup> Article 19 of the Framework Directive and the BEREC Regulation.

<sup>223</sup> BEREC Opinion on Commission draft Recommendation on non-discrimination and costing methodologies, BoR (13) 41, 26.03.2013.

<sup>224</sup> BEREC Opinion on Commission draft Recommendation on non-discrimination and costing methodologies, BoR (13) 41, 26.03.2013.

<sup>225</sup> Talk to specialized journalist, Brussels, 14.03.2013. Reported in *Mlex Market Intelligence*, 19.03.2013.

in its opinions it is still an overly hasty judgment to make given the relative youth of the recently created body. Nonetheless, it can be said any case that whereas in an early stage there was a clear support for the Commission concerns, the trend seems to be to reach a balance, BEREC being a sector-related counterweight between the NRAs and the European Commission.<sup>226</sup>

## 4.2 Implementation. Interplay EU-National Law. Towards a hierarchical network?

The different regimes governing Services of General Economic Interest also have particular features concerning the bodies responsible for their implementation into national law and enforcement procedures. The analysis of the implementation process of the EU regulatory framework for telecommunications is here used as an illustration of the features that characterize the application of the private law rules contained in the sectoral regimes, as opposed to the application of the traditional private law contained in the national civil codes, if any, or the national private law regimes.

The design system for supervision of the implementation of the Regulatory Framework for Electronic Communications raises the concern about the concept of *implementation* itself, which in this context might serve as an example of how it can be interpreted very expansively. This is particularly when it comes to the border drawing exercise between implementing existing EU law as opposed to the *making* (application) of national law and the application of the European regime. The CJEU has already stated that the concept of implementation comprises both “the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application”.<sup>227</sup>

The fragmentation between the EU and the Member States, linked to the scattering of powers between EU institutions, generates problems that encourage the adoption of laws with “strict, judicially enforceable goals, deadlines and transparent procedural requirements”.<sup>228</sup> Likewise, due to the limited implementation and enforcement capacities of the EU law, the European legislator –as understood in a broad sense– has “an incentive to create justiciable rights and to empower private parties to serve as the enforcers of EU law”.<sup>229</sup> Under this approach, the national legislation would turn into a mere “implementer [...] co-opted by the framing purpose”.<sup>230</sup> This section discusses these issues in relation to the actors involved in the application of EU telecommunications regulation.

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<sup>226</sup> Kerber, W., and Wendel, J. (2014). “Regulation of network sectors in the EU: A federalist perspective”, *Joint Discussion Paper Series in Economics*, No. 22-2014.

<sup>227</sup> Case 16/88 *Commission v. Council*, para. 11.

<sup>228</sup> Kelemen, R.D. (2011), *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Harvard University Press, at 8.

<sup>229</sup> *Ibid.*

<sup>230</sup> Davies, G. (2015), “Democracy and Legitimacy in the Shadow of Purposive Competence”, *European Law Journal*, 21(1), pp. 2-22.

### *Judicial Co-operation & implementation networks*

The role of the national judiciary must be observed as it encompasses institutional and procedural features that determine its role in the implementation process of telecommunications regulation.

Institutionally, a national court may be designated as an NRA having to fulfil the obligations entrusted to the regulator following the functional, yet broad, definition contained in Article 2(g) of the Framework Directive.<sup>231</sup> However, in practice such a designation has not taken place.

Procedurally, different jurisdictions are involved in the effective enforcement of the regulatory framework for telecoms, mainly administrative and civil courts.<sup>232</sup> The national judiciary comes into the picture in the appealing of regulatory decisions. National courts might be required to control regulatory decisions as a way of monitoring their regulatory mandate. The Framework Directive (Article 4) provides a right of appeal against regulatory decisions. The body dealing with the appeal might be of judicial or non-judicial character.<sup>233</sup> In any case, such a body shall be independent from the parties concerned. In practice, however, most jurisdictions have opted to designate administrative courts as the appellate bodies. Judicial or not,<sup>234</sup> Article 4 of the Framework Directive requires that the body in charge of the appeal enjoys “the appropriate expertise to enable it to carry out its functions effectively”.

Problems arise with regard to the uniformity in the implementation of the European regulatory framework for telecoms. By way of example, the case study analysed below (section 5.1) shows the relevance of the national judiciary not only in the enforcement but also in the implementation of the European framework. Provided that one of the main aims of the European framework is its consistent application, judicial cooperation becomes key.

On a sociological note, in a forum consisting of national judges dealing with telecommunications and regulatory issues one can easily appreciate the disparities of criteria employed in different Member States. This is particularly striking in a field where the main efforts are currently focused on the building of an Internal Market for telecommunications.<sup>235</sup> These divergences are visible also with regard to the judiciary and the regulators.<sup>236</sup> Empirical analysis has shown that these disparities are very common and that such dialogue is indeed necessary.<sup>237</sup> It gives rise to a sort of judicial cooperation beyond the traditional cooperation in criminal matters.

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<sup>231</sup> De Visser *supra* n 72, see pp. 105ff.

<sup>232</sup> On the differences on enforcement by different jurisdictions see Chapter 5 of this dissertation.

<sup>233</sup> Article 4(1) Framework Directive.

<sup>234</sup> Article 4(2) Framework Directive: “Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty”.

<sup>235</sup> This is one of the reasons the European Commission is fostering a judicial dialogue on telecommunications matters. See <https://ec.europa.eu/digital-agenda/en/judges-seminar>.

<sup>236</sup> Representative from the national regulators are also welcome to these seminars.

<sup>237</sup> The Place of the National Judiciary in the Single Market for Telecoms.

### *Network Approach. Law-Making vis-à-vis Implementation & Enforcement: A Thin Line*

Telecommunications regulation, together with competition law, is placed at the core of the network-based governance.<sup>238</sup> The institutional design of the regulatory system for electronic communications and the interactions among their key players are built on the basis of a *network of cooperation*. If we look to the work of Ladeur,<sup>239</sup> we can see that within this network there are no hierarchical relationships; rather the network tries to give shape to multiple (heterarchical) relationships that are made among its different members. The observation process shows how the Internal Market approach, which –in turn– is the ultimate goal of the EU Regulatory Framework, is the main factor that has paved the way for the evolutionary development of the network. As we have seen, telecommunications regulation is currently more committed to harmonization of the Internal Market and the creation of the Digital Single Market<sup>240</sup> than to liberalization. The most obvious example of this shift is represented by the legal basis employed. Thus, whereas the first generation of European rules were enacted under Article 86 EC Treaty (now Article 106 TFEU) aimed at opening the market to competition, the last two generations have been based on the internal market harmonization (Article 114 TFEU).

At the national level, the interplay between the EU provisions and national law is articulated by the decisive role played by NRAs. Thus, the particular institutional design of the telecommunications law regime has inevitably implied the transformation of the traditional private law approach when it comes to decision-making. Traditionally, the regulation of private law was carried out by the legislative power in a narrow sense (i.e. Parliament) in combination with some minor interventions by the executive. However, the regulation of telecommunications services involves new instruments and actors as opposed to the traditional ones. As a result of the *inevitable delegation*,<sup>241</sup> the legislative power no longer corresponds to a concrete actor (individually considered, the legislature), but now lies in the hands of different players. Altogether, BEREC, the different NRAs and the European Commission are linked by an *interdependence relationship* that is modulated by the two-way formula of *utmost account*, which, in the absence of any legal definition, each side –inevitably– interprets differently.

Telecommunications regulation is not an area of EU exclusive competence and, therefore, there is no formal transfer of powers between the Member States to the EU. Rather, the regulatory network put in place is underpinned by a system of supervision that seeks to monitor the consistent application of the EU provisions.<sup>242</sup> Within this framework, the role of the European Commission overseeing the effective implementation of EU law seems to blur the borderline between rule-

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<sup>238</sup> De Visser *supra* n 72.

<sup>239</sup> Ladeur, K.-H. (2010), “The Emergence of Global Administrative Law and the Evolution of General Administrative Law”. See also Ladeur, K.-H. (2010), “The State in International Law” in C. Joerges & J. Falke (eds.), *The Social Embeddedness of Transnational Markets*, Oxford, Hart Publishing.

<sup>240</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 6.5.2015. COM(2015) 192 final.

<sup>241</sup> Here we have to recall Taggart, M. (2005), “From ‘Parliamentary Powers’ to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century”, *University of Toronto Law Journal*, 55, 75-627 (see in particular p. 615).

<sup>242</sup> Articles 7 and 7a Framework Directive.



making, implementation and enforcement. Thus, the need to ensure a proper and consistent application of the Regulatory Framework via supervisory control or consultation mechanisms places the Commission in the role of a watchdog enforcer. Similar features can be applied to NRAs given its twofold role as rule-maker on the one hand, and enforcer, on the other. Thus, the implementation of EU law is merged within the application (enforcement) of the measures provided for in the European Regulatory Framework when it comes to decision-making by the NRAs. In this regard, the interpretation of the concept and scope of “implementation” hinders the border drawing exercise between rule-making, implementation and enforcement. As a result, the role of the national legislator is reduced to that of a mere implementer of goals.<sup>243</sup> Implementation should thereby be understood in a broader sense, encompassing the enforcement of the EU measures when *applying* them (i.e. decision-making in the case concerned) at the local level.<sup>244</sup>

This transnationally networked institutional setting<sup>245</sup> is aimed at the creation of a governance network. Such institutional choice has been regarded fertile for consensus building, particularly in areas reluctant to European integration.<sup>246</sup> This perfectly marries with the legal basis employed to regulate telecommunications services (Article 95 EC, now Article 114 TFEU). In doing so, the EU is following a *functionalist approach* for telecoms (Internal Market as a *finalité* and as an objective) that also touches upon contract/consumer law (i.e. integration through private law).<sup>247</sup>

### *Supervisory tools at EU level. Article 7 procedures*

In order to ensure a consistent application of the EU rules, a control mechanism was put in place, the so-called Articles 7 of the Framework Directive procedure. These procedures are in nature consultation and notification mechanisms through which NRAs are required to adopt a *collaborative approach* informing the European Commission and the other NRAs when it comes to measures taken under their regulatory responsibilities that may have an impact on the Internal Market. There are two different Article 7 procedures: Article 7 (“Consolidating the internal market for electronic communications”) applies when performing Market Definition<sup>248</sup> and Market

<sup>243</sup>Davies, G. (2015), “Democracy and Legitimacy in the Shadow of Purposive Competence”, *European Law Journal*, 21(1), pp. 2-22.

<sup>244</sup>The ECJ already recognized the vagueness of the concept of “implementation” in the case C-16/88 *Commission of the European Communities v Council of the European Communities*, [1989] ECR 03457. In this case, the Court upheld that the concept of implementation “comprises both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application”; see para. 11.

<sup>245</sup> Here we have to recall Ladeur K-H, (2010), *The State in International Law*, in Joerges/Falke (eds.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, Hart Publishing Oxford, pp. 397-418. See also Svetiev, Y. (2012), “(W)ither Private Law in the face of the Regulatory Deluge”, in Micklitz, H.-W. and Svetiev, Y. (eds.), *A Self-Sufficient European Private Law - A Viable Concept?*, *EUI Working Papers Series Law No. 2012/31*, 26-44.

<sup>246</sup> Maggetti, M. (2014) “The rewards of cooperation: The effects of membership in European regulatory networks”, *European Journal of Political Research*, 53(3), pp.480-499.

<sup>247</sup>Caruso, D. (2006) “Private Law and State-Making in the Age of Globalization”, *New York University Journal of International Law and Politics*, 39, pp. 1-74. For the consumer law aspects, see Schmid, C. (2005), “The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code”, *European Review of Contract Law*, vol. 1(2) 211-227.

<sup>248</sup>Article 15 of the Framework Directive.

Analysis procedures;<sup>249</sup> and Article 7a (“Procedure for the consistent application of remedies”) which comes into play when obligations are imposed on operators with Significant Market Power.

Particularly, as it stands today, the Article 7 procedure (“Consolidating the internal market for electronic communications”) establishes that the NRA concerned shall notify the European Commission when adopting a proposed measure for a particular market.<sup>250</sup> This measure shall concern market definition or SMP designation.<sup>251</sup> The regulatory decision is then assessed by the Commission, which may require the regulator to make a clarification or provide more details within a period of three days. The European Commission will have to conclude the assessment in a period of one month. In case the Commission does not express “serious doubts” on the compatibility of the draft measure with the EU Regulatory Framework, it may provide comments and the NRA involved will have to take into consideration those comments when adopting the measure concerned. In case the European Commission raises “serious doubts” concerning a proposed measure, there will be an extension of the investigation procedure by an additional two months, leading to the opening of what is called “Phase II”. During this stage, the NRA can provide further evidence and BEREC gives an Opinion on the Regulator’s proposal, which cannot be adopted during the proceedings. The final stage involves three possible scenarios: 1) The European Commission may withdraw its serious doubts, in which case the regulator may adopt the measure; 2) the Commission can make comments and the regulator must take utmost account of them when implementing the draft measure; 3) the Commission may require the regulator to withdraw its proposed measure.<sup>252</sup> In any event, the regulator may also withdraw its draft measure at any time during either phase.

With the 2009 review of the Regulatory Framework, the European Commission extended its investigation powers also to remedies, i.e. beyond market definition and market analysis. Accordingly, the “Better Regulation Directive”<sup>253</sup> introduced Article 7a into the Framework Directive. Compared to Article 7, this new provision establishes a more complex procedure where BEREC is also required to intervene and cooperate with the national regulator to modify the proposal by making concrete recommendations. The process can be summarized as follows:

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<sup>249</sup>Article 16 of the Framework Directive.

<sup>250</sup> The markets where competition is considered not to be effective and where national regulators are expected to carry out market analysis are listed in the Commission Recommendation 2007/879/EC on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. These markets are: Access to the fixed telephone network; Call origination on the fixed telephone network; Call termination on individual fixed telephone networks; Wholesale access to the local loop; Wholesale broadband access; Wholesale terminating segments of leased lines; Voice call termination on individual mobile networks. Nonetheless, if a NRA detects consistent market failure on another market/s, it is allowed to regulate, but it will have to justify its decision.

<sup>251</sup> Article 7(4) framework Directive.

<sup>252</sup> Under the Article 7 procedure, the Commission is empowered to “veto” draft measures, where such measures seek: to define markets other than those defined in the Commission Recommendation; or to designate or not operators with significant market power and such draft measures would affect trade between Member States, and the Commission considers that the draft measure would create a barrier to the single European market or has serious doubts as to its compatibility with Community law.

<sup>253</sup> Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 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, 18.12.2009, pp. 37–69.

Phase I: “Communication of draft regulatory measures”. This Phase may take up to 1 month during which other NRAs and the BEREC may provide comments on the proposed measure, as well as the European Commission which may agree (providing comments or not) or may raise “serious doubts”.

Phase IIa: “Regulatory Dialogue”. This Phase may take up to 3 months, preventing the adoption of the draft measure (standstill period).<sup>254</sup> Within the first six weeks, the BEREC may issue an Opinion expressing an evaluation of the Commission’s serious doubts. In that case, there is a process of cooperation between the actors involved; i.e. BEREC, the Commission and the NRA. This stage may be resolved in 3 different ways: a) the NRA withdraws its proposal; b) the NRA amends its proposal taking utmost account of the Commission’s serious doubts and BEREC’s Opinion; or c) the NRA maintains its proposal.

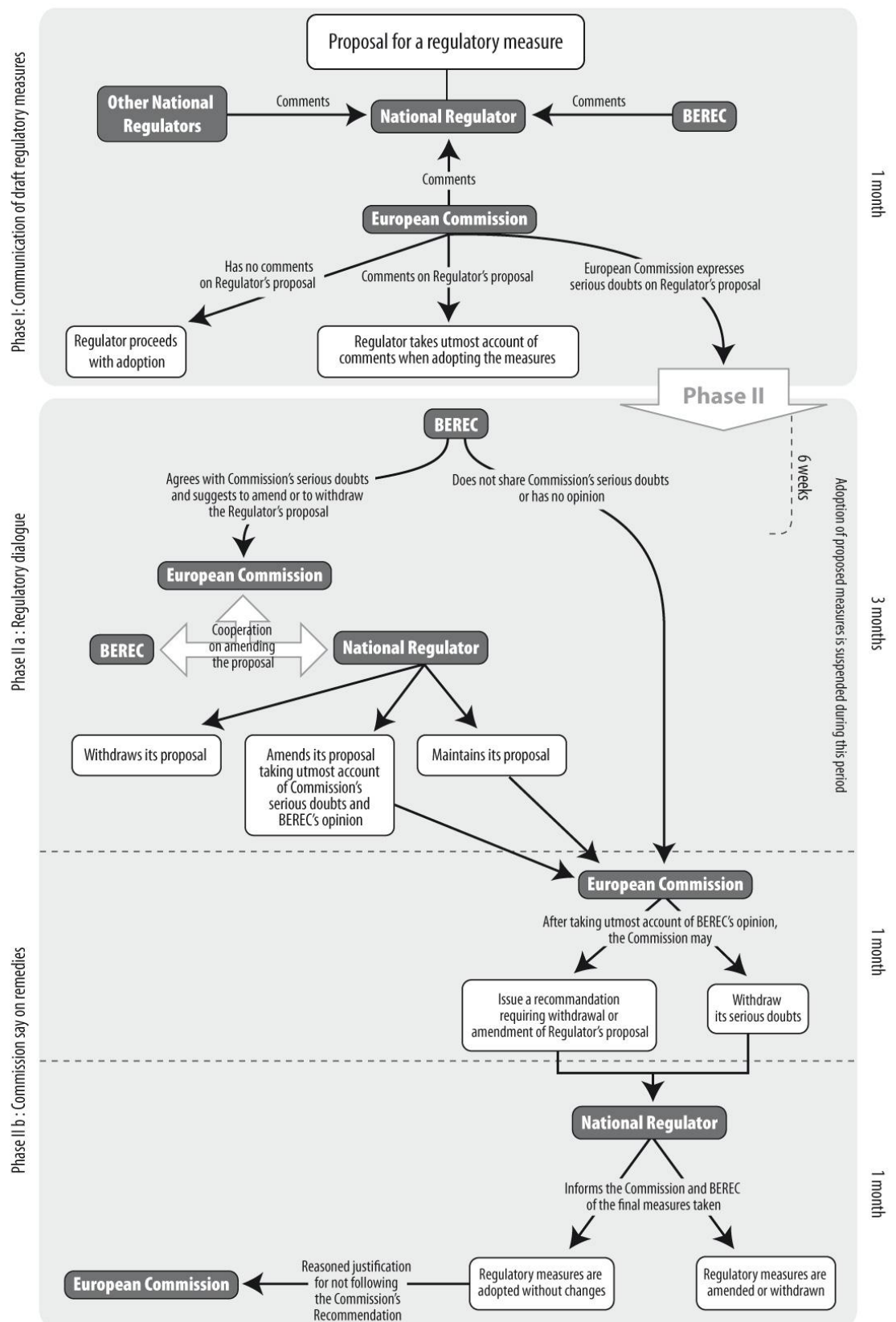
Phase IIb: “Commission say on remedies”. If the NRA decides not to withdraw from its proposal, or if the BEREC does not share the Commission’s serious doubts or it has no opinion, the proposal goes to the European Commission. The Commission then has 1 month to, first, issue a Recommendation requiring the withdrawal or amendment of the Regulator’s proposal or, second, withdraw its serious doubts. In any case, the Commission is not entitled to veto the imposition of remedies. Therefore, the ultimate decision about modifying the proposal or maintaining it unchanged remains with the national regulator.

Finally, within 1 month of the Commission’s position, the national regulator has to inform the Commission and BEREC about the final measures taken, and, where the Commission’s Recommendation has not been followed, the NRA must provide a reasoned justification.

The following chart illustrates the whole process of Article 7a:

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<sup>254</sup> Article 7a(1) of the Framework Directive as introduced by the Directive 2009/140/EC (Better Regulation Directive).



Article 7a procedure. Source: European Commission

What is the influence Article 7a procedure in practice? The consultation procedure of Article 7a is about the subsidiarity principle in so far as market analysis –the cornerstone of the regulatory model for telecommunications– is carried out at the national level by the National Regulatory Authorities. It results in a supervisory mechanism which is “controlled to a large extent by the Commission and now, with the recent addition, the BEREC”.<sup>255</sup> Through this mechanism, the European Commission attempts to achieve consistency in the application of the EU Regulatory Framework in concert with the BEREC and the different NRAs. The following section develops a closer analysis of this distinctive procedure.

## **5. Case-studies: the *making* of telecommunications regulation and its impact in wholesale and retail pricing**

As aforementioned, the EU Regulatory Framework for Telecommunication includes provisions that have an impact in private law matters, either in B2B (wholesale markets) or B2C (retail market) relationships. The following case-studies are intended to illustrate the *making* of telecommunications regulation. Such analysis will bring some light to the influence of telecommunications regulation over national law, and the role of the national legislator and the national judiciary.

The first case study featured here deals with the implementation of a Commission’s Recommendation (soft law) on costing methodologies for termination rates in wholesale markets. This case illustrates well the role of new actors in law-making and the interplay between the different actors (co-operation) underpinned by a multi-level networked institutional apparatus where the EU and the national jurisdictions interact. The second case is more closely related to the EU’s constitutional backing of price regulation. The case concerned –the landmark *Vodafone* case– covers the suitability of Article 95 EC Treaty –now Article 114 TFEU– to regulate retail prices.

### **5.1 Law-making and its impact over contractual relationships within wholesale markets: Article 7 procedure in practice**

#### **Background of the case**

This case illustrates the functioning of the Article 7a procedure in a situation that involves the participation in the regulatory process of OPTA (the former Dutch NRA, now ACM)<sup>256</sup>, the European Commission, BEREC, interest groups –in this case the telecommunications operators–, and the national judiciary. It is the result of a highly controversial case concerning the implementation of the European Regulatory Framework for Electronic Communications by a national regulator, supported by the European Commission, *vis-à-vis* the national judiciary.

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<sup>255</sup> Head of Unit - DG CONNECT - European Commission, Speech at the Florence School of Regulation, October 2012.

<sup>256</sup> OPTA (*Onafhankelijke Post en Telecommunicatie Autoriteit*, "Independent Post and Telecommunications Authority", in English) has been replaced by a single “super watchdog” body: the Netherlands Authority for Consumers and Markets (“ACM”) after the merger of the Netherlands Competition Authority (NMa), the Netherlands Consumer Authority, and the Independent Post and Telecommunications Authority of the Netherlands (OPTA). ACM became operational as of 1<sup>st</sup> April 2013.

First of all, it is important to recall here that NRAs are required to perform their regulatory duties in line with the policy objectives contained in Article 8 of the Framework Directive, namely: promotion of competition, contribution to the development of the Internal Market, and promotion of the interests of the citizens of the European Union.<sup>257</sup> The European Framework requires NRAs (in the case at issue, the current Dutch ACM), among other duties, to investigate market termination, and to impose regulatory obligations upon operators enjoying Significant Market Power (SMP).<sup>258</sup> Among the different regulatory obligations price control is a regulatory intervention required in order to prevent excessive pricing and margin squeeze. To that end, the European framework enabled NRAs to impose cost accounting obligations.<sup>259</sup> Under such obligations, NRAs may compel SMP operators to structure their cost accounting system (CAS) and pricing system under a certain methodology to meet the regulatory requirements in order to support price controls, grouping activities in specified accounts and applying particular rules for the allocation of costs to different services in order to prevent unfair cross-subsidies, excessive or predatory prices, with the aim of preventing margin squeeze as well as promoting sustainable competition and efficiency for the benefit of the user.<sup>260</sup> Accordingly, NRAs must impose obligations to implement the CAS at the national level. This regulatory system was transposed in the Netherlands into national law<sup>261</sup> and in particular, as to the imposition of regulatory remedies, the national framework provided that regulatory obligations shall be *appropriate* if they are based on the nature of the problem identified in the market concerned and are *proportionate* and *justified* in the light of the objectives of Article 1(3) of the Dutch Telecommunications Act.<sup>262</sup>

In order to harmonize pricing control measures in Europe, in 2009, the European Commission issued a Recommendation on termination rates.<sup>263</sup> Without much elaboration on the technical details, termination rates are the rates which telecoms networks charge each other to deliver calls between their respective networks, i.e. how much mobile phone operators can charge to connect calls on each other's networks. These costs are ultimately included in call prices paid by consumers and businesses. The 2009 Commission Recommendation establishes that termination rates (fixed and mobile) should be calculated on the basis of the effective costs incurred by an

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<sup>257</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive"), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 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.

<sup>258</sup> Article 15 of the Framework Directive and Commission Recommendation 2007/879/EC on Relevant Markets.

<sup>259</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('Access Directive'); Article 13.

<sup>260</sup> Article 13(2) Access Directive.

<sup>261</sup> Law of 19 October 1998, containing rules on Telecommunications, Telecommunications Act (Wet van 19 oktober 1998, houdende regels inzake de telecommunicatie, Telecommunicatiewet); hereinafter 'Dutch Telecommunications Act'. Chapter 6a. *Obligations of Undertakings with Significant Market Power*.

<sup>262</sup> Article 6a.2(3). Such objectives are a mere transposition of those contained in Article 8 of the Framework Directive, namely: a. promoting competition in the provision of electronic communications networks, electronic communications services, or associated facilities, including by encouraging efficient investment in the field of infrastructure and supporting innovation; b. the development of the internal market; c. promoting the interests of end-users as regards choice, price, and quality.

<sup>263</sup> Commission Recommendation (2009/396/EC) of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ L 20.5.2009, pp. 67-74.

efficient operator using the *pure* Bottom-up Long Run Incremental Cost (BULRIC) methodology for its calculation. This method imposed a stricter costs measurement method than the previous one operating in The Netherlands, BULRIC+. BULRIC+ model not only assumes the costs that are incremental to providing termination, but also applies a mark-up to non-incremental fixed costs. Thus, unlike BULRIC+, under the *pure* BULRIC methodology some of the costs are not considered for the calculation of the price cap.<sup>264</sup>

On the 7<sup>th</sup> July 2010, OPTA (now ACM), as part of its regulatory duties,<sup>265</sup> published its market analysis including a decision in relation to: (a) the review of the wholesale market for voice call termination on individual public telephone networks provided at a fixed location; and (b) the review of the wholesale market for voice call termination on individual mobile networks in the Netherlands.<sup>266</sup> This decision included conditions establishing price control for mobile and fixed termination rates in line with Article 13 of the so-called Access Directive.<sup>267</sup> The methodology used by OPTA (now ACM) in that decision, consistent with the Commission's Recommendation on terminations rates, was based on the *pure* BULRIC cost standard. The national regulator, in issuing that regulatory decision, considered that establishment of the *pure* BULRIC costing methodology was thought to be the best way to regulate for the "highest consumer welfare", provided that lower termination rates in the wholesale markets would be translated in lower retail prices.<sup>268</sup>

The above-mentioned regulatory decision gave rise to a judicial procedure before the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*, hereinafter CBb) following the appeal of a number of telecommunications operators in the Netherlands.<sup>269</sup> The appeals raised several issues, including the regulator's decision to set the price controls on the basis of the *pure* BULRIC cost standard. Telecommunications operators contended that the cost-price method based on *pure* BULRIC was not an appropriate price obligation within the meaning of Article 6a.2(3) of the Dutch Telecommunications Act, as they considered that this obligation would go beyond what was strictly necessary to rectify the potential competition problems by implying that operators were no longer allowed to include certain costs in their tariffs.<sup>270</sup> In particular, they argued that applying a cost-price method based on BULRIC+ could also offset the competition problem of excessively high prices. The economic consequences of the case provide an overview of the influence of regulatory measures on the (private) relationships amongst operators. In

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<sup>264</sup> Interview with an Economic Expert at OPTA, Florence 18.10.2012.

<sup>265</sup> Pursuant to Chapter 6(a) of the Dutch Telecommunication Act.

<sup>266</sup> Decision of 7 July 2010, OPTA/AM/2010/201951.

<sup>267</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

<sup>268</sup> Interview with an Economic Expert at OPTA, Florence 18.10.2012.

<sup>269</sup> T-Mobile Nederland B.V., Vodafone Libertel B.V., Koninklijke KPN N.B., KPN B.V., Telfort B.V., and Lycamobile Netherlands B.V.

<sup>270</sup> Interview with an Economic Expert from OPTA, Florence 18.10.2012: "When we take a decision, we have to formally consult the draft decision and, then, they (the operators) react to it and said: 'we don't agree with it'. That's what they're always saying and then that there should be lower prices, because there are lower costs. Then, you as a company you're not happy, it is logical and [...] So, there is a consultation phase and after that we have a final decision and, then, they have, of course, the right of defense [...] and they have a right to go to the Court and fight the decision and they did that successfully".

monetary terms, the difference between *pure* BULRIC and BULRIC+ is only about 1 Euro cent. However, that cent, translated into a market where millions of transactions take place every day involves important sums. As stated in the CbB's judgment, ACM estimates a loss of revenue suffered by mobile providers to the order of €21 million to €219 million; the estimates produced by mobile providers themselves were even higher.<sup>271</sup> The question to be answered by the national court was whether the adoption of the new costing methodology (*pure* BULRIC) could be considered *appropriate* in light of the observed competition problem, within the meaning of the Dutch Telecommunications Act.<sup>272</sup>

The CbB's Judgment was released on 31<sup>st</sup> August 2011, rendering judgment in the first and sole instance. In very broad terms, and leaving aside further competition concerns and issues of market analysis that were also object of the plea, the Court, upholding the appeal, argued that despite the Commission's Recommendation on termination rates, conditions remained unchanged and, therefore, it was unfounded to adjust the methodology for cost calculation from *plus* to *pure* BULRIC. The Court grounded its reasoning on the requirement of proportionality and justification as to the objectives of the Dutch Telecommunications Act (Article 1(3)) when imposing price control obligations such as the one concerned.<sup>273</sup> Whereas the authority's aim is to neutralize consequences of market inefficiencies, likely margin squeezes and excessive retail prices by way of imposing a price control obligation, the action "goes beyond what is strictly necessary to correct the identified competitive problem"; the national judge casts doubts on the *proportionality* of the measure.<sup>274</sup> Essentially, the court concludes that the inefficiencies in retail pricing cannot be resolved by imposing a "more invasive measure" at wholesale level, given that the retail mobile market was already considered competitive.<sup>275</sup> As a result, the Court established new cap prices for termination rates and compelled the regulator to take a new decision setting the relevant rates on the basis of BULRIC+ methodology.<sup>276</sup>

Pursuant to Article 7a notification procedure explained above,<sup>277</sup> in January 2012, OPTA notified the European Commission the new decision compliant with the court's judgment and setting the rate following the BULRIC+ methodology. Since this measure departs from the 2009 Commission Recommendation on termination rates, OPTA (now ACM) justified this deviation on the basis of the order by the CbB's Judgment, as the highest appeal body in the Netherlands, to take a new regulatory decision regarding both the price caps for fixed termination rates and for direct

<sup>271</sup> CbB Judgment of 31<sup>st</sup> August 2011, 4.8.3.1. See also Case C-424/07, *Commission v. Germany*, 3 December [2009] ECR I-11431, See, in particular, paragraphs 90-92.

<sup>272</sup> In particular within the meaning of its Article 6a.2(3), that is, proportional and justified in light of Article 1.3 objectives.

<sup>273</sup> CbB Judgment of 31<sup>st</sup> August 2011, 4.8.3.1.

<sup>274</sup> Ibid: "Pure BULRIC is a more stringent form of price regulation than BULRIC+ - there is no mark-up for non-incremental fixed costs - and the text of Article 6a.7(2) of the TA does not provide any support for an interpretation to the effect that a form of price regulation might be imposed which goes beyond a price measure that can already be considered cost-oriented".

<sup>275</sup> CbB Judgment of 31<sup>st</sup> August 2011, 4.8.3.4.

<sup>276</sup> In fact, the CbB itself even set the price cap for Mobile Termination Rates at 0.056 €/min as of 7 July 2010, 0.042 €/min as of 1 January 2011, 0.027 €/min as of 1 September 2011, and 0.024 €/min as of 1 September 2012 on the basis of the BULRIC+ methodology and OPTA's own calculations.

<sup>277</sup> Section 4.2.



interconnection rates following a BULRIC+ cost accounting methodology. During Phase I of the notification procedure, the European Commission raised concerns about the newly adopted regulatory measure and sent a *serious doubts letter* to ACM on the 13<sup>th</sup> February 2012 opening Phase II investigation.<sup>278</sup> Phase II investigation opens a “Regulatory Dialogue” that may take up to 3 months preventing the adoption of the draft measure (standstill period).<sup>279</sup> In the *serious doubts letter*, the Commission expressed reservations concerning the compatibility of the measure with the European Regulatory Framework and provided reasons why it believed that the draft measure would not only create a barrier to the internal market, but would also involve an increase in the retail prices leading to a decline in consumer welfare.<sup>280</sup> In particular, the Commission considered that the measure did not comply with the requirements of Article 16(4) of the Framework Directive, and Article 8(4) of the Access Directive in conjunction with Article 8 of the Framework Directive. In that regard, the European Commission acknowledges that NRAs are allowed to deviate from the Commission’s Recommendation but, in that event, the deviation must be *duly justified* in light of the policy objectives and regulatory principles of the Regulatory Framework.

This *serious doubts letter* initiated the Phase II investigation and meant that for its 3 months duration the draft measure could not be adopted (standstill period).<sup>281</sup> However, the revised mobile termination rates based on the BULRIC+ methodology were already in effect in the Netherlands, as a consequence of the CbB’s judgment. Within the first six weeks of the Regulatory Dialogue, BEREC may intervene in the procedure by issuing an opinion expressing its views on the Commission’s serious doubts. In such case, there is a process of cooperation between the actors involved (i.e. the BEREC, the Commission and the NRA). As noted above, this stage may play out in 3 different ways: a) the NRA withdraws its proposal; b) the NRA amends its proposal taking utmost account of the Commission’s serious doubts and BEREC’s opinion; or c) the NRA maintain its proposal. In the case concerned, BEREC was required to issue an opinion on the serious doubts letter indicating its position. To this end, and following the mandate enshrined in Article 7a(3) of the Framework Directive, a specific Expert Working Group (EWG) within the BEREC was established.<sup>282</sup>

This EWG held its first meeting in London on the 20<sup>th</sup> February 2012. ACM was invited to provide further clarifications and explanations. Several questions followed which were sent to ACM who replied by the 28<sup>th</sup> February. A second video-conference meeting took place one week

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<sup>278</sup> SG-Greffe (2012) D/2859. Brussels 13.02.2012, C(2012) 1038. Interview with an Economic Expert at OPTA, Florence 18.10.2012: “The process of notification requires that you have to notify again to the Commission. So, we came with the Commission and said: “ok, we are going to do this, we have a Court decision, we cannot do anything else than this, so this is what we are going to do”. And, then, the Commission got very annoyed, because they had serious doubts about what we were doing there with regard to the economic analysis underlying the regulator’s decision”.

<sup>279</sup> Article 7a(1) of the Framework Directive as introduced by the Directive 2009/140/EC (Better Regulation Directive).

<sup>280</sup> Commission Recommendation of 13 June 2012, in accordance with Article 7a of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive") in Case NL/2012/1284: call termination on individual public telephone networks provided at a fixed location in the Netherlands and in Case NL/2012/1285: voice call termination on individual mobile networks in the Netherlands; C(2012) 3770.

<sup>281</sup> Article 7a(1) of the Framework Directive as amended by Directive 2009/140/EC.

<sup>282</sup> The EWG was charged with the task of drafting an opinion containing a summary of the notification and the serious doubts, the experts’ analysis, and clear conclusions concerning the compatibility of the proposed regulatory measure with the EU Regulatory Framework, as well as the provision of possible alternative proposals (if any).

later, on the 7<sup>th</sup> March, to gain supplementary clarifications. By the 15<sup>th</sup> March, on the basis of a comprehensive economic analysis, the EWG had drafted an opinion that was referred to the BEREC's Board of Regulators for comments. On the 23<sup>th</sup> March, the majority of the Board of Regulators adopted a final opinion.<sup>283</sup> In that decision, the BEREC found that the serious doubts raised by the European Commission were *justified* and agrees that: 1) The regulator has not provided an economic justification for the use of the BULRIC+ methodology as the appropriate measure "to promote efficiency and sustainable competition and maximize consumer benefits set out in Recital 20 to the Access Directive"; and 2) the proposed measure may create a barrier to the Internal Market. Nonetheless, as for the BEREC's position on whether the measures should be amended or withdrawn, it did not consider appropriate to impose on the regulator any particular way to proceed, due to the legally binding nature of the Judgment by the CBb.<sup>284</sup>

The procedure at hand concludes with a final notification by which, within 1 month after the Commission's position, the national regulator must inform the Commission and BEREC about the final measures taken, and where it does not follow the Commission, the NRA must provide a reasoned justification. In our particular example, ACM deviated from the Commission on the basis that, under national law, the CBb's judgment overturned the original regulatory measure.

Two years after the original decision that gave rise to the case at hand, the national regulator decided to attempt once more to set the *pure* BULRIC costing methodology.<sup>285</sup> This second regulatory decision following the Recommendation was again appealed in front of the CBb. During the process of judicial review, and after an initial unwillingness of the national court to refer the case to the CJEU on the most problematic issues at stake –i.e. the legal effect of the Recommendation–, the national judge has finally decided to suspend the proceedings and request a preliminary reference from the CJEU under Article 267 TFEU.<sup>286</sup> The preliminary questions submitted for reference are examined below.

### *Comment*

This case concerns a conflict between some telecommunications operators in The Netherlands and the National Regulatory Authority for telecommunications. In particular, the case features the implementation of a Commission's Recommendation (soft law) on costing methodologies for termination rates in wholesale markets. The implementation procedure put in place (so-called Article 7a procedure) is grounded on a multi-level networked institutional apparatus where the EU and the national jurisdictions interact. In particular, this *sector-specific* consultation procedure

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<sup>283</sup> BEREC Opinion in Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC Case NL/2012/1284 – Call termination on individual public telephone networks provided at a fixed location in the Netherlands Case NL/2012/1285 – Voice call termination on individual mobile networks in the Netherlands, BoR(12)23.

<sup>284</sup> Ibid.: "BEREC therefore considers that the Commission's serious doubts, as narrowly expressed in its letter to OPTA of 13 February 2012 (i.e. without explicitly addressing the legally binding nature of the CBb's judgment for OPTA), are justified".

<sup>285</sup> Effective as of 1<sup>st</sup> September 2013.

<sup>286</sup> Case C-28/15, *Koninklijke KPN and Others v Autoriteit Consument en Markt (ACM)* [in progress].

touches upon the competences and powers of the regulator, and involves the participation of the regulators' umbrella group (BEREC), the European Commission, interest groups and the national judiciary. Therefore, some issues concerning implementation and decision-making are the subject matter of the analysis below: How are regulatory decisions made? What criteria are taken into account? Who intervenes in decision-making processes? What is the role of the judiciary? Whose interests are taken into account? What is the actual effect of a European Recommendation (soft-law)? As such, by illustrating the role of new actors in law-making and their interplay together with the role of the national judiciary under the judicial review of regulatory authorities, this particular case turns out to be a very good example of the interplay between the national and the EU level, and the role of the European Union in the decision-making processes for issues touching upon private law matters.

i. Implementation of the EU regulatory framework for telecoms and private law

To begin with the implementation of the EU regulatory framework, a potential solution to this case might well have been the opening of infringement proceedings. Yet, an infringement procedure is against the Member State infringing EU law provisions and it is necessary to recall here that National Regulatory Authorities are required to be *independent*.<sup>287</sup> Accordingly, given that the NRAs are independent and also that there was no problem of incompatibility of the national law with the European provisions, in an infringement context this case would have raised the question: Infringement by whom? The Netherlands or the Dutch regulator?<sup>288</sup>

In the field of private law, a problematic matter of competence is represented by the delegation of substantive competence to “specialized institutions”.<sup>289</sup> The establishment of NRAs in the telecoms sector is a clear example of the partial integration or integration by sectors that Pescatore speaks about.<sup>290</sup> In order to gain a clear understanding of this, it is necessary to look at the functional competence of such institutions as well as the interplay between the EU, the Member States and the established administrative structures. A closer look to the implementation of the EU Regulatory Framework for Electronic Communications reveals a subtly increasing power of the EU Commission's role at the functional level when it comes to the achievement of the regulatory goals, i.e. consistent application of the legal framework and harmonization of the Internal Market. This might be the result of the nature of the prerogatives reserved to the European Commission with regard to the control mechanisms which grant it certain powers aimed at the adjustment of the national measures, e.g. via consultation procedures.<sup>291</sup> The rationale behind such procedures responds to the political and legal imperatives set out at EU level.<sup>292</sup>

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<sup>287</sup> Article 3(2) Framework Directive. See Lavrijssen, S. and Ottow, A. (2012) “Independent Supervisory Authorities: A Fragile Concept” *Legal Issues of Economic Integration*, 39(4) 419–446.

<sup>288</sup> Article 258 TFEU.

<sup>289</sup> Pescatore *supra* n 42 at 27.

<sup>290</sup> *Ibid.*

<sup>291</sup> Article 7 and 7a of the Framework Directive. In this regard, see also Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution*, Oxford University Press, 2009

<sup>292</sup> Pescatore, *supra* n 42, at 45.

The case at stake concerns the implementation of a Commission's Recommendation on the methodology employed for the calculation of termination rate costs.<sup>293</sup> When it comes to contracts between telecoms operators, NRAs exert price control over the prices that the incumbent charges to alternative operators for the use of the network (termination rates).<sup>294</sup>

Therefore, this case is a good example for illustrating the implementation process of EU decisions by the Member States with implications for private law (price control in B2B contracts). This regulatory pricing control prerogative arises in the context of regulatory obligations that might be imposed by the national regulator over operators in wholesale markets. In particular, the concerned price control arises from cost accounting obligations. Article 13 Access Directive compels SMP operators to structure their cost accounting system (CAS) and pricing system under a certain methodology to meet the regulatory requirements in order to support price controls, grouping activities in specified accounts and in particular rules for the allocation of costs to different services in order to prevent unfair cross-subsidies, excessive or predatory prices and to prevent margin squeeze as well as to promote sustainable competition and efficiency for the benefit of the user.<sup>295</sup> In the case at hand, the disputed regulatory decision establishes a cap for termination rates so that it can avoid excessive tariffs or margin squeeze practices.

The economic consequences of the case provide an overview of the influence of regulatory measures on the (private) relationships amongst operators. In economic terms, as stated above, the difference between *pure* BULRIC and BULRIC+ is only about 1 Euro cent. Yet, the multiplied effect of such price alteration amounts to millions of Euros.<sup>296</sup>

Without entering into all the economic, competitive and regulatory consequences of the case, it will suffice to examine here the interplay among the actors involved in the implementation of the European Regulatory Framework for telecoms. This alone gives rise to governance problems.

- Multi-level (network) governance conflicts

Essentially, this case is about the national procedural autonomy principle. As aforementioned, the implementation and enforcement of the EU Regulatory Framework for Electronic Communications follows a decentralized approach. Under this scheme, we can identify three types of conflicts:

- a) Vertical conflicts

NRAs are required to perform their regulatory duties in accordance with the regulatory objectives of the specific Directives.<sup>297</sup> In principle, the national regulator enjoys a certain degree of autonomy

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<sup>293</sup> Commission Recommendation (2009/396/EC) of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (OJ L 20.5.2009, pp. 67-74).

<sup>294</sup> In accordance with Article 13(1) of the Access Directive.

<sup>295</sup> Article 13(2) Access Directive.

<sup>296</sup> CBB Judgment of 31<sup>st</sup> August 2011, 4.8.3.1. See also Case C-424/07, *Commission v. Germany*, 3 December [2009] ECR I-11431, See, in particular, paragraphs 90-92.

<sup>297</sup> Article 8(1) Framework Directive.

when carrying out its regulatory tasks. Yet, the European Commission also enjoys a certain degree of control by virtue of Articles 7 and 7a procedures and Article 19 of the Framework Directive.

The vertical conflict arises in relation to the divergence between the European mandate and the disputed national decision that occurs as a consequence of the national ruling. This is a very common situation that the consultation procedures put in place attempt to palliate. The internal market rationale takes precedence over the national legal regime as has been long established by the case law of the European Court.<sup>298</sup>

#### b) Horizontal conflicts of jurisdictions

The horizontal conflict is epitomized by the discrepancy between two different national jurisdictions. A conflict in the field of telecommunications would take place between civil or contract law rules –i.e. general contract law– vis-à-vis telecommunications regulation. Another example would be a potential inconsistency between telecommunications regulation and administrative law. Such incompatibilities might well be solved by rules of conflict and the maxim *lex specialis derogate generalis*. However, jurisdictional conflicts shall be recalled here. In the case at stake, the national regulator maintains the application of sector-specific regulation whereas for the national judge major principles such as legality and the administrative principle of legal certainty prevail.<sup>299</sup>

#### c) (Multi) diagonal conflicts

The literature has thoroughly addressed diagonal conflicts in issues of European governance.<sup>300</sup> Diagonal conflicts arise particularly in issues of decentralized enforcement, such as the one that concerns us here. It epitomizes a multi-dimensional interplay that brings together the national regulator, the European Commission, the umbrella organization BEREC (in a more modest way) and the national judiciary. The latter steps in the framework of the procedure for the judicial scrutiny of regulatory decisions conferred under the right of appeal against such decisions.<sup>301</sup>

The (potential) diagonal conflict emerges in particular with regard to the sought optimization of the market versus the proportionality of the (contested) intervention. As aforementioned in the background of the case, the regulator and the judiciary hold divergent views about the suitability of the measure. In turn, the judicial conclusion and the subsequent new regulatory decision restoring the BULRIC+ methodology triggered the opening of an Article 7a

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<sup>298</sup> Inter alia: Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585, Case C-26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, and C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1991] ECR I-7321.

<sup>299</sup> On the decay of the legality principle see Lavrijssen, S. and Ottow, A. (2011), 'The Legality of Independent Regulatory Authorities', in L. Besselink, F. Pennings and A. Prechal (eds.), *The Eclipse of Legality*, Kluwer Law International.

<sup>300</sup> The most representative works on diagonal conflicts comes from Professor Joerges. See Joerges, C. (1997), "The impact of European integration on private law: Reductionist perceptions, true conflicts and a new constitutional perspective" *European Law Journal* 3(4), pp. 378-406. Joerges, C. (2006) "'Deliberative Political Processes' Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making\*." *JCMS: Journal of Common Market Studies* 44(4), pp. 779-802; amongst others.

<sup>301</sup> Article 4 Framework Directive.

procedure deploying a turf war involving three parties – the European Commission, the national regulator and the national judiciary.

On the one hand, the regulator argues that adopting a costing methodology in line with the European Recommendation would imply lower costs and, therefore, it would be translated into lower consumer prices. In the eyes of the European Commission, in re-establishing the former methodology as required by the national court, ACM did not provide any economic justification of the departure from the *pure* BULRIC methodology that guarantees that the BULRIC+ methodology would equally promote efficiency and sustainable competition, as well as maximizing consumer benefit in the Dutch market.<sup>302</sup> In addition, the European Commission considered that it would create barriers to the Internal Market because mobile termination rates set via the *pure* BULRIC level would contribute to a level playing field at EU level by eliminating competition distortions between fixed and mobile networks.<sup>303</sup>

On the other hand, the national court holds the view that the intervention of wholesale markets under conditions of inefficiency to resolve retail market prices are disproportionate, provided that NRAs cannot intervene in a market that has been already considered competitive and that, therefore, is not subject to *ex-ante* regulation.<sup>304</sup> Retail and wholesale markets are different markets operating at different –and not interlinked– levels. The Recommendation is about the wholesale market. The court reasoning concludes that, the regulator –together with the Commission– cannot come up with a justification from a different market (i.e. it cannot use the retail market to say something about the functioning of the wholesale level).

ii. Compatibility of the regulatory decision with EU law and institutional conflicts

Drawing on the empirical analysis conducted consisting of interviews with staff related to this particular case, this brief case comment tries to draw attention to the implications of European telecommunications regulation in private law relationships. Although ACM sought to follow the Commission's Recommendation on termination rates, it was impossible to *not* to comply with the CBb's judgment.<sup>305</sup> Formally, the case –including the Commission's investigation procedure carried out– gave rise to a complex situation because ACM had to apply the Court's decision. As such, the national court adopted the role of the regulator by overturning the new price caps resulting from the recommended new cost accounting model and restoring the previous methodology, and requiring the regulator to issue a new regulatory decision from the 1<sup>st</sup> January 2012 pursuant the judicial reasoning.<sup>306</sup> The court here performed the role of a *de facto* regulator.<sup>307</sup>

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<sup>302</sup> SG-Greffe (2012) D/2859. Brussels 13.02.2012, C(2012) 1038. European Commission serious doubts letter.

<sup>303</sup> Ibid.

<sup>304</sup> CBb Judgment of 31<sup>st</sup> August 2011, 4.8.3.1.

<sup>305</sup> Interview with an Economic Expert from OPTA, Florence 18.10.2012: “there was only one outcome possible and it was to follow the Court!”.

<sup>306</sup> CBb Judgment of 31<sup>st</sup> August 2011, Section 5.

<sup>307</sup> See S. Lavrijssen and M. De Visser (2006), ‘Independent Administrative Authorities and the Standard of Judicial Review’, *Utrecht Law Review*, no. 1.

Furthermore, this case was not, in principle, a problem of compatibility of Dutch law (the Dutch Telecommunications Act) with EU Law, because the concerned provision (its former Article 6) existed from 2004 and the European Commission never raised questions concerning the law, only about the specific reasoning of the Court.<sup>308</sup> That means that the Commission was not arguing about a lack of compliance of the Dutch Telecommunications Act with EU law, but was only questioning the regulatory decision issued as a consequence of the court's ruling which set the price cap on the basis of the BULRIC+ costing methodology, to the contrary of the cost model suggested by the Commission's Recommendation.

This situation perfectly reflects a clear decoupling of the CBb's Judgment and the EU understanding, which poses a debate on the nature of the EU soft-law –in particular concerning the binding effect of the 2009 Commission's Recommendation on termination rates– firmly on the table. In this regard, NRAs (OPTA in the case concerned) are required to take “utmost account” of the Commission comments. Once again, *utmost account* comes into play in order to modulate the relationship among the different participating institutions, but this time in a different direction: NRAs to take the utmost account of the Commission's position. In reality, the CBb decided that its conclusions are *not* affected by the Commission's Recommendation and the fact that NRAs have to take the utmost account does not imply that OPTA cannot deviate from the (non-binding) Recommendation, especially if this would require a breach of national law.<sup>309</sup> According to the Court, “that Article 19(1) of the Framework Directive requires Member States to ensure that national regulatory authorities, when carrying out their duties, try their utmost to use the recommendations of the Commission, [...] does not affect the obligation of OPTA to deviate from the –non-binding– call termination recommendation because they would otherwise act in violation of provisions of national law”.<sup>310</sup> This is the only reference made to *utmost account* throughout the Judgment. Utmost account, then, would imply that “you do not have to follow it exactly, but you have to take account of it”.<sup>311</sup> Unfortunately, the Court did not go deeper into the nature of the Recommendation and did not clarify what *utmost account* actually involves either. In the case at issue, OPTA initially followed the Commission's Recommendation because, above all, the new methodology (*pure* BULRIC) revealed itself after economic analyses to be the best solution economically; it was the national Court who overturned that decision.<sup>312</sup> Meanwhile, the European Commission held: “it is very important to note that this is a case where the European Commission, BEREC and OPTA were working closely together. There was no confrontation. It was about the European Commission not being happy with the decision taken by the national Court”.<sup>313</sup>

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<sup>308</sup>Interview with an Economic Expert from OPTA, Florence 18.10.2012.

<sup>309</sup>Interview with an Economic Expert from OPTA, Florence 18.10.2012.: “And the Commission formally –and that's also what the Court acknowledges– is that, formally, its Recommendation is not a binding measure, is not binding to OPTA, that measure. That's also why the Court says: ‘ok, if it is not binding, it is just a Recommendation, is not binding’. So, OPTA is not bind to follow that Recommendation, but the law –in the way as the Court explains it- is binding. So...”.

<sup>310</sup>CBb's Judgement 4.8.3.6.

<sup>311</sup>Interview with an Economic Expert from OPTA, Florence 18.10.2012.

<sup>312</sup>Interview with an Economic Expert at OPTA, Florence 18.10.2012: “What we applied is the reasoning from the Court. OPTA does not necessarily agree with that, but we have to live with that”.

<sup>313</sup>Head of Unit - DG CONNECT - European Commission, Speech at the Florence School of Regulation, October 2012.

These conflicting views between the court and the regulator have resulted in a complex situation because the European Commission is not allowed to compel the national regulator to disregard the court's ruling. Besides, although NRAs are supposed to be independent, OPTA would not have been allowed to adopt the decision establishing the *pure* BULRIC methodology in so far as the Court would annul it again. Neither could OPTA appeal the Court's decision due to the fact that, in the Netherlands, there is no higher appeal body as a result of the choice for efficient procedures. Otherwise, OPTA would have appealed the CBb's ruling.<sup>314</sup> The result was, then, a "deadlock situation" which could have been overcome if the Court would have asked to the CJEU for its opinion on the interpretation of the status of the Commission's Recommendation.<sup>315</sup> In the same vein, the European Commission also considers that the Dutch Court should have referred the case to the CJEU.<sup>316</sup>

#### - Socio-legal comment

This case exemplifies a situation where the judiciary spills over into the regulatory process of telecommunications. What do key players of the sector say on this? BEREC for instance is not pleased with the idea of national courts intervening in the cases and fears that they could alter the objectives set out at European level. "We do not like the Court to step in and change our targets".<sup>317</sup> In this case, the court set the price, the methodology, etc., and it created a problem for the Commission since it attempts to implement a consistent methodology that can be followed and adopted across the different Member States: The Court "has changed that by jumping in in issues where it does not have any real competence, perhaps formal, but not real".<sup>318</sup>

These are very significant statements. It seems that the regulators chose to disregard the formal and legal competences of the national court, as they might not be qualified enough to carry out such task.<sup>319</sup> It may reveal the *omnipotent aspirations* of the telecommunication sector, showing itself as a sort of *Supreme Being* even above the judiciary. Technicality and expertise alienates the telecommunication sector from the traditional legal structures bypassing the anchored control (judicial) mechanisms. It also seems to suggest that telecommunications unfolds within its own *parallel world* and only once in a while does it go down to earth to deal with specific issues when they may hamper the smooth functioning of the market. In addition to that, the European Commission disagrees with the ruling: "[T]he Commission was not happy with this decision by the

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<sup>314</sup> Interview with an Economic Expert at OPTA, Florence 18.10.2012.

<sup>315</sup> Interview with an Economic Expert at OPTA, Florence 18.10.2012.: "Another solution for this situation is to appeal this Court asks the European Court for their opinion. That would be, in these types of cases, [...] very appropriate, the thing to do for the Dutch Court, but they did not do that. So, yeah, that is their decision and we cannot influence that, but, of course, if you have these difficult interpretations of the status of a Recommendation I would say "I would ask the European Court for that", but that's my personal opinion".

<sup>316</sup> Head of Unit - DG CONNECT - European Commission, Speech at the Florence School of Regulation, October 2012: "That would normally be the case when you speak to other judges in other Member States, they would tell you: Mmmm..., that should have normally been referred to Luxembourg. And that was not the case".

<sup>317</sup> Interview with a BEREC High Representative, Brussels 14.03.2013.

<sup>318</sup> Ibid

<sup>319</sup> Ibid: "From my point of view, not necessarily the BEREC's one, where the national courts step in a case where they are not familiar, they do not have the expertise nor the technical background to analyze whether termination rates should be created at 1.2 or 2 or whatever... They do not have the necessary instruments and the technical staff to do so".



national court. We think that the entire earth would agree!. A court decided that the cost model that we all want to achieve at the European level should not be applied in this Member State and that can be, from a European perspective, non-acceptable”.<sup>320</sup> Once again, it shows that the Commission *puts on airs*, believing that it alone possesses the absolute truth and that nobody would dare –or even should not dare!– doubt it.

iii. The role of “soft-law”

Essentially, what is at stake here is the influence of a Commission Recommendation. To this end, it is important to determine the nature of the Recommendation. The, let’s say, “soft-law box” encompasses those instruments that we are reluctant to qualify as “hard law”.<sup>321</sup> Hence, Recommendations would fall within the category of “soft-law”. To a lawyers mind, that is directly translated into non-binding. Yet, it is crucial to ascertain the legal effect of the measures contained in the Recommendation.

Article 60 TFEU enables the Commission to issue recommendations in the field of liberalization of SGEIs. According to Article 288 TFEU (former Article 249 in the EC Treaty), Recommendations do not enjoy binding force.<sup>322</sup> Rather, they are indicative guidelines to implement and to interpret legislation. Nonetheless, the CJEU has recognized that they are not completely deprived of legal force, and that the national judges should take them into consideration.<sup>323</sup> As a matter of fact, national courts shall take a Recommendation into account “where they are capable of casting light on the interpretation of other provisions of national or Community law”.<sup>324</sup> Against this background, Recommendations would serve the purpose of harmonization or, at least, the performance of the European Commission in this particular case of study sheds some light on the reading that the Commission seems to make of the Recommendation by attributing *de facto* binding force.

The reasons that lead the Commission to issue a Recommendation on cost-accounting methodologies might well be its impact on private relations, a subject matter which falls outside EU’s competence. Actually, as recognized in *Grimaldi*, the European institutions generally adopt Recommendations “when they do not have the power under the Treaty to adopt binding measures”.<sup>325</sup> In the issue that has brought us here, the European Commission alleges lack of harmonization in the application of cost-accounting principles to termination markets, divergence between price control measures and different practices in implementing costing tools.<sup>326</sup> In addition,

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<sup>320</sup> Head of Unit - DG CONNECT - European Commission, Speech at the Florence School of Regulation, October 2012.

<sup>321</sup> Klabbers, J. (1998), ‘The Undesirability of Soft Law’, *Nordic Journal of International Law*, 67, p. 381.

<sup>322</sup> In the same vein the CJEU in the Case C-322/88, *Salvatore Grimaldi v. Fonds des Maladies Professionnelles*, [1989] ECR 4407; see, in particular, para. 13.

<sup>323</sup> *Ibid.* para. 18.

<sup>324</sup> *Ibid.* para. 19.

<sup>325</sup> *Grimaldi* case, para. 13.

<sup>326</sup> Recitals 2, 3 and 4 of the Recommendation.

the Recommendation seeks for a *consistent application* of the specific provisions concerning cost accounting and accounting separation.<sup>327</sup>

The confrontation in the case does not lie on the proportionality of the measure itself, but in the nature of the instrument it stems from. Thus, the Court observes that although the mandate of Article 19 of the Framework Directive for NRAs is to try their utmost to follow the Commission's Recommendations when carrying regulatory duties, it does not preclude the possibility of deviation. The court acknowledges that it is particularly important that this compliance with EU rules entails a violation of national law. The regulatory decision on tariff-regulation setting cap prices using the *pure* BULRIC cost model is at odds with the former Article 6a.2(1), (a), and (3) of the Dutch Telecommunications Act.<sup>328</sup> Accordingly, the legal debate at stake is a supremacy concern EU *soft-law* vis-à-vis *hard* national law.

Determining the legal effect of the Recommendation might give a proper *locus standi* to other operators –those seeking access to the network– to appeal the regulatory decision<sup>329</sup> setting cap prices via the BULRIC+ methodology on the grounds that the national measure impairs the outcome achieved via the application of EU law (i.e. the Recommendation).<sup>330</sup> Accordingly, the question to pose here would be whether the supremacy or precedence principle can be extended to a Recommendation that, in practice –and as a result of the control mechanisms put in place such as Article 7a procedure–, might be considered *de facto* binding.

#### iv. Independence and expertise

The issues at stake in this case also call for looking an examination of the role of the actors involved and the governance structure. What is the difference between the national court and the regulatory authority? The court has taken over the role of the regulator undermining the remit of the authority.

Independence might be impaired as a result of the complexity of the implementation procedure put in place. Furthermore, a veto power exercised by the Commission not only undermines the national procedural autonomy, but also interferes with the independence of the

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<sup>327</sup>Recital 6.

<sup>328</sup> CBB Judgment of 31<sup>st</sup> August 2011, Section 4.8.3.7. To date, in its previous version, as the *Telecommunicatiewet* (Telecommunications Act) was amended in 2012.

<sup>329</sup> See case C-426/05, *Tele 2* (See para. 33: are the operators entitled to derive those rights and are affected by the NRA decision?) Para: 36. “It follows that users or undertakings competing with an undertaking with significant power on the relevant market must be considered to be potential beneficiaries of the rights corresponding to the specific regulatory obligations imposed by a national regulatory authority on that undertaking with significant market power pursuant to Article 16 of the Framework Directive and the telecommunications directives cited therein. Consequently, those users and undertakings may be regarded as being ‘affected’, within the meaning of Article 4(1) of the Framework Directive, by decisions of that authority which amend or withdraw those obligations”. Are these operators compliant with these requirements? Answer: Para 38. “(..) a strict interpretation of Article 4(1) of the Framework Directive to the effect that that provision confers a right of appeal only on persons to whom the decisions of the national regulatory authorities are addressed would be difficult to reconcile with the general objectives and regulatory principles resulting, for those authorities, from Article 8 of that directive, particularly with the objective of promoting competition”.

<sup>330</sup> See the case C-213/89 *Factortame* [1990] ECR I-2433, paras. 20 and 21. See also Case C- 106/77 *Simmenthal* [1978] ECR I-629, paras. 22 and 23.

national regulator, given that the Commission pursues policy goals.<sup>331</sup> But, to what extent does independence guarantee the effective application of the law?

The role of the judiciary as a regulator calls for scrutiny; given that telecommunications is a highly technical sector. In fact, expertise is one of the rationales for NRAs' continued existence. The independence requirement logically also applies to the judiciary. Thus, in order to ensure effective legal protection, the court –or the body in charge of deciding the appeal– should also ensure a proper level of expertise.<sup>332</sup> This raises an institutional issue as to what is the instance that provides a better understanding, the national regulator or the judge? From a technical point of view, it is hardly possible to translate into legal terms these costing methodology issues. Accordingly, the interpretation of the national market conditions requires a high level of specialization. In the case at stake, it turns out that the Dutch court is composed of specialized team of economist, but this might not be the case in every single Member State.

v. Contextualization in further European experiences. Termination tariff regulation

As a matter of fact the above case is neither the first nor the last where the Commission put into practice the mechanism of Article 7a. Despite its short life –Article 7a entered into force with the third package (May 2011)– to date there have already been 29 Opinions issued by BEREC in cases which have given rise to the Phase II investigation.<sup>333</sup> As previously mentioned, in those cases BEREC largely shared the Commission's doubts. In 18 of them BEREC supported the European Commission in having serious doubts. In another 5 cases, BEREC only partially agreed with the Commission, while in 5 cases BEREC considered that the Commission's concerns were unjustified.

Particularly, in the field of termination rates, some NRAs in different Member States have followed the Commission's Recommendation proposing *pure* BULRIC methodology in that context. In these countries, the application of this methodology has “succeeded so far”.<sup>334</sup> On the contrary, there have been other cases where NRAs are also coming across similar issues in similar issues as the Netherlands when implementing the Commission's Recommendation, such as is the case for Germany<sup>335</sup> or Italy<sup>336</sup> *inter alia*.

vi. The role of the Court of Justice of the European Union

The CJEU may get involved in this procedure as a consequence of the preliminary reference procedure.<sup>337</sup> Already within the first appeal procedure culminating in the judgment that gave rise to the opening of the Phase II of the Article 7a procedure, the national judge should have submitted the case for consideration by the European Court. However, at that time, the CBb did not see the

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<sup>331</sup> Lavrijssen, S. and Ottow, A. (2012) ‘Independent Supervisory Authorities: A Fragile Concept’, *Legal Issues of Economic Integration*, 39(4), pp. 419–446.

<sup>332</sup> Article 4(1) Framework Directive.

<sup>333</sup> Data from March 2015 (Cullen International).

<sup>334</sup> Interview with an Economic Expert at OPTA, Florence 18.10.2012.

<sup>335</sup> Press Release at [http://europa.eu/rapid/press-release\\_IP-13-180\\_en.htm](http://europa.eu/rapid/press-release_IP-13-180_en.htm).

<sup>336</sup> Press Release at [http://europa.eu/rapid/press-release\\_IP-13-98\\_en.htm](http://europa.eu/rapid/press-release_IP-13-98_en.htm).

<sup>337</sup> Article 267 TFEU.

need to *consult* the European Court for clarification.<sup>338</sup> This particular reluctance has been identified as a usual practice within the Dutch judiciary, at least in the highest administrative court.<sup>339</sup> In a case such as the one at stake, which concerns the legal effect of a piece of European guidance embodied in the form of a Commission’s Recommendation, the national court is *required* to submit a request for a preliminary ruling to the CJEU.<sup>340</sup>

Be that as it may, the new appeal on a new regulatory decision on termination rates seems to now be being referred by the CBb. The questions referred for preliminary ruling are as follows:<sup>341</sup>

1. Must Article 4(1) of the Framework Directive, read in conjunction with Articles 8 and 13 of the Access Directive, be interpreted as meaning that, in principle, in a dispute concerning the lawfulness of a cost-oriented scale of charges imposed by the national regulatory authority (NRA) in the wholesale call termination market, a national court is permitted to make a ruling which does not accord with the European Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC), 3 in which pure BULRIC is recommended as the appropriate price regulation measure for call termination markets, if, in that national court’s view, this is required on the basis of the facts in the case brought before it and/or on the basis of considerations of national or supranational law?
2. If the answer to Question 1 is affirmative: to what extent is the national court permitted, in assessing a cost-oriented price regulation measure:
  - a. in the light of Article 8(3) of the Framework Directive, to evaluate the NRA’s argument that the development of the internal market is promoted by reference to the degree to which the functioning of the internal market is in fact influenced?
  - b. to assess, in the light of the policy objectives and regulatory principles laid down in Article 8 of the Framework Directive and Article 13 of the Access Directive, whether the price regulation measure:
    - i. is proportionate;
    - ii. is appropriate;
    - iii. has been applied proportionately and is justified?
  - c. to require the NRA to demonstrate adequately that:
    - i. the policy objective, referred to in Article 8(2) of the Framework Directive, that the NRAs should promote competition in the provision of electronic communications networks and electronic communications services is genuinely being attained and that users are genuinely deriving maximum benefit in terms of choice, price and quality;
    - ii. the policy objective, referred to in Article 8(3) of the Framework Directive, that NRAs should contribute to the development of the internal market is genuinely being attained; and

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<sup>338</sup> According to one of the judges of the CBb involved in the case, the argumentation either from OPTA or the Commission was not enough to request a preliminary reference to the CJEU. He claims that if the regulator would have put the internal market argument over the table: “of course, it would have been different(!)”. The reasons why they did not referred the case, he says, is because in the court, they “knew that the answer (by the CJEU) to the question (legal effect of the Recommendation) is no”. National judge, Brussels, 20.11.2014.

<sup>339</sup> On this account, see Lavrijssen, S., Eijkens, J., & Rijkers, M. (2014). The Role of the Highest Administrative Court and the Protection of the Interests of the Energy Consumers in the Netherlands. TILEC Discussion Paper No. 2014-032.

<sup>340</sup> Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling Proceedings, OJ C 338, 6.11.2012, para. 16. Although this recommendation was not in place at the time the appeal was pending.

<sup>341</sup> Case C-28/15, *Koninklijke KPN and Others v Autoriteit Consument en Markt (ACM)* [in progress].

- iii. the policy objective, referred to in Article 8(4) of the Framework Directive, that the interests of the citizens should be promoted is genuinely being attained?
- d. in the light of Article 16(3) of the Framework Directive, and of Article 8(2) and (4) of the Access Directive, when assessing whether the price regulation measure is appropriate, to take into account the fact that the measure has been imposed on the market on which the regulated undertakings possess significant market power but, in the form chosen (pure BULRIC), has the effect of promoting one of the objectives of the Framework Directive, namely the interests of end users, on another market which has not been earmarked for regulation?

The first question is expected to result in an important debate on the role of EU law. Furthermore, it addresses classic and timely questions about the role and legal effect of EU soft-law in the context of the new governance debate. The national judge asks the European court to clarify the discretion of the *national judge* to deviate from a European Recommendation where, at the national level, not only legal national legal but also factual circumstances require doing so. It refers here to the fact that the national conditions remain unchanged.

The second question would challenge the nature and rationale of the Article 7a procedure itself as a supervisory mechanism, provided that the national court is interested in defining to what extent the effect on the Internal Market of a national regulatory decision is *enough* so as to justify a mandatory compliance with a non-binding European instrument. For the telecommunications sector in particular, the court should also determine the suitability of the Internal Market argument to follow the Recommendation when it actually has little effect outside the national borders. To this end, the European court will have to address the question of proportionality of the regulatory decision to modify a measure in the national market in accordance with the Recommendation, especially when national circumstances remain unchanged.

Interestingly, the national court poses question(s) on the *legitimacy* of the court to deviate from the Recommendation, but does not refer to the NRA's. This reflects a significant decoupling of the regulator and the judiciary, even though, in practice, they are performing the same task of tariff regulation. Thus, the role of the regulator might be *adulterated* by the Commission's view in its pursuit of the internal market-building project, or replaced by the judiciary when overturning regulatory decisions.

## Conclusions

This case serves as a reminder for European private lawyers to look beyond the institutional design of the legal areas concerned. Apart from the actors involved in this institutional conflict, the case has evidenced the impact of the sector-specific European supervision procedure put in place as well as the practical legal effect of a soft-law instrument. The CJEU will be decisive in confirming the latter.

The examination of this case reveals the intricacies of a highly bureaucratic procedure whose *raison d'être* is consolidating the Internal Market for electronic communications (*finalité*)

through a consistent implementation of the European Regulatory Framework vis-à-vis national law and the judiciary. The established co-ordinated approach in the implementation of telecommunications regulation involves a regulatory power transfer. However, this regulatory power shift seems to replace democratically elected bodies (i.e. Parliament) as power is re-allocated to administrative bodies further from democratic accountability. As for private law concerns, it represents a novel source a law-making that comes from polarized sources. Thus, the role of the regulator might be influenced by the Commission's view in its pursuit of the internal market-building project, or replaced by the judiciary when overturning regulatory decisions in an attempt to restore the democratic deficit in the established regulatory system. Moreover, the collaborative scheme –mainly based on persuasion and guidance– between the European Commission and the (network of) NRAs seems to be more effective than coercion via the adoption of binding rules or the use of veto powers. As a matter of fact, Article 7a procedure unfolds as a mechanism for a “new” and network governance that potentially shifts the power from the national to the European level. Under this co-ordinated approach, the EU Commission has managed to dodge the political rejection –coming particularly from the Member States, the European Parliament and even the Council of Ministers itself– associated with the creation of an *ex novo* European authority or the enactment of hard law.<sup>342</sup>

In consequence, even though the combination of hard and soft law is considered a less intrusive measure, it actually increases regulatory harmonization with the advantage of bypassing political accountability. This mode of law-making of a post-national nature,<sup>343</sup> and the use of a Recommendation coupled with the scrutiny of the Article 7 procedure extends the mandatory interpretative role of the recommendation.<sup>344</sup>

## 5.2 Law-making and price setting on retail markets

At the retail level, the definition of spheres of competence and power relationships in the telecoms sector has been tackled by the CJEU in the landmark *Vodafone* case. This case concerns the validity of the implementation of the Regulation (EC) No 717/2007, commonly known as the “Roaming Regulation”.<sup>345</sup> This legal text establishes maximum charges, the so-called *Eurotariff*, that mobile telephony operators are allowed to invoice end-users for voice calls received or made by an end-user travelling abroad. Provision is also made for a cap on wholesale charges, i.e. the prices payable by the consumer's network operator to the foreign network. Initially scheduled to expire on 30<sup>th</sup> June 2010, this Regulation was amended to extend its validity until 30<sup>th</sup> June 2012, whilst at the same time extending the caps on charges to SMS and other data transmissions.

<sup>342</sup> By way of example, the conferring of powers to the European Securities and Markets Authority (ESMA), which gave rise to the Judgment of the Court (Grand Chamber) of 22 January 2014 (ESMA case), also C-217/04, ENISA. See also Ottow, A. (2012) ‘Europeanization of the Supervision of Competitive Markets’. *European Public Law* 18(1), pp. 191–221, and Simpson (2011).

<sup>343</sup> Senden, L. (2013), “Soft Post-Legislative Rulemaking: A Time for More Stringent Control”, *European Law Journal*, 19(1), 57-75. Here, Senden refers to *decisional acts*. Article 7a procedure could well be an example of such acts.

<sup>344</sup> Recall *Grimaldi* case.

<sup>345</sup> Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ 2007 L 171, p. 32).

The validity of this Regulation was challenged before the High Court of Justice in England and Wales (High Court). In particular, a reference has been made to the CJEU concerning the validity of provisions for the implementation of Regulation No 717/2007 adopted by the United Kingdom of Great Britain and Northern Ireland in proceedings between Vodafone Ltd and other operators of public mobile telephone networks in the United Kingdom, the European Union and other international markets, and the Secretary of State for Business, Enterprise and Regulatory Reform.

On these grounds, the questions referred to the suitability of Article 95 EC (now Article 114 TFEU) as a legal basis for the adoption of the Regulation and the imposition of a ceiling tariff for Roaming charges and its compliance with the principles of subsidiarity and proportionality. In particular, the national court referred the following questions:

- a) Is Regulation (EC) No 717/2007 invalid, in whole or part, by reason of the inadequacy of Article 95 EC as a legal basis?
- b) Is Article 4 of Regulation (EC) No 717/2007 (together with Articles 2(a) and 6(3) insofar as they refer to the Eurotariff and obligations relating to the Eurotariff) invalid on the grounds that the imposition of a price ceiling in respect of retail roaming charges infringes the principle of proportionality and/or subsidiarity?

The Grand Chamber rendered judgment on The 8th of June 2010.<sup>346</sup> The Court recalls that it already held, in *United Kingdom v. Parliament and Council, ENISA*,<sup>347</sup> that the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonized, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features.<sup>348</sup> The Court also considered that the attempts to solve the problem of the high level of retail prices using the existing legal framework did not yield the effect of lowering charges. In fact, in the court's view, the Regulatory Framework for telecommunications had not provided NRAs with enough tools to act against this problem because of the cross-border nature of roaming services.<sup>349</sup> Therefore, the adoption of the Regulation on the basis of Article 95 TEC is suitable for the purpose it is aimed for.

As for proportionality of the measure adopted regards the cap price in retail markets, the Court considered that the Regulation does not infringe the principle of subsidiarity as long as a "regulation of wholesale charges alone would not have had a direct and immediate effect for consumers", a regulation on retail charges being more appropriate, and that the regulation adopted was the only solution, to tackle the problem at stake.<sup>350</sup> In addition, as for the subsidiarity principle,

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<sup>346</sup> Judgment of the Court (Grand Chamber) of 8 June 2010. Case C-58/08, *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-04999.

<sup>347</sup> C-217/04 *United Kingdom v. European Parliament and Council (ENISA)*, [2006] ECR I-3771.

<sup>348</sup> Ibid. Para. 35

<sup>349</sup> Ibid. Para. 40.

<sup>350</sup> Paragraph 66: "(...)it is clear that regulation of wholesale charges alone would not have had a direct and immediate effect for consumers. By contrast, only the regulation of retail charges could improve the situation of consumers directly". See also paras. 61-65.

the situation is said to require a joint approach in both retail and wholesale markets.<sup>351</sup> In addition, the Court identified that the pursued aim is best achieved at Community level.<sup>352</sup>

### *Comment*

This case is about the EU the boundaries of EU competence on the basis of Article 114 TFEU (Article 95 TEC at that time). The constitutional backing of EU's legislation concerning the internal market harmonization basis is a traditional issue within the European case-law.<sup>353</sup>

The relevance of this case for private law resides not in the competence of the national legislator or national regulator, but on the suitability of the European legislator to establish maximum prices in the retail market under the internal market legal basis, provided that it may represent a spillover of the Internal Market competence. In order to decide on the case, the court had to assess the measure in the view of the principles of proportionality and subsidiarity.

By virtue of the proportionality principle, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.<sup>354</sup> In the case at stake, the EU legislature shall justify its decision of setting cap prices not only in the wholesale market, but also of putting in place ceiling prices, together with information duties concerning roaming charges to end-users. To that end, Recital 14 of the Roaming Regulation states that “experience has shown that reductions in wholesale prices for Community-wide roaming services may not be reflected in lower retail prices for roaming owing to the absence of incentives for this to happen”. In addition, Recital 19 of the Roaming Regulation provides that the *Eurotariff* reasonably reflects the underlying costs involved in the provision of the service giving operators a reasonable margin over the wholesale costs. On this matter, the court acknowledged that regulation of the wholesale market would not be directly translated into a benefit for consumers and that, accordingly, only the regulation of retail prices would directly improve consumers' welfare in terms of lower prices.<sup>355</sup> The court also verified that this target could be best achieved with a supranational action.<sup>356</sup>

Furthermore, the temporary character of the measure also became a justification on the basis of the proportionality principle. In fact, Recital 39 of the Roaming Regulation introduced a sunset rule concerning the limitation of the intervention.<sup>357</sup> In this regard, the court held that the intervention, since it is aimed at protecting consumers against excessive charges, is proportionate even if it implies negative consequences for certain operators, given that such a measure is limited

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<sup>351</sup> Para. 77.

<sup>352</sup> Para. 78.

<sup>353</sup> *Tobacco, Federutility*, etc.

<sup>354</sup> On this account, see Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423.

<sup>355</sup> Para. 66.

<sup>356</sup> Para. 77.

<sup>357</sup> Recital 39: “This common approach should be established for a limited time period. This Regulation may, in the light of a review to be carried out by the Commission, be extended or amended. The Commission should review the effectiveness of this Regulation and the contribution which it makes to the implementation of the regulatory framework and the smooth functioning of the internal market and also examine the impact of this Regulation on the smaller mobile telephony providers in the Community and their position in the Community-wide roaming market”.



in time.<sup>358</sup> To date, Roaming charges and pan-European price ceilings are still in place and only recently an agreement has been reached on their removal from June 2017.<sup>359</sup>

On subsidiarity, a question arises regarding the extent to which prices can be regulated, even once the market has been opened to competition.<sup>360</sup> One may ask whether price regulation is the aim of EU telecommunications regulation and how it might come into conflict with the regulatory goals of the European Regulatory Framework for Telecommunications. Indeed, putting an end to geographic lottery might be justified on grounds of non-discrimination and in the field of roaming charges by the fundamental freedoms.<sup>361</sup> But how can this European intervention be justified in cases where there is no supranational dimension, i.e. where there is not a single market for telecommunications?

Furthermore, it has been argued, that the consumer protection argument might not be enough of a reason to justify a EU intervention, given that the EU legislature is not exclusively competent in consumer issues. In addition, the suitability of Article 114 TFEU as the basis to put an end to a situation that is the result of the conditions of national markets and not a consequence of the disparity between the national legal regimes has been questioned.<sup>362</sup> Accordingly, it has been suggested that a more fitting legal basis would have been Article 308 EC Treaty (now Article 352 TFEU) instead of Article 95.<sup>363</sup>

### *Conclusions*

In *Vodafone*, the court has again conducted a non-restrictive reading of Article 114 TFEU. Particularly in this case, the European justice supports retail price fixing by the European legislature on the grounds of a need for European action to tackle excessive prices. In doing so, the Court confirms the suitability of the Internal Market competence for the adoption of retail prices by the EU legislator itself.

The practical relevance of the intervention results is indisputable. Since the cap prices entered into force, prices for calls and SMS has decreased by 80%, whereas data roaming is currently more than 90% cheaper than it was in 2007.<sup>364</sup>

It remains to be discussed, however, whether it is the aim of the EU to allow fixed prices in certain markets. Remarkably, only a few weeks before the CJEU rendered judgment in *Vodafone*, again the Grand Chamber was in charge of ruling on State intervention on the price for the supply

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<sup>358</sup> Para. 69. In a more substantive assessment, Advocate General (Maduro) argues that the time restraint gives the market a “second opportunity” to correct the market failure. See Para 41 of the AG’s Opinion.

<sup>359</sup> Commission welcomes agreement to end roaming charges and to guarantee an open Internet – Press Release – 30 June 2015, IP/15/5265. Available at [http://europa.eu/rapid/press-release\\_IP-15-5265\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5265_en.htm).

<sup>360</sup> See case C-265/08, *Federutility and Others v Autorità per l’energia elettrica e il gas* [2010] ECR I- 03377.

<sup>361</sup> Para. 32 *Vodafone*.

<sup>362</sup> Brennecke, M. (2010). ‘Case C-58/08, *Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010’. *Common Market Law Review*, 47(6), 1793-1814.

<sup>363</sup> *Ibid.*

<sup>364</sup> Commission welcomes agreement to end roaming charges and to guarantee an open Internet – Press Release – 30 June 2015, IP/15/5265.

of natural gas.<sup>365</sup> And, as expected, such intervention was allowed in view of its compliance with the proportionality principle, although this time by the national regulator.

In conclusion, this means that both the European legislator and the national regulator in the respective markets, supported by the European court, are paradoxically in favor of allowing regulatory price setting in liberalized markets, and this does not come into conflict with the defined objectives of the respective regulatory frameworks.

## 6. Conclusions: From parliamentary rule-making to *specialized* regulatory powers and *sector-specific* supervisory mechanisms

This chapter represents a legal analysis of the potential sources of intervention in the sphere of private law via the making of telecommunications regulation. Such analysis has evidenced how new modes of governance have also influenced the creation of (regulatory) private law.

The liberalization of the telecommunications sector has entailed a shift from national regulation to supranational law-making. The legal basis employed reflects that telecommunications regulation is part of the Internal Market construction project. Against this background, the European Commission seems to take the lead in telecommunications regulation and controls the coordination efforts for a consistent application of the regulatory framework, particularly, in the application of Internal Market principles.<sup>366</sup> As a corollary of liberalization, the regulatory framework for telecommunications contains several contract-related provisions both at the wholesale or retail level. The rights and remedies provided for by the telecoms rules entail implications for private law and, in particular, for the freedom of contract. This has meant an increasing transformation in the way private law is manifested, enacted and applied.

Decision-making at the EU level takes place in a wide range of forms. In the telecoms sector, it occurs via an institutional design based on a system of supervision in which the Commission holds strong supervisory powers that prevent the distorted application of the EU rules by relying on a *collaborative* approach. This aims to remove the divergences among the performance of the different national regulatory authorities. Interestingly, what is also at stake in the implementation case analyzed is the role of EU soft-law. In any case, this chapter has illustrated how a separation of roles between policy/law-making *vis-à-vis* execution/implementation gets blurred when it comes to the supervisory powers of the Commission and the role of NRAs as decision-makers,<sup>367</sup> which must try to give shape not only to the implementation of the measures

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<sup>365</sup> Judgment of the Court (Grand Chamber) 20 April 2010, Case C-265/08, *Federutility and Others v Autorità per l'energia elettrica e il gas* [2010] ECR I- 03377.

<sup>366</sup> Groenleer, M., & Kars, M. (2008). Regulation and governance of the European telecommunications sector: from network to agency. In ECPR Standing Group on Regulatory Governance Conference '(Re) Regulation in the Wake of Neoliberalism. Consequences of three decades of privatization and market liberalization'. Utrecht.

<sup>367</sup> Interview with the Economic Expert at OPTA, Florence 18.10.2012: "The discussions in BEREC are, thus, broader than the specific functions performed by NRAs at the national level. For instance, OPTA (former Dutch NRA) is not empowered in the field of spectrum issues and some discussions within the BEREC are about spectrum issues or net neutrality. These matters concern policy. However, *the BEREC does not want politicians sitting around the table*. And, therefore, it is in those (potentially political) cases where the Ministry could express some concern into the matter and its

adopted at EU level, but also to their *consistent* application. This has given rise to a “semi-autonomous level of governance”.<sup>368</sup>

In particular, the analysis of the case-study on termination rates has shown how the national authority, at the very far end representing the role of the Member State *vis-à-vis* the EU, has become just a mere “executive authority”<sup>369</sup> (strongly) subordinated to the regulatory objectives set out at the EU level. In a similar vein, a closer look at the implementation of the EU Regulatory Framework for Electronic Communications reveals a subtle increasing relevance of the EU Commission’s role at the functional level when it comes to the achievement of one of the major regulatory goals: the consistent application of the legal framework and harmonization of the Internal Market. Hence, given the lack of capacity of the EU to implement EU rules according to the EU’s aspirations, it has set up a proper institutional framework made out of national players (NRAs), European *fora* (BEREC) and implementing procedures (Article 7 Framework Directive) which ensure the application of the Regulatory Framework according to the EU understanding and in line with its policy goals. Against this background, the European Commission seems to take the lead in telecommunications regulation and controls the coordination efforts for a consistent application of the regulatory framework, particularly for the application of Internal Market principles.<sup>370</sup> This means that under the Internal Market-driven institutional and procedural setting put in place, the European Commission might be enjoying a significant level of control and could potentially restrict the national procedural autonomy principle, giving rise to a new mode of law-making deeply committed to a market building project.

In close connection to the above, one may ask whether NRAs, under the exercise of powers defy the orthodox separation of powers and the principle of legality.<sup>371</sup> Particularly, the examination of this case brings normative conclusions related to the democratic accountability of the examined supervisory mechanism and the principle of legality. Here the role of the national court becomes prominent in order to counterbalance the *side effects* of the procedure regarding the legitimacy of the regulatory intervention, be it national or European. This gives rise to the issue of the spillover of the judiciary in the making of regulatory law. Thus, when the national judiciary is reviewing a regulatory decision, it is not getting into the shoes of the regulator, but it certainly shapes the way in which EU legislation must be applied into the national system. Whereas the clash (conflict and resistance) of the national judiciary *vis-à-vis* the application of EU rules affecting private and contract law is visible in the implementation process of the Regulatory Framework, this

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desire of being involved in one way or another. Accordingly, the distinction between the regulator and the Government is “quite clear” at the national level; whereas, at the European level, *is not that clear-cut*”, emphasis added.

<sup>368</sup> As Joerges has put it; in Joerges, C. (2006). “Deliberative Political Processes’ Revisited: What Have we Learnt About the Legitimacy of Supranational Decision - Making”, *Journal of Common Market Studies*, 44(4) 779-802.

<sup>369</sup> Pescatore *supra* n 42, at p. 46.

<sup>370</sup> Groenleer, M., and Kars, M. (2008). Regulation and governance of the European telecommunications sector: from network to agency. In ECPR Standing Group on Regulatory Governance Conference ‘(Re) Regulation in the Wake of Neoliberalism. Consequences of three decades of privatization and market liberalization’. Utrecht.

<sup>371</sup> See for a discussion of the position of NRAs in various Member States: Zwart, T. and Verhey, L. (eds.) (2003), *Agencies in European and Comparative Law*, Intersentia; and Caranta, R., Andenas, M. and Fairgrieve, D. (2004), *Independent Administrative Authorities*, London, British Institute of International and Comparative Law.

turf war is most noticeable under the judicial review process of regulatory adjudication of disputes by NRAs.<sup>372</sup>

In sum, the *making* of telecommunications regulation is multidimensional. Formal and informal procedures come together and, together with delegated acts and monitoring practices by the EU, increase the role of soft-law. The internal market harmonization expands EU's competence to regulate issues related to private law. In particular, the influence of telecommunications regulation in private law takes place mainly via regulatory decisions. Thus for example, price control and tariff regulation are part of the NRAs' regulatory duties. This allocation of powers exclusively to the sector-specific regulator shifts the source of private law from the legislature to the sector-specific regulator, monitored by sector-specific European supervisory mechanisms. To conclude, this chapter argues that the institutional design of telecommunications regulation, together with the institutional conflicts, as evidenced in the cases analyzed, clearly impact on the substance of private law as long as regulatory interventions are contingent upon the objectives of the regulatory framework for electronic communications, namely the promotion of competition and protection of EU citizens and, most importantly the development of the Internal Market.

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<sup>372</sup> See, in this particular, Chapter 5 of this Dissertation.

## CHAPTER 4 – SUBSTANTIVE LAW.

### CONTRACTUAL IMPLICATIONS OF THE EU REGULATORY FRAMEWORK FOR ELECTRONIC COMMUNICATIONS

#### 1. Introduction. Contracts as a regulatory tool

In recent decades, Private law has been used as an equally efficient technique to regulate markets as other forms of public, social or economic regulation.<sup>1</sup> As a matter of fact, contracts in the telecommunications sector are aimed at enabling (an efficient) market participation. This market participation regulatory model builds heavily upon the idea of *access*.<sup>2</sup> Given that telecommunications is a networked industry,<sup>3</sup> access is crucial for the functioning of the market.

The configuration of the access paradigm operates at two different levels, wholesale and retail markets. At the wholesale level, the network operator (owner of the network infrastructure) must grant access to the network at least to an alternative undertaking providing telecom services in order to facilitate competition. Competition in the electronic communications field is based on the assumption that all market players should be able to provide services through the network, regardless of who is the holder of the property rights through the network; usually the incumbent.<sup>4</sup> To this end, the European regulatory scheme for telecommunications provides for a regime of regulatory obligations that enable access to and the interconnection of networks. Access and interconnection are thus used as regulatory tools that circumvent to a great extent the cardinal private law principle of freedom of contract. At the retail level, the idea of access is more easily linked to access to the market (*access justice*).<sup>5</sup> The legal regime provides for a set of rights that are oriented to strengthen consumer protection on the basis of a more competitive –i.e. efficient– behavior at retail level, facilitating the functioning of the market. Yet, simply introducing *competitive contract rules*<sup>6</sup> (competition law approach) does not fulfill the aims of competition policy as long as certain consumers remain excluded from the market. Accordingly, in addition to more competition-oriented mechanisms, the legislator has introduced more *redistributive* tools (universal service approach) aimed at enabling access to the market to those users who are, economically or geographically, vulnerable. By so doing, the regulatory framework provides for

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<sup>1</sup> Collins, H. (1999), *Regulating Contracts*, Oxford University Press.

<sup>2</sup> Micklitz, H. W. (Ed.) (2011), *The many concepts of social justice in European private law*. Edward Elgar Publishing.

<sup>3</sup> Millward, R. (2005), *Private and public enterprise in Europe: energy, telecommunications and transport, 1830-1990*. Cambridge University Press.

<sup>4</sup> In telecommunications, the incumbent is the former monopolist who, under such condition, still enjoys significant market share.

<sup>5</sup> Micklitz, H.W. (2011), “Social Justice and Access Justice in Private Law” *EUI Working Paper LAW* No. 2011/02..

<sup>6</sup> Micklitz, H. W. (2005), ‘The Concept of Competitive Contract Law’, *Penn State International Law Review*, 23, pp. 549ff.

certain universal service obligations binding telecommunications operators that also impact the classical *autonomie de la volonté*.

Against this background, the introduction of private law rights and remedies aim to advance market competition. Hence, in the design of a competitive market for telecom, the legislator has deployed contract law as a regulatory instrument in order to achieve the aims of the European Regulatory Framework for Electronic Communications.<sup>7</sup> This chapter argues that, when contract law is used to give access to the market, it is used as a regulatory instrument in such a way that it implies a transformation in the way private law has been traditionally understood.<sup>8</sup> In other words, it raises the question of whether there is a contrast between the objectives of the European regulatory framework for telecommunications and the traditional functions of private law. The analysis carried out in this chapter will thereby aim fruitful in order to assess the role of contract law in both the wholesale and the retail markets. In the former contracts are regulatory *in nature*, in the retail market the focus is on whether we can it is apt to talk about the emergence of a New European Socio-Private Law<sup>9</sup> as long as it that introduces certain rights whose features bring the law closer to public services ideals under in a privatized relations resulting in a blurred distinction between public and private law. Furthermore, and most importantly, this chapter looks at a potential development of the *Market-State*<sup>10</sup> and whether there is a gradual introduction (*intrusion and substitution*) of new remedies in B2C (business-to-consumer) relationships. In other words, it addresses the implications of a potential transformation in private law when it comes to contractual relationships.

Having analyzed the creation of telecommunications regulation in the previous chapter, not only from an historical perspective, but also from the viewpoint of the actors involved and their interaction, this chapter exhibits, from a descriptive perspective, the content of telecommunications rules and their substantial provisions in view of their potential implications for private law. The chapter is structured in different sections. It deals first [section 2] with the regulatory goals and the two different approaches envisaged to achieve those aims. Secondly [section 3], it provides an overview of the rights and remedies provided for in the EU Regulatory Framework at the wholesale –regulatory obligations– as well as the retail level –consumer protection provisions. Section 4 elaborates on two cases studies. The first case study, concerning the wholesale market, is related to the obligation to negotiate interconnection agreements between undertakings that publicly provide electronic communications services. A second case study examines the Italian retail market dealing with a consumer-related dispute where the breach of quality standards in the provision of services gives rise to the emergence of a remedy apparently *endogenous* to the telecommunications sector; in this case, the right to switch for free or contract termination without incurring a penalty. Finally,

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<sup>7</sup> Already introduced by Micklitz *supra* n 6.

<sup>8</sup> Understood as a “coherent set of rules for the centralized adjudication of contracts, torts, and property dispute”, Caruso, D. (2006) “Private Law and State-Making in the Age of Globalization”, *New York University Journal of International Law and Politics*, 39, 1–74; at p. 5, referring to the notion of traditional private law in the literature on global State-making.

<sup>9</sup> Micklitz, H.-W., (2011) ‘Universal Services: Nucleus for a Social European Private Law’, in Cremona, M. (ed.), *Market Integration and Public Services in the European Union*, Oxford University Press, pp. 63-102.

<sup>10</sup> Bobbitt, P. (2002), *The Shield of Achilles: War, Peace and the Course of History*, Knopf.

section 5 aims to display the interplay between sector-specific rules *vis-à-vis* horizontal regimes represented by broader private law rules and the paradoxes in the application of the different regimes. The chapter concludes [section 6] by arguing that the expansion of (goal oriented) private law provisions contained within sector-specific regulation downgrades the application of civil and contract law.

## 2. Policy objectives of the EU Regulatory Framework for Electronic Communications

The policy objectives of the EU Regulatory Framework for Electronic Communications are:<sup>11</sup> 1) contributing to the development of the Internal Market by removing obstacles to the provision of electronic communications networks and services at European level and fostering the interoperability of pan-European services, on the basis of non-discrimination and under a collaborative approach between the NRAs and the EU Commission and among them; 2) encouraging competition, by ensuring users to derive the maximum benefit in terms of choice, price, and quality; and 3) guaranteeing basic users' (citizens')<sup>12</sup> service rights by ensuring access to universal services, a high-level of protection of consumers, and that the integrity and security of public communications networks are maintained.

The first objective was already addressed in the previous chapter [chapter 3], where it can be seen that the Internal Market aspiration penetrates the institutional design of telecommunications rule-making as a whole. The two other goals –i.e. encouraging competition and ensuring *basic* user's services rights– are achieved via substantive law provisions. Given that they are two distinct goals, two different approaches are used. The EU Regulatory Framework provides a set of rules that are clearly competition-oriented. The role of the law in the retail market is to facilitate competition by grating certain rights that seem to place the consumer at a certain level field to participate *efficiently* in the market. At the wholesale level, this is reflected in certain provisions, which provide for regulatory obligations (e.g. access and interconnection). These obligations seek to open the market to competition by enabling the participation of third parties to deliver services through the network. At the retail level, the idea of access prevails too. The universal service ideal is deeply rooted in the idea of non-discriminatory access. This twofold approach towards substantive law provisions has given rise to the emergence of two differentiated sets of rules: competition-oriented (autonomy) and social-oriented (regulation).<sup>13</sup> Notwithstanding this differentiation, both approaches are accommodated within the sector-related regime, reconciling the nature of the service with the liberalization of the sector and the subsequent *imposed*

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<sup>11</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services as amended by Directive 2009/140/EC ('Framework Directive'). Article 8: Policy objectives and regulatory principles.

<sup>12</sup> Benyon, F. ed. (2013), *Services and the EU Citizen*. Hart Publishing.

<sup>13</sup> On the distinction of autonomy *vis-à-vis* regulation see the dichotomy of the Formal v the Social in Kennedy, D. (1997), 'The Paradox of American Critical Legalism' *European Law Journal*, 3(4) 359–377.

competition. This dualist discourse can be applied not only to the telecommunications sector, but also to other network services given their nature as Services of General Economic Interest.

### **Between Competition (Autonomy) and the Social (Regulation): A dual *approach* in Services of General Economic Interest**

Services identified as Network services –particularly, telecommunications services and the supply of electricity, gas, and water<sup>14</sup>– are included within the concept of Services of General Economic Interest (hereinafter, SGEIs). Traditionally, SGEIs were provided by the State under a public monopoly regime. However, since the 1980s, the European Community has been pressing for the liberalization of these markets, and many formerly state-owned companies have been gradually privatized. In addition, in the course of this liberalization, national monopolies were broken up and their privileges were drastically reduced, with the aim of making competition possible. The main purpose of the liberalization process was to create competition and, thus, more cost-efficient services. The relationship with the recipients has, thereby, been transferred from the public to the private law domain. Accordingly, the provision of the service falls within private law. Yet, their nature as network services and the fact that they constitute economic activities of particular importance to citizens means that they are subjected to public intervention. Its nature as regulated markets services entails, therefore, a particular configuration of the contracts for the provision of these services, freedom of contract being, to some extent, limited. Hence, the implemented regime pursues the model of the *Regulatory State*.<sup>15</sup> Under this model, the provision of the immediate service is entrusted to a private company, whereas the State guarantees that private providers comply with their supply obligations.<sup>16</sup>

The aim of achieving an Internal Market means that the regulation of Services of General Economic Interest occurs at the European Union level. The provision of such services (i.e. the relationship user-provider) is, thus, an evolving field of European Private Law. Nevertheless, despite several attempts,<sup>17</sup> the European Union does not have a single European Contract Law, resulting in the regulation of different contracts in an isolated manner. In addition, freedom of contract is not expressly recognized in European Union Law. Nonetheless, in spite of this lack of recognition, it has been acknowledged by the European Union Court of Justice,<sup>18</sup> and it has gradually gained a foothold within public policy; e.g. consumer protection.<sup>19</sup> Further, some claimed that the principle of contractual freedom can be constructed in relation to the protection of

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<sup>14</sup> This Chapter mainly addresses Telecommunications Services, as part of the Services of General Economic Interest. However, I have omitted any further reference to the classification of the Services of General Economic Interest as this task involves a more detailed analysis into the conceptual dimension of such services and this is not the purpose of this section.

<sup>15</sup> Majone, G. (1994) 'The rise of the Regulatory State in Europe', *West European Politics*, 17(3) 77-101.

<sup>16</sup> Rott, P. (2005), 'A New Social Contract Law for Public services?—Consequences from Regulation of Services of General Economic Interest in the EC', *European Review of Contract Law*, 3, pp. 323–345.

<sup>17</sup> Niglia, L. (2015), *The Struggle for European Private Law. A Critique of Codification*, Hart publishing.

<sup>18</sup> Case C-240/97 *Spain v European Commission* [1999] ECR I-6571; Case C-277/05 *Société thermale d'Eugénie-les-Bains v Ministère de l'Economie, des Finances et de l'Industrie* [2007] ECR I-6415.

<sup>19</sup> Whittaker, S. (2011), 'The optional instrument of European contract law and freedom of contract', *European Review of Contract Law*, 7(3) 371-398.



competition, as a result of its interrelation with the EC Treaty's aim of an open, competitively-structured market.<sup>20</sup> In other words, private autonomy is seen as "an instrument for allocation of national economic resources as long as the participants interact with one another on an approximately equal level –which is often not the case".<sup>21</sup> Following the argument of Basedow, *when this is not the case*, the State takes measures to lift the weaker party to a similar level. In the case of SGEIs, these measures may consist of, for instance, information duties<sup>22</sup> (enhancing competition), universal service requirements (protecting the social), or –as in the case of telecommunications– both.

Market liberalization was envisaged to entail a new outlook for services provided within regulated markets as former public services. In theory, as a result of competition, the opening of these markets would mean an improvement in the position of services users, as a larger supply creating choice, better prices and an increase in quality.<sup>23</sup> With liberalization, new telecommunications service providers have recently emerged which has implied greater competition. Now, telecommunications users are able to look for better deals taking part in the competition game. However, the reality is that, as a result of the market-opening, there were –and there still are– people who stand outside of these markets and Universal Service requirements were, thereby, established. The necessity of preserving access conditions in liberalized markets has led to the use of private law principles in combination with other values coming traditionally from economic public law or social policies; i.e. private supply contracts but under the obligation to contract (access and interconnection remedies & universal service obligations) or price regulation via tariff controls and price caps, for instance. The regulation of these services is, thus, derived from a combination two different approaches.

Since there is no explicit EU competence in relation to the Universal Service, it had to be created out of existing EU Treaty competition rules and the principles and instruments dealing with the creation of the Internal Market.<sup>24</sup> In fact, the rules that govern these services are mostly based on Article 95 EC Treaty (now Article 114 TFEU), related to the *establishment and functioning of the Internal Market*. In this regard, rights such as information duties, the right to switch provider, the right of termination, cancellation, withdrawal, etc., are aimed at fostering competition. These rights function as a counterbalance for consumers and encourage its *efficient* actuation in the market. Nevertheless, the provision of SGEIs is also subject to public/universal service obligations,

<sup>20</sup> Basedow, J. (2008), 'Freedom of Contract in the European Union', *European Review of Private Law*, 16, pp. 901-923.

<sup>21</sup> Ibid., see p. 904

<sup>22</sup> In this case, I do not pretend to go further into the debate concerning the real recipients of disclosure regulation and the different dichotomies that are part of the Wilhelmsson analysis, in Wilhelmsson, T. (2004a) 'Varieties of Welfarism in European Contract Law Blunt Dichotomies on Contractual Values', *European Law Journal*, 10(6) 712-733.

<sup>23</sup> For example, broadband Internet is today much cheaper than a few years ago. For an analysis of the improvement of the German telecommunications markets as a result of the liberalization, see Möschel, W. (2009), 'The Future Regulatory Framework for Telecommunications: General Competition Law instead of Sector-Specific Regulation–A German Perspective' *European Business Organization Law Review*, 10(1) 149-163.

<sup>24</sup> Braun, J.-D. & Capito, R. (2009) The emergence of EC Telecommunications Law as a new Self-standing field within Community Law, in Koenig, C.; Bartosh, A.; Braun, J.D and Romes, M., *EC Competition and Telecommunications Law*, 2<sup>nd</sup> edition, Wolters Kluwer, pp. 41-52. See also Davies, J., & Szyssczack, E. (2011), 'Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest', in E. Szyssczack, J. Davies, M. Andeanes & T. Bekkedal (Eds.), *Developments in Services of General Interest*, The Hague. T.M.C. Asser Press, pp. 155-178.

due to its character as essential services/facilities. These obligations lie at the heart of the human rights dimension, protecting the most vulnerable consumers; whereas private law is traditionally considered to encourage the functioning of the competitive market by contract deeply rooted in the autonomy of the parties. As a result, the rules governing these services pursue a dual approach: to enhance competition within the Internal Market (*Internal Market approach*), and –at the same time– to protect other social/welfarist values (*Universal Service approach*).

With regard to the Internal Market approach, the provision of mandatory rules is intended to empower users of SGEIs in general or telecommunications users in particular. Thus, rights such as information, cancellation, choice, termination, withdrawal, switching, etc., are oriented to encourage competition by granting consumers the necessary tools to participate in the market *efficiently*.

On the other hand, there is a more interventionist stream (a clear *visible hand*) granting other rights more in the line with social policies.<sup>25</sup> Market failures cannot be corrected simply by the establishment of rights and remedies aimed at the promotion of competition; rather, it is also necessary to protect the most vulnerable consumers. This approach is derived from the premise that the forces of the market are not able to produce a satisfactory outcome at all times. Thus, room is left to authorities to interfere in order to fill gaps consistent with public policy objectives; for example, access rights, affordable access, physical access, continuity, prohibition of disconnection, etc., were granted due to the link between the absence of such services and social exclusion. It is not, therefore, an intervention based on the enhancement of competition within the Internal Market, but rather a regulatory market interference granting new rights –related to the accessibility to the service– hitherto unknown within the European consumer *acquis* or within the different national private legal orders.

*Universal Service* as a concept existed already in the 19<sup>th</sup> Century in the UK<sup>26</sup> and widely adopted in the US,<sup>27</sup> has been used by the European Union in order to guarantee the effective accessibility to essential services by ensuring the availability a provider of last resort in order to keep those services designated as Universal Services accessible, equivalent to the level of access previously provided by the State itself.<sup>28</sup> Therefore, access to services is achieved by imposing Universal Service Obligations (hereinafter, USOs), which are aimed at guaranteeing that everyone has access to certain essential services of a high quality and at prices that they can afford.<sup>29</sup> Further, according to the European Commission, Universal Service is a concept aimed at preventing social

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<sup>25</sup> The European Social Model was recognized by the Nice European Council 2000. On this account, see Ross, M. (2009), The value of Solidarity in European Public Services, in Krajewski; Neergaard; Van de Gronden (Ed.), *The Changing Legal Framework for Services of General Interest in Europe*, pp. 81-100. The Hague, T.M.C. Asser Press. See also Scharpf, F. W. (2002), 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies*, 40, pp. 645–670.

<sup>26</sup> Uniform Penny Post, Rowland Hill's *Post Office Reform: its Importance and Practicability* (February 1837).

<sup>27</sup> US Communications Act of 1934.

<sup>28</sup> See Communication from the Commission (1996), Services of General Interest in Europe. COM(96) 443 final.

<sup>29</sup> Ibid. p. 2.

exclusion.<sup>30</sup> Hence, the designation of a service as a Universal Service implies “the right of everyone to access certain services considered as essential and imposes obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price”.<sup>31</sup> These assumptions entail interventions within the freedom of contract which go beyond the traditional private law. In the telecommunications field, an illustration of this intervention is Article 1(2) Universal Service Directive<sup>32</sup>:

“[t]his Directive establishes the rights of end-users and the corresponding obligations of undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition (...)”.

Another example statement can be found in Recital 47 of the Directive 2009/73/EC concerning common rules for the internal market in natural gas<sup>33</sup>, which establishes that “[t]he citizens of the Union and, where Member States deem it to be appropriate, small enterprises, should be able to enjoy *public service obligations*, in particular with regard to security of supply and reasonable tariffs”.<sup>34</sup> These public service obligations are contained in Article 3 of the Directive 2009/73/EC, establishing that Member States may impose on undertakings *public service obligations* which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, comprising energy efficiency, energy from renewable sources and climate protection. Article 3 of Directive 2009/72/EC concerning common rules for the internal market in electricity<sup>35</sup> is drafted in similar terms. Likewise, Directive 2002/22/EC (Universal Service Directive), allocates its entire Chapter II to Universal Service obligations. Freedom of contract has, thereby, been strongly limited in favor of the most vulnerable consumers who, without access, could be subject to discrimination or social exclusion.

At the wholesale level, Article 1(1) of the Access Directive establishes that the aim is “(...) to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits”.<sup>36</sup> To this end, when it comes to relationships among operators (wholesale market), the rules establish certain mandatory

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<sup>30</sup> *Inter alia*, Conclusions of the European Commission Communication on ‘Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC, 23.11.2011, COM(2011) 795 final, p. 12.

<sup>31</sup> See Green Paper on Services of General Interest, COM (2003) 270, 21.5.2003, paragraphs 50 to 54. See also Micklitz, H.-W., (2011) ‘Universal Services: Nucleus for a Social European Private Law’, in Cremona, M. (ed.), *Market Integration and Public Services in the European Union*, Oxford University Press, pp. 63-102; and Rott, P. (2005)

<sup>32</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on *universal service and users' rights relating to electronic communications networks and services* (OJ L 108 , 24.04.2002, pp. 55-77) and now amended by the Directive 2009/136/EC (OJ L 337 18.12.2009 , pp. 11-36).

<sup>33</sup> OJ L 211, 14.8.2009, pp. 94-136

<sup>34</sup> Emphasis added.

<sup>35</sup> OJ L 211, 14.8.2009, pp. 55-93.

<sup>36</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

rules.<sup>37</sup> The main idea is *access*, given that access regime allow alternative operators to access to the Significant Market Power (SMP) operators' networks which enables competition.

The goals in the wholesale and in the retail markets are closely connected. They follow common approaches, since the achievement of a competitive market in telecommunications is a mediate goal to enhance consumer welfare. Accordingly, the different European rules that govern the provision of services in regulated markets comprise both private and public law mechanisms. As a result, the mix between private and public instruments, in conjunction with the absence of a coherent welfarist system of values in the EU regulation, trigger "an inherent and inevitable *tension* in the welfare-state concept itself".<sup>38</sup> Hence, the challenge for the legislator is to successfully combine the enhancement of competition with the preservation of Universal Service requirements.<sup>39</sup> All this leads to the existence of rules concerning private relations –such as contracts for the supply of a service categorized as Service of General Economic Interest– which establish not only mandatory provisions concerning private law, but also make use of the establishment of public/universal service obligations –which are more akin to public policy.

### 3. Contractual regulation in the Regulatory Framework for Electronic Communications. Wholesale and retail markets

The cornerstone and the main purpose of telecommunications regulation is the achievement of a fully competitive (internal) market for telecommunications.<sup>40</sup> The designed system is then based on the assumption that competition contributes to the creation of economic welfare by yielding consumer benefits, translated into lower prices, better quality services and more consumer choice. The paramount idea of network services is, consequently, *access* to the market. Against this background, the legislator has relied on *ex-ante* regulatory intervention via contract law to achieve the regulatory goals. Because electronic communications markets encompass two different levels – and, hence, rationales–, it requires two different models of intervention: one for wholesale and another for retail markets. At the wholesale level, the access paradigm interferes with the contractual dimension as it implies a regulatory obligation for the network operator to contract with the party seeking access to the network. As mentioned above, the European Regulatory Framework harmonises the manner in which Member States regulate access to, and the interconnection of,

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<sup>37</sup> Article 1(2) Access Directive.

<sup>38</sup> Wilhelmsson (2004a), p. 715.

<sup>39</sup> This conflict related to the European *social market economy* has been addressed by the Court of Justice within the Viking case judgment (Case C-438/05, International Transport Worker's Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Esti), observing that '[s]ince the Community has ... not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy' (para. 79). For a deeper analysis see Azoulai, L. (2009) 'The Court of Justice and the Social Market Economy. The emergence of an ideal and the conditions for its realization'. *Common Market Law Review*, 45, pp. 1335-1355. For an illustration of the conflicting "market-making" and "market-correcting" policies, see Scharpf, Fritz W. (2012), 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies*, 40 (4), pp. 645–670.

<sup>40</sup> Pillar I of the Digital Agenda for Europe. Europe 2020 Strategy, available at <http://ec.europa.eu/digital-agenda/digital-agenda-europe>.

electronic communications networks.<sup>41</sup> Accordingly, the Access Directive sets up the “rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities”.<sup>42</sup> For instance, under the European legal framework for electronic communications, operators enjoying Significant Market Power must subject the terms and conditions of access and/or interconnection provision to the approval of the regulator. The contract is formally called “Reference Interconnection Offer” or “RIO”. On the other hand, at the retail level, provided there is a contractual relationship between the user and the service provider, the provision of Services of General Economic Interest (“SGEIs”) also falls within contract law. Consumer law provisions are also applicable to these contracts, insofar as SGEIs users are household customers, i.e. they act as consumers.<sup>43</sup>

This section briefly analyzes the contractual rights and remedies provided for in the EU Regulatory Framework for Electronic Communications.

### 3.1. “Regulatory rights and obligations” in wholesale markets

At the wholesale level, the introduction of competition is undertaken via regulation, whose rationale is to ensure a certain level of “sustainable competition”<sup>44</sup> by creating a level playing field through granting access to the networks –and its interoperability– in order to overcome market entry barriers. Given that telecommunications are characterized by economies of scale and scope, the simple opening to competition does not prevent the existence of undertakings holding Significant Market Power (SMP operators), which may hinder competition. While the combined system adopted (competition law + sector-specific regulation) provides for an extensive supervision that encompasses a three-stage procedure (market analysis, SMP designation, and imposition of regulatory obligations), this section will focus only on the latter as long as regulatory obligations, *remedies* so-called, have an impact in the contractual relationships between the different telecommunications network operators. The imposition of regulatory obligations is the third stage of such regulatory process.

In particular, this tiered-procedure can be summarized as follows:<sup>45</sup> 1) first, there is a process of market definition in order to identify whether the market is subject to regulatory intervention<sup>46</sup>, so-called *relevant markets*; 2) then, a market analysis is carried out in order to detect whether there are undertakings which hold a certain level of market power which may distort prices at a competitive level –Significant Market Power; SMP–;<sup>47</sup> 3) the last stage involves the imposition of regulatory obligation(s).<sup>48</sup> Accordingly, the EU Regulatory Framework for Electronic

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<sup>41</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (‘Access Directive’); Article 1(1).

<sup>42</sup> Ibid. Article 1(2).

<sup>43</sup> Rott (2009).

<sup>44</sup> Article 1(1) Access Directive.

<sup>45</sup> For a deeper analysis of the imposition of regulatory remedies in telecoms, not only *ex-ante*, but also *ex-post*, see De Streel (2004) ‘Remedies in the European Electronic Communications Sector’, in Geradin, D. (Ed.). *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation*, Intersentia, pp. 67-122.

<sup>46</sup> The procedure of market identification and definition is set out by Article 15 Framework Directive.

<sup>47</sup> Articles 14 and 16 Framework Directive.

<sup>48</sup> Article 16 Framework Directive, Article 8 Access Directive and Article 17 Universal Service Directive.

Communications provides for a system whereby the imposition of regulatory obligations is conditional upon the existence of markets susceptible to *ex-ante* regulation (relevant markets), and SMP operators, giving rise to asymmetric regulation;<sup>49</sup> provided the telecommunications sector is considered to be a competitive market, with the exception of those situations where a contracting party is identified as SMP on a relevant market. In such event –i.e. when in a market the two premises can be identified (relevant market + SMP power) the NRA concerned should impose, at least, one regulatory obligation. Its choice will depend on the nature of the problem. This means that NRAs enjoy a certain degree of flexibility in the imposition of remedies. In addition, the specific regulatory obligation imposed should be *effective* in addressing the lack of competition and must be *proportionate* in relation to the problem concerned. The imposition of these remedies also needs to be *justified* in the light of the objectives enshrined in Article 8, Framework Directive,<sup>50</sup> and *proportionate*;<sup>51</sup> i.e. the interventions chosen should be the least intrusive option possible to achieve the regulatory aim.

### Role and nature of “regulatory obligations”

From the empirical analysis it follows that contractual disputes between operators mainly obtain to problems concerning the breach of some of the terms specified in the interconnection and access contracts as well as their economic conditions.<sup>52</sup> This is the result of conflicts of interests caused by the extant bottleneck facilities. Thus, operators enjoying dominant positions sometimes abuse their position by imposing economic barriers to operators seeking network access or physically interrupt the access to the relevant infrastructure, which leads those concerned to report these abuses or to initiate a dispute settlement procedure.<sup>53</sup> Further, certain operators have reported problems of client migration, i.e. when operators block the transfer of clients from one company to another.

The regulatory design is aimed at mitigating the potential conflicts between undertakings that provide electronic communications networks and services, via the imposition of regulatory obligations. The rationale for regulatory intervention is the existence of market failures, negative network externalities and information asymmetry.<sup>54</sup> Regulatory intervention is grounded on the necessity of preventing the abuse of a dominant position over other network operators. The target is the achievement of the ideal of a *flawless, competitive and cost-oriented* commercial relationships between the parties, such that it can give rise to interconnected networks and services at competitive costs in the wholesale market which, in turn, might be translated into lower prices in

<sup>49</sup> Petiz, M. (2005), “Asymmetric access price regulation in telecommunications markets”, *European Economic Review*, 49(2), pp. 341–358. See also Carter, M. and J. Wright (2003), “Asymmetric network interconnection”, *Review of Industrial Organization*, 22, pp. 27–46.

<sup>50</sup> Articles 5 and 8, Access Directive.

<sup>51</sup> Article 5(2), 8(4), 12(2) and Recital 15 of the Access Directive.

<sup>52</sup> Interconnection is the process of handling calls for other service providers. This allows the customers of one service provider to communicate with the customers of another service provider. Thus, as a way of example, if two operators A and B are not interconnected partners then it would not be possible for a customer of Operator A to communicate with a customer of operator B.

<sup>53</sup> An exhaustive analysis of dispute resolution and its institutional design in telecoms wholesale market and is carried out in Chapter 5 of this dissertation.

<sup>54</sup> Stiglitz, J. E. (1999), “Promoting competition in telecommunications”, *Centro de Estudios Economicos de la Regulacion*. Working Paper Series.

the retail market. To this end, the Regulatory Framework for Electronic Communications has put in place a set of obligations on operators and market review procedures. In particular, Articles 9 to 13 of Directive 2002/19/EC (Access Directive) lists the following obligations on operators: transparency obligation,<sup>55</sup> non-discrimination obligation,<sup>56</sup> accounting separation obligation,<sup>57</sup> obligation of access to essential facilities,<sup>58</sup> price control and cost accounting obligations.<sup>59</sup> In addition, the 2009 Amendment to the Access Directive includes two new obligations: imposition of functional separation of vertically integrated undertakings under specific circumstances (*ultima ratio*),<sup>60</sup> and the procedure to follow when a vertically integrated undertaking decides to carry out a voluntary separation.<sup>61</sup>

In circumstances in which none of the wholesale remedies proves to be effective, i.e. not resulting in the achievement of the objectives set out in Article 8 of Framework Directive, NRAs are entitled to impose regulatory obligations at the retail level.<sup>62</sup> With the aim of protecting end-users interests whilst promoting effective competition, these obligations on the retail market may consist in the application of appropriate retail price caps, measures to control individual tariffs, or measures to orient tariffs towards costs or prices on comparable markets.<sup>63</sup>

In practice, this has resulted in National Regulatory Authorities attempting to put an end to the contractual problems arising from the existence of bottleneck facilities via the establishment of regulatory decisions concerning, mainly, the fees to be paid for the wholesale services (interconnection charges, access, termination rates, etc.) or the establishment of regulatory contracts (Reference Offers; “RO” or “RIO”) in order to avoid further potential disputes.

As opposed to, or rather compared to, the remedies provided under competition law, these regulatory obligations do not consist in fines and/or damages, but rather they are akin to *ex-ante remedies* that have a *direct impact* in the contractual relationships between operators. The legal understanding of “remedy” is crucial for the dichotomy *regulation/competition* interventions in a certain market. Thus, while *competition* remedies are aimed at correcting existing market failures, the imposition of *regulatory obligations* aims to avoid future market failures.<sup>64</sup> This distinction is significant for present purposes given that this section deliberately leaves aside competition law

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<sup>55</sup>Ibid. Article 9.

<sup>56</sup>Ibid. Article 10.

<sup>57</sup>Ibid. Article 11.

<sup>58</sup>Ibid. Article 12.

<sup>59</sup>Ibid. Article 13.

<sup>60</sup> Article 13a as introduced by the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 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 (‘Better Regulation Directive’).

<sup>61</sup>Article 13b as introduced by the Directive 2009/140/EC (Better Regulation Directive).

<sup>62</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ L 108 , 24.04.2002, pp. 55-77) and now amended by the Directive 2009/136/EC (OJ L 337 18.12.2009 , pp. 11-36); Article 17(1): ‘Regulatory controls on retail services’

<sup>63</sup> Ibid. Article 17(2) Universal Service Directive.

<sup>64</sup> For a deeper analysis on the dichotomy antitrust *vis-à-vis* sector-specific remedies, see Sidak, J. G. (2003), “Remedies and the Institutional Design of Regulation in Network Industries”, *Michigan State DCL Law Review*, Vol. 2003, Issue 3, 741-756.

remedies.<sup>65</sup> Rather, the present Section aims to provide evidence of the impact of sector-specific regulation in contractual relationships.

From our reading of the regulatory objectives pursued, and our reading of Article 1 Access Directive, which harmonizes the regulation of access and interconnection for the relationships between telecommunications operators, it is considered that the key element of the system for achieving the policy goals of the regulatory framework is the “legal relationship” between telecommunications providers.<sup>66</sup> The rationale of the framework might well be “embodied in the interconnection terms” agreed between the parties.<sup>67</sup> Articles 9 to 13 of the Access Directive stand as the “most intrusive parts of the regulatory scheme”.<sup>68</sup>

### 3.1.1. Transparency obligation

Article 9(1) of the Access Directive establishes that

National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including any conditions limiting access to and/or use of services and applications where such conditions are allowed by Member States in conformity with Community law, and prices.

Paragraph 2 sets out, in addition, that where an operator has obligations of non-discrimination, the NRA may request from that operator the publication of a reference offer. Reference offers (RO) or Reference Interconnection Offers (RIOs) include the terms and conditions applicable to wholesale network infrastructure access contracts for supply and use. Such reference offers, which must be sufficiently unbundled, i.e. the contract offer does not require the other party to pay for facilities that are not required for the provision of the requested service, must also contain a description of the relevant offerings containing a minimum set of elements. They must include, at least:<sup>69</sup>

#### A. Conditions for unbundled access to the local loop

1. Network elements to which access is offered covering in particular the following elements together with appropriate associated facilities:
  - (a) unbundled access to local loops (full and shared);
  - (b) unbundled access to local sub-loops (full and shared), including, when relevant, access to network elements which are not active for the purpose of roll-out of backhaul networks;
  - (c) where relevant, duct access enabling the roll out of access networks.

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<sup>65</sup> A more general application of *ex-ante* competition law does not take place generically, but rather under a more case-by-case approach (e.g. mergers and acquisitions concerning telecommunications markets), as opposed to the role performed by NRA on market analysis (SMP analysis) and the imposition of access and interconnection obligations; see Gijrath, 2006, p. 9.

<sup>66</sup> *British Telecommunications Plc v Telefónica O2 UK Ltd and Others*, [2014] UKSC 42, at para. 8. Next Chapter provides an extensive analysis of the reading of the EU Regulatory Framework and the application of its principles vis-à-vis contract limits by the judiciary.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid. at para. 9.

<sup>69</sup> Annex II Access Directive.



2. Information concerning the locations of physical access sites including cabinets and distribution frames, availability of local loops, sub-loops and backhaul in specific parts of the access network and when relevant, information concerning the locations of ducts and the availability within ducts;
3. Technical conditions related to access and use of local loops and sub-loops, including the technical characteristics of the twisted pair and/or optical fibre and/or equivalent, cable distributors, and associated facilities and, when relevant, technical conditions related to access to ducts;
4. Ordering and provisioning procedures, usage restrictions.

#### B. Co-location services

1. Information on the SMP operator's existing relevant sites or equipment locations and planned update thereof (\*).
2. Co-location options at the sites indicated under point 1 (including physical co-location and, as appropriate, distant co-location and virtual co-location).
3. Equipment characteristics: restrictions, if any, on equipment that can be co-located.
4. Security issues: measures put in place by notified operators to ensure the security of their locations.
5. Access conditions for staff of competitive operators.
6. Safety standards.
7. Rules for the allocation of space where co-location space is limited.
8. Conditions for beneficiaries to inspect the locations at which physical co-location is available, or sites where co-location has been refused on grounds of lack of capacity.

#### C. Information systems

Conditions for access to notified operator's operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing.

#### D. Supply conditions

- 3 Lead time for responding to requests for supply of services and facilities; service level agreements, fault resolution, procedures to return to a normal level of service and quality of service parameters.
- 4 Standard contract terms, including, where appropriate, compensation provided for failure to meet lead times.
- 5 Prices or pricing formulae for each feature, function and facility listed above.

The underlying idea to this obligation is that the EU legislator relies on the transparency of the terms and conditions for access and interconnection as a way to accelerate the negotiation process, but also as a manner of avoiding disputes and, more importantly, as a means to place trust in the market by guaranteeing a non-discriminated access.<sup>70</sup>

The Access Directive entitles NRAs to impose changes to the reference offers in order to fulfill the obligations arising from the Directive.<sup>71</sup>

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<sup>70</sup> Recital 16 Access Directive.

<sup>71</sup> Article 9(2) Access Directive.

### 3.1.2. Non-discrimination obligation

The Access Directive (Article 10) entitles NRAs to impose obligations of non-discrimination in relation to interconnection and/or access. More specifically, Paragraph 2 establishes that those obligations shall ensure

(...) that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.

It establishes, in addition, that in the case of vertically integrated firms, they should provide information under the same conditions and quality as it provides for its own services or subsidiaries.<sup>72</sup>

The non-discrimination obligation is essential for the opening of the market and the achievement of a fully competitive market for telecoms, provided that it ensures the equivalence of access.<sup>73</sup> According to a private law understanding, non-discrimination is translated into the supply and the application of comparable terms and conditions under equivalent circumstances for undertakings providing equivalent services. The non-discrimination requirement is particularly significant in the case of vertically integrated SMP operators, which should provide the same supply conditions and quality as the service provided to their subsidiaries.<sup>74</sup>

### 3.1.3. Accounting separation obligation

Accounting separation means that NRAs may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices to ensure, inter alia, compliance where there is a requirement of non-discrimination to prevent unfair cross-subsidization. National regulatory authorities may specify the format and accounting methodology to be used.<sup>75</sup>

Article 11(1) of the Access Directive refers, in particular, to the need for the vertically integrated firm to make transparent its wholesale and internal transfer prices. It is a minimum requirement to demonstrate compliance with non-discrimination.

### 3.1.4. (Mandated) Access obligation. *Network access*

The underlying aim in network services is *interoperability*,<sup>76</sup> which is also enshrined in the Treaty.<sup>77</sup> Access and interconnection are the means to achieve interoperability. Accordingly, networks are required to be interconnected, directly or indirectly, to allow the connection between

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<sup>72</sup> De Streel, A (2004). 'Remedies in the European electronic communications sector', in D. Geradin (ed.), *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation*, Intersentia, pp. 67-124.

<sup>73</sup> See Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment; 11.9.2013, C(2013) 5761 final.

<sup>74</sup> De Streel *supra* n 72.

<sup>75</sup> Article 11 Access Directive.

<sup>76</sup> Recital 9 of the Access Directive.

<sup>77</sup> Article 170 TFEU (ex Article 154 TEC): "To help achieve the objectives referred to in Articles 26 and 174 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures".

users of different networks. This is accomplished via access and interconnection agreements between the different network operators. Article 2 of the Access Directive provides the definition of both elements:

- (a) “access” means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop), access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems, access to number translation or systems offering equivalent functionality, access to fixed and mobile networks, in particular for roaming, access to conditional access systems for digital television services; access to virtual network services;
- (b) “interconnection” means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;

Access and interconnection to the network is the major objective of the Directive aimed at ensuring the achievement of competition. The Access Directive claims that increasing competition is a justification to impose access obligations on the network infrastructure.<sup>78</sup> To this end, Article 12(1) of the Access Directive enables NRAs to

(...) impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

Yet, according to the *essential facility doctrine* of competition law, access may only be imposed when the facility is essential.<sup>79</sup> To be sure, compelled access may entail a disincentive to investment in networks; as such, NRAs are required to strike a balance between the economic rights of the network infrastructure owner and the rights of the operators seeking access to the network. The Access Directive provides that access requests can only be rejected on the basis of objective criteria, such as technical feasibility or the need to maintain network integrity.<sup>80</sup>

Moreover, a recent Directive on broadband cost reduction<sup>81</sup> (Article 3) imposes on Member States the obligation to ensure access to the physical network infrastructure. Under this obligation,

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<sup>78</sup> Recital 19 Access Directive.

<sup>79</sup> Ibid: “(...)as long as this access becomes essential to enable competition in network industries”. See also Sullivan, E. T., and Hovenkamp, H. (2004), *Antitrust Law, Policy, and Procedure: Cases, Materials, and Problems*, 5th Edition. LexisNexis.

<sup>80</sup> Recital 19 Access Directive.

<sup>81</sup> Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks (OJ L 155, 23.5.2014, p. 1–14).

network operators<sup>82</sup> are obligated to give access to their physical infrastructure, on reasonable terms and conditions, including price, with a view to deploying elements of high-speed electronic communications networks.

With regard to private law and, in particular, freedom of contract, mandated access and interconnection obligations require not only third-party access,<sup>83</sup> but, also, an obligation to negotiate in good faith with undertakings requesting access.<sup>84</sup>

### 3.1.5. Price control & cost accounting obligations

Recital 20 Access Directive establishes that

Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are *reasonable* as laid down in Directive 97/33/EC, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. In particular, operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition.<sup>85</sup>

The Cost Accounting obligation (Article 13 Access Directive) compels SMP operators to structure their cost accounting system (CAS) and pricing system according to a certain methodology to meet the regulatory requirements in order to support price controls, grouping activities in specified accounts and, in particular, rules for the allocation of costs to different services in order to prevent unfair cross-subsidies, excessive or predatory prices and to prevent margin squeeze as well as to promote sustainable competition and efficiency for the benefit of the user.<sup>86</sup> The Directive does not impose any particular costing methodology as a preferred option. Accordingly, the differences in costing methodologies for termination rates –the price that operators pay to deliver calls on others operators’ networks– around Europe, prompted the EU Commission to *recommend* the use of a particular methodology to harmonize the matter.<sup>87</sup> The legal effect of the recommendation has led to a heated debate in different Member States, notably in the Netherlands, examined in the previous chapter.

One of the main problems concerning interconnection is related to the price charged. In such a case, problems mostly arise in relation to the reimbursement of the sums already paid after

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<sup>82</sup> According to Article 2 of such Directive, ‘network operator’ means an “undertaking providing or authorised to provide public communications networks (...)”.

<sup>83</sup> See Case C-64/06 *Telefónica O2 Czech Republic a.s. v Czech On Line a.s.*, [2007] ECR I-04887. Here, the Court recognizes the obligation to contract to those undertakings enjoying Significant Market Power; see, in particular, paragraph 28.

<sup>84</sup> Article 12(1) let b) Access Directive. See Section 4.1 *infra*, for an extensive treatment of the subject matter.

<sup>85</sup> Emphasis added.

<sup>86</sup> Article 13(2) Access Directive.

<sup>87</sup> Commission Recommendation (2009/396/EC) of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ L 20.5.2009, pp. 67-74.

the NRA has corrected the tariff to be actually paid.<sup>88</sup> Although these are disputes of a contractual nature, the NRA when deciding a dispute under its mandate<sup>89</sup> issues a regulatory (hence, administrative) decision and civil litigation can take place only according to a separate procedure once the issue has been, *administratively*, resolved.<sup>90</sup>

The extent to which these prices may be considered *reasonable* is another important matter. One may wonder what the aim of this pricing fixing strategy is and whether it is the aim of the EU to allow fixed prices.<sup>91</sup> Unlike affordability as defined in the Universal Service Directive for retail markets,<sup>92</sup> in *Federutility* in the energy field, the Court states that “reference prices” are allowed provided the intervention maintains prices at a *reasonable* level for end consumers. Yet, it is necessary to clarify the scope of the reasonableness of prices in a liberalized market; in particular, whether it responds to public or private (contractual) standards.<sup>93</sup> Case law in the Netherlands reflects a clash between, on the one hand, the regulator, which maintains the view that it must meet public standards and requires that reasonableness is interpreted in the light of the EU regulatory framework for telecoms, and the judiciary, on the other hand, who consider that a NRA’s powers are limited by the obligations arising from the contract that binds the parties.<sup>94</sup>

### 3.1.6. Functional separation (ultima ratio)

Functional separation is established by the newly introduced Article 13a of the Access Directive, where the NRA identify that the

“appropriate obligations imposed (...) have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets, it may, *as an exceptional measure*, (...), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity. That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes”.<sup>95</sup>

### 3.1.7. Voluntary separation

Voluntary separation is understood as the procedure by which designated SMP operators voluntarily intend to transfer their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or to establish a separate business entity in order to

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<sup>88</sup> See Ottow, A. (2012), ‘Intrusion of public law into contract law: the case of network sectors’, *The Europa Institute Working Paper* 03/12.

<sup>89</sup> Article 20 Framework Directive.

<sup>90</sup> Ottow, A. (2012), “Intrusion of public law into contract law: the case of network sectors”, *The Europa Institute Working Paper* 03/12 referring to the case Administrative Court of Rotterdam in first instance, 29 November 2001, *BabyXL vs. KPN Telecom*.

<sup>91</sup> See Case C-265/08, *Federutility and Others v Autorità per l'energia elettrica e il gas* [2010] ECR I-03377.

<sup>92</sup> See below.

<sup>93</sup> Ottow supra n 90.

<sup>94</sup> Ibid., referring to the case Administrative Court of Rotterdam January 31, 2003, *Mediaforum* 2003-4, Jur. Nr. 21., p. 139-141.

<sup>95</sup> Emphasis added.

provide to all retail providers, including its own retail divisions, fully equivalent access products. Against this background, Article 13b of the Access Directive sets out the information conditions under which the operator concerned is required to inform the national regulator of its intention in such a way that it enables the regulator to assess the effect of the intended transaction on existing regulatory obligations under the Framework Directive.<sup>96</sup>

### **3.1.8. Regulatory controls on retail services (Article 17 Universal Service Directive)**

The imposition of regulatory controls in retail markets is foreseen where obligations imposed in the wholesale markets are insufficient to achieve the objectives of the Regulatory Framework. Moreover, these obligations are only imposed on undertakings with SMP power in those markets not effectively competitive.<sup>97</sup> These regulatory obligations must be proportionate and necessary to achieve the aims enshrined in the Framework Directive.<sup>98</sup> These obligations must be aimed at controlling and preventing the imposition of excessive prices, avoiding the distortion of competition and the bundling of unnecessary services. To this end, NRAs are entitled to impose on SMP operators, retail price cap measures, measures to control individual tariffs, or measures to orient tariffs towards costs or prices on comparable markets.<sup>99</sup>

## **3.2. Rights and remedies in retail markets**

At the retail level, the goals of the Regulatory Framework for Electronic Communications – guaranteeing basic users’ service rights by ensuring access to universal services, and a high-level of consumer protection<sup>100</sup> – are based on the idea of *access* (universal access) to the market without compromising the quality of the service. In order to prevent market failure and ensure consumer access, Universal Service Obligations (USOs) are required; also to ensure the non-discrimination of consumers, especially those who are geographically and economically vulnerable. Universal access encompasses a set of rights linked to the concept of universal service itself. Thus, the Universal Service Directive establishes that Member States shall ensure not only access to the service, but also safeguard the access conditions (availability and affordability of the service) at a reasonable quality.<sup>101</sup>

In addition to this *Universal Service approach*, at the retail level, we find a more *competitive approach* oriented towards the empowerment of the consumer. To advance these aims, we find the introduction of other parameters based consumer protection understanding but with particular sector-related features that justify the existence of particular consumer protection measures belonging (*endogenous*) to the telecoms sector and, therefore, provided in the Regulatory

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<sup>96</sup> Article 13b(2) Access Directive.

<sup>97</sup> Article 17(1) Universal Service Directive.

<sup>98</sup> Article 17(2) Universal Service Directive.

<sup>99</sup> Ibid.

<sup>100</sup> Article 8(4) Framework Directive.

<sup>101</sup> Article 3 Universal Service Directive.

Framework for Electronic Communications itself; i.e. *lex specialis*. By way of example, these rights encourage consumers to make the most of competition –under assumptions of efficient market-behavior– by way of reducing minimum duration of contracts to enable frictionless switching of service provider and relying on an information paradigm. In fact, the second generation of EU telecoms rules (2002 package) already introduced a set of sector-specific rules dealing with consumer-related issues to alleviate the common problems faced by telecommunications users. As such, the Universal Service Directive establishes the conditions under which the services shall be provided.

Consequently, under the European telecommunications regime, we can identify two different sets of consumer-rights: those provided under the universal service idea, and therefore, applicable only to the beneficiaries of universal service, and those more general that apply to all end-users. This duality gives rise to a differentiated scope of application determined by the concept of universal service itself.

<b>Rights under universal service (Article 3 Universal Service Directive)</b>	<b>End-users rights</b>
Availability of the service	Right to a contract (Article 20(1) USD)
Specified Quality	Right to switch of provider (Article 20(2) USD)
Everyone (non-discriminatory conditions)	Information disclosure (Article 21 USD)
Identical conditions	Quality of the service (Article 22 USD)
Affordable price	Telephone directory enquiry, emergency services, European telephone access codes (Article 27 USD)
	Number portability (Article 29 USD)
	Access to out-of-court procedures (Article 34 USD)

Table 4.1 Universal service rights and End-users rights

The following two sections provide a more detailed picture of these two sets of telecommunications-related consumer rights.

### 3.2.1. Universal Service rights

As a result of the dual approach pursued by the European legislator in the configuration of Services of General Economic Interest, users were granted not only “consumer-empowerment rights”, but also with provisions that take into account the situation of vulnerable consumers. Thus, in order to ensure that liberalization would not lead to a situation where some social groups would be excluded from basic telecommunications services, the legislator also provided legislation granting Universal Service rights, such as access, affordability, quality and continuity, to mention a few. The EU Treaty acknowledges universal services access as one of the shared values of the Union concerning SGEIs,<sup>102</sup> and European telecommunications regulation defines the parameters access for markets players via sector-specific legislation materializing the fundamental freedoms.<sup>103</sup>

In order to guarantee the availability and the access to these set of (universal) services, the Universal Service Directive establishes the guidelines for Member states to ensure the provision of universal services to those end-users that, otherwise, would be excluded from the market.<sup>104</sup> From the wording of Article 3 of the Universal Service Directive it follows that universal service corresponds to a minimum set of services, of a specific quality, that has to be available to everyone under particular conditions and at a reasonable price. As such, the Universal service idea works as a safety net for social inclusion. For example, consumers who do not enjoy access to the Internet do not have access a certain amount of choice and deals available solely online (online markets).

Universal service is based on the idea of *availability* of the service, meaning access to everyone regardless of his or her economic, or geographic situation. The Universal Service Directive provides access to elementary services to which *Universal Services rights* apply. Under Chapter II, the Universal Service Directive establishes the Universal Services Obligations (USOs) applicable to universal services. The universal service concept covers the following services (“minimum set of services”):

- Telephony services at a fixed location: voice + data<sup>105</sup>
- Directory enquiry services and directories<sup>106</sup>
- Public pay telephones and other public voice telephony access points<sup>107</sup>
- Measures for disabled users<sup>108</sup>

The Directive provides for a system of cost recovery for “designated operators” to guarantee the provision of universal service under Universal Service Obligations.<sup>109</sup> Member States may extend the Universal Service Obligations beyond the services listed in Chapter II of the Directive. In such

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<sup>102</sup> Protocol of the Lisbon Treaty (Protocol n.26), Article 1.

<sup>103</sup> Micklitz, H. W. (2013), “Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse”, *Yearbook of European Law*, 32(1) 266-367.

<sup>104</sup> Article 1(1) Universal Service Directive: “(...) to deal with circumstances in which the needs of end-users are not satisfactorily met by the market”.

<sup>105</sup> Article 4 Universal Service Directive.

<sup>106</sup> Article 5 Universal Service Directive.

<sup>107</sup> Article 6 Universal Service Directive.

<sup>108</sup> Article 7 Universal Service Directive.

<sup>109</sup> Article 12 and 13 Universal Service Directive.



circumstances, the Directive clearly states that no compensation mechanism can be put in place for the provision of those services not covered within the meaning of universal service.<sup>110</sup>

The most prominent example of the constraints on the concept comes from the limitation of the concept of data communications to “data rates that are sufficient to permit functional Internet access”. This raises the question as to what extend broadband is considered “functional” under the current prevailing technologies and technical feasibility as enshrined in Article 4 of the Universal Service Directive. To date, access to broadband Internet has not been included in the scope of universal service. The Universal Service Directive was enacted in 2002. Article 15 contains a provision on the review of its scope. Scope was reviewed but never amended, despite technological developments.<sup>111</sup> Thus, the European legislator has also decided not to extend the scope of universal services to mobile communications and Internet data provided via mobile communications. Currently, there is European case-law where the feasibility of mobile communications and broadband to be included as part of the Universal service scope is examined.<sup>112</sup> The Court, following the Advocate General’s Opinion, considered that the financing provisions of the Universal Service Directive of the Universal Service Obligations does not cover internet subscription services provided by means of those mobile communication services.<sup>113</sup> As such, provided that the national legislator decides to expand the obligations contained in the Directive, such *extra* services would only fall under the category of ‘additional mandatory services’ where the Directive excludes compensation.<sup>114</sup>

### *Access and right to contract*

Pursuant to Article 3(1) Universal Service Directive, “Member States shall ensure that the services set out in this Chapter are made *available* at the quality specified *to all end-users* in their territory, *independently of geographical location*, and, in the light of specific national conditions, *at an affordable price*”.<sup>115</sup> From the wording of this provision it follows that, this obligation has, therefore, two implications: *economic access*, on the one hand; and *physical access*, on the other.<sup>116</sup> Economic access refers to access rights for the more economically vulnerable citizens, and physical access entails accessibility to the network infrastructure, regardless of the consumer’s geographic location.<sup>117</sup> Concerning the former, economic access is linked also to the idea of affordability, whereas for the latter, the use of telecommunications services requires the previous installation of the line in remote areas. Access is also coupled with the idea of *continuity*. Thus, continued access

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<sup>110</sup> Article 32 Universal Service Directive.

<sup>111</sup> In 2014, the European Commission launched a tender to study the feasibility of reviewing the scope of universal service. See Review of the Scope of Universal Service – Study SMART 2014/0011, available at <https://ec.europa.eu/digital-agenda/en/news/review-scope-universal-service—study-smart-20140011>.

<sup>112</sup> See Case C-1/14, *Base Company NV and Mobistar NV v Ministerraad*, not yet reported.

<sup>113</sup> Ibid. Judgment of the Court (Third Chamber), of 11 June 2015. See paras 32-43.

<sup>114</sup> Ibid. See also Article 32 Universal Service Directive.

<sup>115</sup> Emphasis added

<sup>116</sup> See also Micklitz *supra* n 9.; Rott *supra* n 16, and Rott, P. (2009) ‘The user-provider relationship: informed choice and user protection through private law’, in *The Changing Legal Framework for Services of General Interest in Europe* (pp. 215-232). The Hague, T.M.C. Asser Press

<sup>117</sup> Article 4(1) Universal Service Directive: “Member States shall ensure that all reasonable requests for connection at a fixed location to a public communications network are met by at least one undertaking”.

to services also implies that contracts guaranteeing access cannot be easily terminated.<sup>118</sup> This is particularly important where the termination of a contract exposes the user to risks such as social exclusion.

Furthermore, in telecommunications retail markets, this interference is particularly manifested as a *right to contract*, recognized in the Universal Service Directive which establishes that

Member States shall ensure that, when subscribing to services providing connection to a public communications network and/or publicly available electronic communications services, consumers, and other end-users so requesting, *have a right to a contract* with an undertaking or undertakings providing such connection and/or services (...).<sup>119</sup>

Access rights involve particular implications for –specifically freedom of contract– not necessarily/previously addressed by the general consumer *acquis*. Access rights are intended to guarantee a certain level of availability of the service which results in a number of obligations for the providers nonexistent outside Services of General Economic Interest’s scope or within the national private legal orders. Accordingly, as a result of the universal service idea, all end-users – who request it– will have a right to a contract for the provision of the services covered by the universal service’s scope. This statement entails two effects. First, the service is not provided automatically. Interested users will have to demand the supply of the service, which only will be provided, therefore, on request; and secondly, the service must be listed as a universal service to be subject of the access rights obtained. Thus, users are not granted general access to the service, but rather with a *right to the provision of the (universal) service upon request*. This means that network providers designated as having Universal Service Obligations will not be allowed to refuse to contract with those who request a contract, regardless their geographical location or economic situation.<sup>120</sup>

### *Affordability and control of expenditure*

Within the universal service system, tariffs for the use of telecommunications services are to be paid by users. However, the universal service idea requires them to be “affordable”. Affordability is a new concept within the field of contract and consumer law, the result of the obligations derived from the Universal Service approach. According to the Universal Service Directive, *affordable price* is “a price defined by Member States at national level in the light of specific national conditions, and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users”, related to the ability of individual consumers to monitor and control expenditure.<sup>121</sup> As a result, Member States have to ensure that prices are not excessive and must encourage users to control their expenditure.

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<sup>118</sup> Rott supra n 116, at 225 and Rott n 9, at 333.

<sup>119</sup> Article 1 Directive 2009/136/EC, amending Article 20 Directive 2002/22/EC. Emphasis added.

<sup>120</sup> Article 3 Universal Service Directive.

<sup>121</sup> 2002 Universal Service Directive, Recital 10 and Recital 15.

Affordability is explicitly mentioned in the Protocol (n.26) of the Lisbon Treaty and, together with control of expenditure, is regulated in the Universal Service Directive, articles 9 and 10 respectively. Considering that prices are entrusted to market forces as a result of liberalization, National Regulatory Authorities are responsible for monitoring the evolution and level of retail tariffs of the services falling under the universal service obligations. To this end, NRAs will take into account, in particular, national consumer prices and income.<sup>122</sup> More specifically, Article 9 USD establishes

National regulatory authorities shall ensure that, where a designated undertaking has an obligation to provide special tariff options, common tariffs, including geographical averaging, or to comply with price caps, the conditions are fully transparent and are published and applied in accordance with the principle of non-discrimination. National regulatory authorities may require that specific schemes be modified or withdrawn.

In addition, Article 9 enables Member States to put in place social obligations. These social obligations may require designated undertaking to introduce price differentiations for low cost consumers different than market prices with the aim of ensuring access to telecommunications services by economically vulnerable consumers.<sup>123</sup>

One of the particularities of telecommunications services is “bill shock”. Excessive bills may be incurred and when the user is not able to pay such bills he or she may be disconnected, which will distort the chief aim of the universal service requirement. In order to avoid such an event, Member States must ensure that designated undertakings with Universal Service obligations, allow subscribers to monitor and control their expenditure.<sup>124</sup>

Affordability requirements also impact the right to unilaterally modify prices when universal service considerations apply. In those circumstances, at least in the energy sector, timely information on contractual modifications and a right to termination is not enough to compensate the imbalance of the contractual parties.<sup>125</sup>

## *Continuity*

Access rights are coupled with the idea of continuity. Thus, continued access to services implies that contracts guaranteeing access cannot be easily terminated.<sup>126</sup> This is particularly important where the termination of a contract exposes the user to risks such as social exclusion as a result of

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<sup>122</sup> Universal Service Directive, Article 9.

<sup>123</sup> Article 9(2): “Member States may, in the light of national conditions, require that designated undertakings provide to consumers tariff options or packages which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing the network referred to in Article 4(1) or from using the services identified in Article 4(3) and Articles 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings”.

<sup>124</sup> Article 10(2). The information concerning facilities and services billing have to be described according to the parameters established in Annex I, Part a.

<sup>125</sup> See Case C-92/11, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, nry. See paras. 53-54. Para 54: “(...) Account must be taken in particular of whether the market concerned is competitive, the possible cost to the consumer of terminating the contract, the time between the notification and the coming into force of the new tariffs, the information provided at the time of that communication, and the cost to be borne and the time taken to change supplier”.

<sup>126</sup> Rott supra n 116, at 225 and Rott n 9, at 333.

the importance of telecommunications services today.<sup>127</sup> According to the 2002 Universal Service Directive, except in cases of persistent late payment or non-payment of bills, consumers should be protected from immediate disconnection from the network on the grounds of an unpaid bill and, in particular, in the case of disputes over high bills for premium rate services, should continue to have access to essential telephone services pending the resolution of the dispute. Member States may decide that such access may continue to be provided only if the subscriber continues to pay line rental charges.<sup>128</sup>

### *("Specified") Quality*

Quality is another key objective in the Universal Service idea. As opposed to the former system by which telecommunications services were provided by the State, where good quality was not an essential requirement, it is now a decisive parameter not only for market competition but also for market inclusion. Article 3 of the Universal Service Directive does not only require access to certain services, but also this access has to be provided according to a "specified quality".<sup>129</sup> In this regard, Member States should ensure that Universal Services are made available with the quality specified to all end-users in their territory.<sup>130</sup> Pursuant to the Universal Service Directive amendment,

[a] competitive market should ensure that end-users enjoy the quality of service they require, but in particular cases may be necessary to ensure that public communication networks attain minimum quality levels so as to prevent degradation of service, the blocking of access and the slowing of traffic over networks.<sup>131</sup>

To this end, NRAs may require that designated operators with universal service obligations provide the services under certain performance targets.<sup>132</sup> National regulators must also monitor quality standards compliance.<sup>133</sup> Quality parameters at the European level are established by the European Telecommunications Standards Institute (ETSI).<sup>134</sup> These are minimum requirements, with additional quality parameters regarding services for disabled end-users and disabled consumers, for instance, at the national level by NRAs.<sup>135</sup>

#### **3.2.2. End-users rights**

Apart from the bundle of rights provided under universal service obligations, the European legal framework provides for a second set of consumer ("end-user") rights that apply not only to services falling within the scope of universal services, but to the rest of telecommunications services; i.e. "services normally provided for remuneration which consists wholly or mainly in the conveyance

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<sup>127</sup> See Conclusions of the European Commission Communication on 'Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC', 23.11.2011, COM(2011) 795 final, p. 12.

<sup>128</sup> 2002 Universal Service Directive, Recital 16.

<sup>129</sup> Article 3(1) Universal Service Directive.

<sup>130</sup> 2002 Universal Service Directive, Recital 7.

<sup>131</sup> 2009 Universal Service Directive, Recital 34.

<sup>132</sup> Article 11(4) Universal Service Directive.

<sup>133</sup> Article 11(5) and (6).

<sup>134</sup> See Annex III, 2002 Universal Service Directive and 2009 Amendment.

<sup>135</sup> 2002 Universal Service Directive, Article 11(2).

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”.

As a matter of fact, data shows that issues related to billing, tariff transparency and Internet quality are still the most frequent causes of telecommunications users’ complaints.<sup>136</sup> Thus, the right to a contract, information and transparency duties, the quality of the service, and the right to switch provider, together with the availability of out-of-court mechanism for the settlement of consumer-related disputes, comprise end-users rights stemming from European minimum standards for the provision of telecommunications services aimed at achieving a fully competitive market (competition law approach). The Universal Service Directive specifies these contractual rights in Chapter IV (‘End-users interests and rights’).

### *Transparency and information*

The tool for the establishment and maintenance of competition on the consumer side is the choice of the best service provider.<sup>137</sup> This has to be an informed choice. Information duties are oriented to consumers to make qualified decisions and informed choices. Thus, pre-contractual information, suppliers’ duties of information, information rights, transparency and so on are specified in the rules governing these services, and consist of important obligations operating at the time of the conclusion of this kind of contracts. Thus, the accessibility to full, truthful and up-to-date information is of paramount importance to the consumer in order to be able to choose, in an *efficient* way, the best provider according to her needs. Information duties are, therefore, complementary to the effective operation of competition.<sup>138</sup>

In the case of telecommunications, the provisions contained in the Universal Service Directive are related to the availability of transparent and adequate information on offers and services, as well as price and tariffs.<sup>139</sup> Providing information on prices is decisive given that consumers consider price as the primary factor when subscribing to an Internet connection.<sup>140</sup> In addition, obtaining adequate information on, for example, possible limitations or traffic management enables consumers to make informed choices.<sup>141</sup> In fact, according to the BEREC, the greater part of consumer complaints compiled by NRAs is related to the discrepancy between advertised and actual delivery speeds for an Internet connection.<sup>142</sup>

The third regulatory package (Article 21(3) USD) relies on NRAs to *oblige* public electronic communications networks and/or publicly available electronic communications services to *inter alia*: 1) provide information on tariffs and pricing conditions; 2) inform subscribers of any

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<sup>136</sup> Special Eurobarometer 414 - e-Communications Household Survey.

<sup>137</sup> Rott supra n 16 at 334.

<sup>138</sup> “Competitive transparency is deeply rooted in competition law”, Micklitz supra n 9, at 567.

<sup>139</sup> See Universal Service Directive Recital 32 and Article 21(1).

<sup>140</sup> Eurobarometer special issue on e-communications and household (2014).

<sup>141</sup> Commission Communication on The open internet and net neutrality in Europe, p. 7.

<sup>142</sup> Commission Communication on The open internet and net neutrality in Europe, 19.4.2011, COM(2011) 222 final.

change of access to emergency services or caller location information; 3) inform consumers about any change to conditions limiting access to and/or use of services and applications; 4) provide information on any procedures put in place by the provider to measure and shape traffic such as to avoid filling or overfilling a network link, and on how those procedures could impact on service quality; 5) inform subscribers of their right to determine whether or not to include their personal data in a directory, and of the types of data concerned; and 6) regularly inform disabled subscribers of details of products and services designed for them. For this purpose, NRAs, if they deem it appropriate, may promote self- or co-regulatory measures prior to imposing any binding obligations.

In addition to the above, users are also granted a sector-specific right of withdrawal, without penalty, on notice of proposed modifications in the contractual conditions, if they do not accept the new conditions.<sup>143</sup>

### Quality

Apart from the quality parameters established under the universal services approach, Article 22 requires NRAs to set up “minimum quality of service requirements” on undertakings with the aim of preventing the degradation of the service and/or the slow-down of traffic over the networks.<sup>144</sup> In addition, BEREC has set up a Quality of Service Measurements working group and recommends that NRAs collaborate on a voluntary basis on the development of a potential future multi-NRA opt-in quality monitoring system.

By way of example, given that quality problems are widely recurring (in Italy, low quality of the services represents 44.7% of the problems related to broadband internet), the Italian NRA has developed a quality measurement system regarding the internet at a fixed location. According to the 2012 AGCOM Report, Misura Internet allows users to test free of charge, by means of the Ne.Me.Sys. software (acronym for NEtwork MEasurement SYStem), downloadable from the site [www.misurainternet.it](http://www.misurainternet.it), the performance of the broadband internet connection service from a fixed position. In order to assess the evolution of the performance of the service on the basis of the daily network capacity, Ne.Me.Sys. registers a measurement in each of the 24 hourly time brackets, for a total of 24 measurements per day. The user has 3 days to complete the measurements in each time brackets. The test results are reported in a certificate containing the values of the key performance indicators (KPI, i.e. transmission speed, delay and loss of data packets during the uploading and downloading phases). If the value of at least one of the indicators is of inferior quality than the contractual parameters, the user is entitled to present a complaint to the operator for non-fulfillment and ask for the restoration of the agreed standards; if, according to a subsequent test with

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<sup>143</sup> Universal Service Directive, Article 20(1). See Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, nry; in particular, para. 44: “Information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier”. See also Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (Invitel), para. 29. See also Reich, N. (2015), ‘I Want My Money Back’ – Problems, Successes and Failures in the Price Regulation of the Gas Supply Market by Civil Law Remedies in Germany, *EUI Department of Law Research Paper* No. 2015/05.

<sup>144</sup> Article 22(3) Universal service Directive.

Ne.Me.Sys., the service quality is not restored to the required level, the user has the *right to withdraw from the contract free of charge*, avoiding the payment of a penalty for the internet access service from a fixed location.

### *Right to switch of provider*

The possibility to switch provider is linked to the transparency, the supply of information and quality of the service provided. As part of the information paradigm, consumers must be informed of their right to terminate the contract.<sup>145</sup> Enabling switching is another essential tool to contribute to the functioning of competition. Hence, the different Directives concerning network services contain provisions related to the right to switch service provider.

According to the European Commission, effective consumer rights are essential to ensure that liberalization delivers real choice and gives consumers the confidence to switch supplier if they wish to do so.<sup>146</sup> Stimulating consumer interest in alternative supply offers is expected to play a part in creating competitive markets as well. The claim is that past experience has shown that consumers will only be active on the market if they are confident that their rights continue to be protected, in particular, when switching operator.<sup>147</sup> Moreover, the European Commission in its recent Open Internet and Net Neutrality Communication has also expressly recognized:

The EU regulatory framework aims at promoting effective competition, which is considered the best way to deliver high-quality goods and services at affordable prices to consumers. For competition to work, consumers must be able to *choose* between a variety of competing offerings on the basis of clear and meaningful *information*. Consumers must also be effectively able to *switch* to a new provider where a better quality of service and/or a lower price is offered, or where they are not satisfied with the service they are receiving, e.g. where their current provider imposes restrictions on particular services or applications. In a competitive environment this acts as a stimulus to operators to adapt their pricing and abstain from restrictions on applications that prove popular with users, as is the case with voice over IP (VoIP) services.<sup>148</sup>

Moreover, the Commission is of the opinion that the rules on transparency, switching and quality of service that form part of the revised EU electronic communications framework should contribute to producing competitive outcomes.<sup>149</sup> Thus, in order to take full advantage of the competitive environment within the electronic communications sector, consumers should be able to make informed choices and to change providers when they want.<sup>150</sup> Therefore, transparency and the right to switch are crucial to the functioning of competition.

In the case of network industries, the user-provider relationship is usually governed by long-term contracts. In this regard, long-term contracts present a barrier to competition, since

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<sup>145</sup> See *Invitel* case, para. 29. Article 20(1)(e) and Recital 30 Universal Service Directive.

<sup>146</sup> Commission Communication, *Towards a European Charter on the Rights of Energy Consumers*, 5.7.2007 COM(2007)386 final, p. 2.

<sup>147</sup> *Ibid.* p. 3.

<sup>148</sup> Commission Communication, *The open internet and net neutrality in Europe*, 19.4.2011, COM(2011) 222 final, p.4 (Emphasis added).

<sup>149</sup> *Ibid.* Conclusions, pp. 8-10.

<sup>150</sup> Universal Service Directive (2009), Recital 47.

competition requires the possibility of changing provider.<sup>151</sup> The third regulatory package for telecoms (2009) provides a contractual limit of an initial maximum duration not exceeding of 24 months.<sup>152</sup> It also mandates Member States to ensure that operators provide contracts with a maximum duration of 12 months.<sup>153</sup> In addition, the regulatory framework provides that minimum duration clauses do not prevent consumers changing service provider.<sup>154</sup>

EU legislation, in addition, takes into consideration practical issues that may prevent customers from changing their providers: *number portability*. Number portability is a “key facilitator of consumer choice and effective competition in a competitive telecommunication environment”, as specified by Recital 40 Universal Service Directive. The 2009 package was significant for the switching process. In this regard, the Article 30(4) Universal Service Directive establishes that the “[p]orting of numbers and their subsequent activation shall be carried out within the shortest possible time. In any case, subscribers who have concluded an agreement to port a number to a new undertaking shall have that number activated within *one working day*”. Moreover, operators must offer users the possibility to subscribe to a contract with a maximum duration of 12 months. The new rules make sure that conditions and procedures for contract termination do not act as a disincentive against changing service provider. In addition, with regard to the terminal equipment, Recital 24 of the Universal Service Directive amendment requires that “(...) the customer contract should specify any restrictions imposed by the provider on the use of the equipment, such as by way of ‘SIM-locking’ mobile devices, if such restrictions are not prohibited under national legislation, and any charges due on termination of the contract, whether before or on the agreed expiry date, including any cost imposed in order to retain the equipment”.

As a result, all the measures introduced by the legislator in this matter are envisaged to enhance competition –the aim of the Internal Market– by facilitating not only the change of provider, but also the switching process itself, in order to remove possible barriers to the switch procedure if the user wishes to do so.

### *Availability of extrajudicial settlement procedures*

The effectiveness of the rights granted by the Universal Service Directive will be conditional upon the success of consumer redress mechanism for the resolution of consumer-related disputes. Accordingly, the Universal Service Directive requires effective procedures to solve disputes between end-users and undertakings providing telecommunications services. In particular, and without prejudice to judicial procedures,<sup>155</sup> the Directive requires member states to ensure the availability of “transparent, non- discriminatory, simple and inexpensive out-of-court

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<sup>151</sup> Rott *supra* n 116.

<sup>152</sup> Newly introduced Paragraph 5 into Article 30 USD.

<sup>153</sup> *Ibid.*

<sup>154</sup> Article 30(6) Universal Service Directive: “Without prejudice to any minimum contractual period, Member States shall ensure that conditions and procedures for contract termination do not act as a disincentive against changing service provider”.

<sup>155</sup> Article 34(4) Universal Service Directive.



procedures”.<sup>156</sup> Interestingly, it enables extrajudicial bodies to adopt a system of reimbursement and/or compensation.<sup>157</sup>

#### 4. Case-studies

The liberalization of the telecommunications sector and the shift from public to privately provided services implies the need for the European Regulatory Framework to regulate private relationships under the rationality and goals of the sector in order to manage the transition to competition. Nevertheless, general (traditional) contract law consists of different rationales than those of sector-specific regulation. In case of conflict, regulatory goals and traditional schemes of contract law collide. While the regulatory goals respond to European concerns –mainly the completion of the Internal Market– contract law, understood in the traditional sense, remains national. The main question to answer is: what is the role for contract law in the telecommunications sector? This Section attempt to disclose the role and function of private law when it comes to particular cases, both in wholesale and in retail markets. The first case of the two cases addressed in this section deals with the obligation to negotiate in good faith with a third party operator. The second case, concerns a commonplace dispute between an operator and the user (consumer) concerning the application of compensation and switching for free as a remedy for the degradation of the quality of the service provided.

By examining two case-studies, this section discerns whether particular telecommunications-related problems are decided on the basis of national (contract) private law or European (regulatory) private law and the relative significance of each of these legal regimes in practice.

##### 4.1. Regulatory intervention in wholesale markets

In the telecommunications sector, when it comes to B2B relationships in wholesale markets, the major focus has always been placed on competition law issues.<sup>158</sup> Yet, little attention has been paid to the contractual dimension of such cases and to how it affects the contractual relationship between the parties as a result of the function of NRAs responsible for securing adequate access, interconnection and interoperability of services in the interest of end-users including via the imposition of regulatory obligations on undertakings. By way of example, Article 5(1) Access Directive, “without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8 [of the same legal text]”, requests NRAs to impose:

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<sup>156</sup> Article 34(1) Universal Service Directive.

<sup>157</sup> Ibid. The following chapter contains a detailed analysis of these procedures.

<sup>158</sup> For instance, the seminal ‘TeliaSonera case’ (C- 52/09, *Konkurrensverket v TeliaSonera Sverige AB*. ECR [2011] I-00527); C-280/08 *Deutsche Telekom v Commission* ECR [2010] I-09555; T-336/07 *Telefónica v Commission*, not reported yet; T-398/07 *Spain v Commission*, not reported yet; T-458/09 and T-171/10 *Slovak Telecom v Commission*, not reported yet; T-486/11 *Telekomunikacja Polska v Comission*, not reported yet.

a) to the extent that is necessary to ensure end-to end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;

ab) in justified cases and to the extent that is necessary, obligations on undertakings that control access to end users to make their services interoperable.

b) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms.

The issue at stake here is whether such obligations may be imposed on all operators providing electronic communications services. Accordingly, the following case examines the role of NRAs when it comes to the regulatory powers of NRAs to intervene in the wholesale market via the imposition of certain obligations, which clearly has an impact in private law matters as it concerns the obligation to contract an interconnection agreement and the necessity to conduct such negotiation in good faith, such that it does not imply a distortion of competition.<sup>159</sup> This case, therefore, provides a comparison between negotiated *vis-à-vis* regulated access.

### *Background of the case*

Under EU legislation, National Regulatory Authorities may impose obligations on undertakings that control access to end-users including, where justified, the *obligation to interconnect their networks* where this is not already undertaken.<sup>160</sup> In addition, the general authorisation for the provision of electronic communications networks or services gives undertakings providing electronic communications networks or services to the public the right to “negotiate interconnection with and where applicable obtain access to or interconnection from other providers of publicly available communications networks and services covered by a general authorisation anywhere in the Community under the conditions of and in accordance with Directive 2002/19/EC (Access Directive)”.<sup>161</sup> In addition, Article 12 of that Directive provides that NRAs may impose access obligation obligations on operators

“in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user’s interest”.<sup>162</sup> The European legal framework establishes that operators may be required, among other obligations, to “negotiate in good faith with undertakings requesting access”.

<sup>163</sup>

These provisions were implemented in the Finnish legal system under the Finnish Communications Market Act.<sup>164</sup> In Paragraph 39 (‘Interconnection obligations of a telecommunications operator’), the national text provides that telecommunications operators have an obligation to negotiate

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<sup>159</sup> Case C-192/08 *TeliaSonera Finland Oyj v iMEZ Ab*, ECR [2009] I-10717.

<sup>160</sup> Article 5(1) let a) Access Directive. Emphasis added. See also Article 12(1) let i) Access Directive.

<sup>161</sup> Article 4(2) let a) Authorisation Directive.

<sup>162</sup> Article 12(1) Access Directive.

<sup>163</sup> *Ibid.* let. b).

<sup>164</sup> *Viestintämarkkinalaki* (393/2003) of 23 May 2003.

interconnection agreements. Furthermore, the national provision enables the national regulator responsible for telecoms to impose interconnection obligations not only for Significant Market Power (SMP) operators,<sup>165</sup> but also to non-SMP operators.<sup>166</sup>

On 10 May 2006, a small Swedish service operator (iMEZ) requested the intervention of the Finnish NRA for telecommunications (CRA)<sup>167</sup> in order to facilitate the conclusion of an interconnection contract with TeliaSonera to enable the transmission of text messages (SMS messages) and multimedia messages (MMS messages) over the networks of both operators. Accordingly, on 18 May 2006, CRA referred the case to arbitration. In August 2006, in view of the failure of arbitration, iMEZ requested CRA to oblige the network operator (TeliaSonera) to negotiate an agreement in good faith pursuant to the Access Directive.<sup>168</sup> In particular, NRAs are entitled to oblige operators to negotiate in good faith with undertakings requesting access.<sup>169</sup> Therefore, in the absence of an agreement, iMEZ requested CRA to impose an interconnection obligation on TeliaSonera concerning SMS and MMS and to price the forwarding of those two types of messages on the basis of the costs incurred and in a non-discriminatory manner. Alternatively, it sought a declaration that SMS and MMS are relevant communications markets and the designation of TeliaSonera as an SMP operator, so that iMEZ could obtain (compulsory) interconnection.

In December 2006, CRA issued a decision in which it acknowledged that TeliaSonera had not fulfilled its obligation to negotiate in good faith the interconnection agreement with iMEZ. In those circumstances, TeliaSonera appealed against that decision to the *Korkein hallinto-oikeus* (Finnish Supreme Administrative Court) seeking the annulment of the CRA's decision. The *Korkein hallinto-oikeus*, decided to refer the following questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling:<sup>170</sup>

1. Is Article 4(1) of Directive 2002/19/EC of the ... Access Directive, when read in conjunction with recitals 5, 6 and 8 in the preamble to that directive and with Article 5 and Article 8 thereof, to be interpreted as meaning that:

(a) national legislation may provide, as in Paragraph 39(1) of the ... [Communications Market Law], that any telecommunications operator has an obligation to negotiate on interconnection with another telecommunications operator and, if so,

(b) a national regulatory authority can take the view that the obligation to negotiate has not been complied with where a telecommunications operator which does not have significant market power has offered another undertaking interconnection under conditions which the authority regards as wholly

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<sup>165</sup> Ibid. Paragraph 39(2).

<sup>166</sup> Ibid. Paragraph 39(3).

<sup>167</sup> Communications Regulatory Authority – FICARO (in Finnish *Viestintävirasto*).

<sup>168</sup> See Recital 5: “In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the [EC] Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection *should in principle conclude such agreements on a commercial basis, and negotiate in good faith*”. Emphasis added.

<sup>169</sup> Article 12(1) let. b) Access Directive.

<sup>170</sup> Case C-192/08 *TeliaSonera Finland Oyj*, ECR [2009] I-10717.

unilateral and likely to hinder the emergence of a competitive market at the retail level, where they have hindered in practice the second undertaking from offering its customers the opportunity to transmit [MMS] messages to end-users subscribed to the telecommunications operator's network and, if so,

(c) the national regulatory authority can in its decision require the aforementioned telecommunications operator, which therefore does not have significant market power, to negotiate in good faith on the interconnection of [SMS] and [MMS] communications services between [the] systems [of the two undertakings concerned] in such a way that, in commercial negotiations, regard must be had to the objectives which interconnection seeks to achieve and negotiations must be based on the premise that the operation of SMS and MMS services between undertakings' systems can be made subject to reasonable conditions so that users have the possibility of using telecommunications operators' communications services?

2. Do the nature of [iMEZ's] network or whether iMEZ ... should be regarded as an operator of public electronic communications networks have any bearing on the assessment of the questions set out above?

### *Reasoning of the CJEU*

The first part of the first question and the second question concern the applicability of access obligations to operators that do not have significant market power, including the obligation to negotiate in good faith with undertakings requesting access as specified in the Access Directive.<sup>171</sup> In this regard, the Court acknowledged that the way in which Article 4(1) is drafted clearly implies that the obligation to negotiate interconnection agreements applies to “all operators of *public communications networks* when requested to do so by another authorised undertaking”.<sup>172</sup> The Court states that according to the Authorisation Directive,<sup>173</sup> “general authorization” refers to “a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services” and that it concerns not only network but also service operators.<sup>174</sup> Given the reciprocal nature of interconnection, the Court states that, therefore, both parties to the negotiations have to be public network operators.<sup>175</sup> The Court concludes that the obligation to negotiate an interconnection agreement can only be imposed on operators of *public communications networks*, such that Member States may not impose that obligation to negotiate on those operators that do not enjoy the status and nature of public communications networks operators and, therefore, it corresponds to the national court to determine such classification.<sup>176</sup>

As to the second part of the first question, the Court states that in view of the tasks to be performed by the NRAs which are “aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those

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<sup>171</sup> Article 12(1) let. b) Access Directive.

<sup>172</sup> Para. 28. Emphasis added.

<sup>173</sup> Article 2(2)(a) Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), OJ L 108, 24.4.2002, p. 21–32.

<sup>174</sup> Paras. 29–30.

<sup>175</sup> Para. 32–34.

<sup>176</sup> Paras. 47–48.

services at European level”,<sup>177</sup> the regulator may consider that the obligation to negotiate has been breached even if it concerns a non-SMP undertaking which has proposed interconnection “under unilateral conditions likely to hinder the emergence of a competitive market at the retail level where those conditions prevent the clients of the second undertaking from benefiting from its services”.<sup>178</sup>

Accordingly, and concerning the answer to the third part of the first referred question, the Court grants NRAs the power to require non-SMP operators which control access to end-users “to negotiate in good faith with other undertakings for either *interconnection* of the two networks concerned if the undertaking which requests such access must be classified as an operator of public communications networks, or *interoperability* of SMS and MMS message services if that undertaking is not covered by that classification”.<sup>179</sup>

### *Comment*

The main question at stake is whether *any* operator, and not only those enjoying Significant Market Power, has an obligation to negotiate interconnection with another telecommunications operator. In case of a positive answer, the safeguards of competition alone do not serve as a basis to justify such a regulatory obligation. Hence, competition is not the rule and simply the involvement on the telecommunications market as an authorized undertaking providing electronic communications networks or services to the public becomes sufficient to apply regulatory obligations. The contractual relationships between undertakings (B2B) in wholesale markets –and, consequently, the interest of the (private) parties– are strongly affected by higher regulatory goals; adequate access and interconnection and interoperability of services in the interest of end-users.

Para 55: It is clear from the foregoing that the answer to the second part of the first question referred is that a national regulatory authority may take the view that the obligation to negotiate an interconnection has been breached where an undertaking *which does not have significant market power* proposes interconnection to another undertaking under unilateral conditions likely to *hinder the emergence of a competitive market* at the retail level where those conditions prevent the clients of the second undertaking from benefiting from its services.

From the foregoing it follows that, even though under conditions of a competitive market, the objective of Article 8 Framework Directive are to be achieved through the terms of the interconnection agreements in a context of minimum regulatory interference, these contractual terms have to be *consistent with* the regulatory obligations contained in Articles 5, 6, 7 and 8 of the Access Directive.<sup>180</sup> This means that the interconnection terms, given that they have to secure the

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<sup>177</sup> Articles 8 to 13 of the Framework Directive. See Case C-227/07 *Commission v Poland* [2008] ECR I-0000, paragraphs 62 and 63.

<sup>178</sup> Paras. 50, 54-55.

<sup>179</sup> Paras. 61-62. Emphasis added.

<sup>180</sup> Article 4(1) Access Directive.

policy objectives contained in Article 8 Framework Directive, must be available to any contractual party requesting them.<sup>181</sup>

The case-in-point evidences a clear erosion of freedom of contract. And here one may ask: what is the rational(es) for such an intervention into such a central principle of private law?; is it because of the contractual imbalance and the weaker party argument?;<sup>182</sup> who is the weaker party here: access seekers (wholesale) or end-users? In this situation what happens is that the contractual imbalance in the wholesale market have an impact on the retail market (and therefore for the end-user). Accordingly, the regulatory framework establishes a statutory duty to contract. As such, contract law in telecommunications serves to attain the objectives of the regulatory framework. Yet, despite such configuration, can one still talk about private law?

### *Is it private law?*

In the end, the decision of the Finnish authority (CRA), the competent court was the Administrative Court (*Korkein hallinto-oikeus*, Finnish Supreme Administrative Court) decided the dispute. Even though the conflict concerned conditions concerning the terms of an agreement to be negotiated with respect to the interconnection of SMS and MMS services between two private parties, what was challenged was the administrative decision (and the powers of the NRA) to impose those terms and conditions over non-SMP operators. Notwithstanding these issues are, in the end, about two (private) parties in a wholesale market and it deals with pure private law institution (agreement, negotiation and good faith), there is not a single mention of the private law of contract.<sup>183</sup> Rather, the provision examined in this case stem either from the EU Regulatory Framework for Electronic Communications or the national law that applies the latter and related exclusively to the telecommunications market (Communications Market Law). In any case, what it is relevant, from a private law perspective, is the powers of NRAs to intervene in contractual relations.

The Court noted that those interventions are subject to the protection of the objectives enshrined in Article 8 of the Framework Directive, yet there are no rules for power delimitation.<sup>184</sup> Accordingly, the NRAs enjoy discretionary powers to intervene in private relations between operators providing electronic communications services, provided that these interventions are contingent on the preservation of regulatory goals. Private law is, thus, subservient to those goals, namely, in this case the removal of measures that “hinder the emergence of a competitive market”.<sup>185</sup> The designed system, with a regulatory regime which relies on the existence (and

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<sup>181</sup> See *British Telecommunications Plc v Telefónica O2 UK Ltd and Others*, [2014] UKSC 42. Para 12. This reading is in line with the Recital 5 Access Directive: In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith.

<sup>182</sup> Gijrath, S. J. (2006). *Interconnection regulation and contract law*, DeLex.

<sup>183</sup> In fact, Advocate General in its Opinion specifies that interconnection agreements are “similar in nature to a private law institution” (see para. 110 of the Opinion). Yet, there is no single mention to private rules.

<sup>184</sup> Para. 60 of the Judgment.

<sup>185</sup> *Ibid.* Para. 55.

imposition) of regulatory obligations in access and interconnection contracts, is aimed at achieving the major objectives enshrined in the Regulatory Framework *through* the terms of the interconnection agreements between the contractual parties.<sup>186</sup> This regulatory model is the result of the wording of Article 5(4) of the Access Directives, which requires NRAs to secure the policy objectives contained in Article 8 of the Framework Directive.<sup>187</sup> Therefore, interconnection is seen as a safeguard that “must be available to any party which asks for them”.<sup>188</sup> This means that we are beyond a (traditional) private law dispute, and are rather facing a sort of *regulatory* private law understood as private law subordinated to the achievement of regulatory objectives. As such, the private law contained in telecommunications regulation is shaped by competition law considerations under which NRAs intervene in order to facilitate contract formation. Accordingly, the question now to ask is: what would be the role of civil courts under such regulatory configurations? Would contract law, understood in the traditional sense, be sufficient to attain the goals of the regulatory private law? The first question is addressed in the next chapter. As a matter of fact, the nature of the court dealing with a contract related dispute in telecoms –or, better, the nature of the body responsible for deciding on the dispute– is relevant when it comes to interpret the contractual terms in light of sector-specific regulation. As to the suitability of civil law rules on contracts, it is sufficient to say that they are contingent such that private law operates insofar as it does not distort the accomplishment of the regulatory objectives.

#### 4.2. Regulatory and consumer provisions in the retail market. *Switching (for free) as a new remedy*

The second case-study concerns the resolution of a dispute in Italy under the settlement procedure provided for in the Italian legislation (*definizione della controversia*) in which the regional authorities (delegated powers from the Italian NRA) define and adjudicate the dispute. The issue at stake here is not the procedure itself,<sup>189</sup> but the nature of the problem concerned, given the high number of problems related to quality and malfunctioning of the internet service provider. Against this context, the Italian company Pub S.r.l., as a services user,<sup>190</sup> challenged the failure of the DSL service provided by the Italian operator N. S.p.a., as not reaching the minimum bandwidth requirement, as well as the billing of undue amounts as they relate to an ADSL service provided which do not respond to the parameters contained in the commercial offer.

##### *Background of the case*

In particular, the applicant from January 2010 to September 2010 noticed the failure of the DSL service, characterized by repeated falls and breaks of her connection, which did not permit a

<sup>186</sup> See, by way of example, *British Telecommunications Plc v Telefónica O2 UK Ltd and Others* [2014] UKSC 42; para. 10.

<sup>187</sup> Now Article 5(3<sup>17</sup>) of the access Directive. As required also by Article 4(1).

<sup>188</sup> *BT v Telefonica*, *supra* n 185, para. 10.

<sup>189</sup> For a profound overview of dispute settlement procedures in Italy see Chapter 5.

<sup>190</sup> The Universal Service Directive expands its consumer protection provisions to SMEs. Recital 49: “This Directive should provide for elements of consumer protection, including clear contract terms and dispute resolution, and tariff transparency for consumers. It should also encourage the extension of such benefits to other categories of end-users, in particular small and medium-sized enterprises”.

regular and continuous use of the service. The applicant was aware of the fact that the company N. S.p.a. operated a downgrade in the service, which prevented the bundling of two lines, useful to ensure the agreed services. This disruption was repeatedly reported by the claimant to the customer service of the operator, without solution.

The applicant sought, therefore, the refund of the amounts invoiced equal to € 1,710.00 from January 2010 to September 2010, the partial repayment of the amounts billed for the month of October 2010 until the date of request, the payment of compensation the disruption caused, as well as reimbursement of the costs of the proceedings.

The internet service provider (N. S.p.a.), pointed out that

“as evidenced in our communication of 4 July 2011, already pending the settlement procedure, the undersigned in the face of the downgrade denounced by the user with reference to the period between January 2010 and September 2010 has already acknowledged an extension of free wireless internet service equal to 5 months. In this regard, it should be noted that this extension, although it was not compulsory, finds its reason in the will of the undersigned to avoid the rise of any dispute in origin, trusting indeed in the absolute good faith of the user. The company states that it had always guaranteed a minimum bandwidth with 1000 kb/s. Lastly, it declares that, for what concerns the last customer communication of 12th July 2011 in which the user reports once again problems with the connection speed, the technical area of expertise has been working, immediately, in order to verify the quality of the guaranteed connection, noting as a result of these checks, and contrary to what was reported, an excellent quality of service”.

#### *Grounds for the decision*

The deciding Authority points out that the company N. S.p.a. provided no technical justification or legal responsibility for the failure of the internet service, but merely informs the recognition of “an extension of the free wireless internet service equal to 5 months” assuming its own free will in the view of the downgrade objected to by the claimant. In this regard, the deciding Authority states that, in order to exempt itself from liability, the company N. S.p.a. could have provided the copy of the log files in order to demonstrate the possible existence, without interruption, of access connections to the Internet during the period from January 2010 to September 2010. Therefore, the Authority decides that, in the absence of evidence to the contrary, the irregular and intermittent delivery of DSL service, which however did not result in the total interruption of service by the number of 272 days in the aforementioned period is due solely to the responsibility of the company N. S.p.a. and as such requires the payment of *compensation* proportionate to the outage suffered by the user, calculated according to the parameter of EUR 2.50 per day provided for in Article 5, paragraph 2 of Resolution n.73/11/CONS. However, the Authority provides for a different determination of the request for a full refund of fees billed for the specified reference period is not



acceptable, provided that the applicant has, however, used the service albeit with discontinuities and intermittently.

In addition, the deciding Authority highlights that as regards the second point at issue, namely the issue of connection speed, that in light of the new framework regulations outlined by resolution n.244/08/CSP, there is an obligation of the supplier to specify in the contract the minimum benefits promised. Given the above, the Authority emphasizes that the slight degradation of the single-band minimum upload speed of data transmission (960 instead of 1,000 Kbit/s), demonstrated primarily by surveys performed by speed test and confirmed by the results on July 9, 2011 by Ne.Me.Sys software, cannot be considered as a cause of failure or partial use of the service, such as to require the return in part or in full the fees paid.

Moreover, in accordance with the provisions of Article 8, paragraph 6 of resolution n.244/08/CONS, states that

If the customer finds the measured values of the indicators less favorable than those mentioned above may submit, within 30 days the receipt of the measurement results, a detailed complaint to the operator and where the evidence does not restore the levels of quality of service within 30 days of the submission of such complaint, he is entitled to *withdraw from the contract without penalty* for the part relating to the service of Internet access from a fixed location, with a notice of one month, by notice sent by registered mail to the operator

Accordingly, the user, once the relevant proofs are demonstrated, has the power to change operator without the necessity to pay any termination or penalty costs.

### *Comment*

This case evidences only one of the numerous problems reported by users of electronic communications services. However, the particularity of such a case resides in the fact that, apart from compensation, the adjudicator –in this case, the Italian NRA– grants the consumer a right to freely change provider at zero cost; i.e. without the need of paying the penalty for terminating the contract before its expiration. The introduction of such a remedy responds to the particular features of telecommunications contracts, given that they are contract for the supply of telecommunications services and, therefore, they usually are long-term contracts. Nevertheless, in order to foster competition via facilitating change of provider, the European legal framework places a limit on the duration of the contract up to a maximum of 24 months as an initial commitment period.<sup>191</sup> In the event that the user/consumer wishes to terminate the contract prior to its expiration, he must pay a penalty. In this case, by the annulment of the effect of the penalty clause the consumer may switch *for free* implying that the adjudicator is granting a novel sector-specific remedy. In so doing, telecommunications regulation is reducing the scope of application of private law remedies,<sup>192</sup> but at the same time, it is expanding sector-related consumer redress by creating ex-novo (sector-specific) remedies outside civil law, granted by the sector-specific regulator. The introduction of

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<sup>191</sup> Article 30(5) Universal Service Directive.

<sup>192</sup> Bellantuono, G. (2014). Forthcoming in P. Monateri (ed.), Handbook of Comparative Contract Law, Elgar Publishing, 2015. Available at SSRN: <http://ssrn.com/abstract=2486066>.

private law remedies via European sector-specific legislation is not new. In the financial sector, the Mifid II Directive entitles supervisory authorities to impose remedies.<sup>193</sup> This attempted expansion of private law remedies via sector-specific regulation has been visible with the (abortive) amendment of the European regulatory framework for telecoms. In this regard, the draft Regulation entitled NRAs to grant compensation remedies in the line of the Mifid II Directive.<sup>194</sup>

This approach also makes more difficult their enforcement via civil courts.<sup>195</sup> Yet, the issue of exclusionary powers of the NRA does not operate in Italy where, compliant with the principle of liberty enshrined in EU law, the legislator has provided that the definition of the dispute by the regulator, at least in B2C, does not preclude civil compensation.<sup>196</sup> Should a civil court have decided the case, the judge would have (probably) resolved the case under the Italian *civil* law. By analogy, as it has been already pointed out with regard to the energy sector, “a civil judge employing the traditional tools of contract interpretation might come to different conclusions”.<sup>197</sup> In regulated markets, regulatory goals in civil courts are not relevant, disregarded by civil judges *vis-à-vis* contract law principles; whereas these contractual principles might in parallel be disregarded by the regulators in those cases where they are opposed to the regulatory goals pursued.<sup>198</sup>

## 5. Consumer law v sector-specific regulation. Substitution or complementarity?

While major attention has been paid to the intersections between sector-related regulation and competition law, the analysis of the interactions of sector-specific provisions and the broader (horizontal) instrument of contract law (particularly consumer law) has been, with some exceptions,<sup>199</sup> mostly neglected. This section seeks to examine the interplay between sector-specific rules *vis-à-vis* horizontal instruments of consumer protection (Consumers Rights Directive, CESL, Service Directive, etc.). The analysis of such interplay aims to shed some light on the relation of the two different legal regimes (horizontal v vertical). Because these two regimes serve different rationalities, and hence purposes, comparing the different instruments becomes an important analytical exercise. Is it possible to apply horizontal law provisions to sector-related issues? How do they interact? Does the sector-related regime overrule horizontal provisions? Do they lead to different outcomes?

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<sup>193</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, 12.06.2014, OJ L 173/349. Article 69.

<sup>194</sup> Draft Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent - COM(2013) 627, Article 30(8).

<sup>195</sup> Ibid.

<sup>196</sup> Article 11(4) Delibera 179/03/CSP ‘Direttiva generale in materia di qualità e carte dei servizi di telecomunicazioni’: La corresponsione dell’indennizzo non esclude la possibilità per l’utente di richiedere in sede giurisdizionale il risarcimento dell’eventuale ulteriore danno subito (The payment of compensation does not exclude the possibility for the user to apply to the courts for compensation for any further damage). See chapter 5 of this dissertation.

<sup>197</sup> Bellantuono, G. (2010), “The Limits of Contract Law in the Regulatory State”, *European Review of Contract Law*, 6, 115-142.

<sup>198</sup> Ibid.

<sup>199</sup> Micklitz, H. W. (2013), “Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse”, *Yearbook of European Law*, 32(1), 266-367. For a particular analysis on the Energy sector see Bellantuono, G., & Boffà, F. (2007) “Energy Regulation and Consumers’ Interests”. Available at SSRN 1120928.

Sector-related rules apply without prejudice to consumer protection rules. The Universal Service Directive makes particular reference to Directive 93/13/EEC on Unfair Contract Terms, and Directive 97/7/EC on Distance Selling.<sup>200</sup>

Because the enforcement of telecoms rules can be performed by a multiplicity of actors (national court or national regulatory authority), it raises the question as to which instruments are better-suited for applying consumer protection measures or whose values are more relevant for the resolution of a particular issue.<sup>201</sup> In this regard, and setting aside the procedure (who applies the law?) by focusing on the substance (hierarchy of norms), Case C-522/08 represents a conflict between two legal regimes.<sup>202</sup> It concerned the issue of *services bundling*; i.e. a commercial practice consisting in the provision of a service contingent on the supply of an additional service. By way of example, in the telecoms field it represents those cases in which the user can only obtain Internet or TV services by means of the conclusion of a contract of supply of telephone services.

In the case concerned, *Telekomunikacja Polska* (TP, nowadays Orange Poland) made the conclusion of a contract for the provision of ‘neostrada tp’ broadband internet access services contingent on the conclusion of a contract for telephone services.<sup>203</sup> Under the Universal Service Directive (sector-specific legislation),

Member States shall ensure that designated undertakings, in providing facilities and services additional to those referred to in Articles 4, 5, 6, 7 and 9(2), establish terms and conditions in such a way that the subscriber is not obliged to pay for facilities or services which are not necessary or not required for the service requested.<sup>204</sup>

On the other hand, national law provided that:

Article 46(2) of the Polish Law on Telecommunications<sup>205</sup>

For the purpose of protecting the end-user, the President of the [UKE] may, by way of a decision, impose on a telecommunications undertaking with significant market power in the retail market the following obligations:

(...)

(5) not to oblige an end-user to subscribe to services which that end-user does not require.

Article 57(1) of the Polish Law on Telecommunications provides:

1. A service provider may not make the conclusion of a contract for the provision of publicly available telecommunications services, including connection to a public telecommunications network, contingent on:

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<sup>200</sup> Article 1(4) Universal Service Directive.

<sup>201</sup> On the multiplicity of actors and outcomes see Chapter 5.

<sup>202</sup> Case C-522/08. Judgment of the Court (Third Chamber) of 11 March 2010, *Telekomunikacja Polska SA w Warszawie v Prezes Urzędu Komunikacji Elektronicznej*. ECR [2010] I-02079.

<sup>203</sup> Para. 15.

<sup>204</sup> Article 10(1) of the Universal Service Directive.

<sup>205</sup> *Ustawa – Prawo telekomunikacyjne*, of 16 July 2004, Dz. U. No 171, item 1800, (hereinafter, ‘Law on Telecommunications’).

(1) The conclusion, by the end-user, of a contract for the provision of other services or the purchase of equipment from a specific provider;

(...)

Under these provisions, the President of UKE issued a decision in order to put an end to such a commercial practice.<sup>206</sup> TP challenged that decision in front of the *Wojewódzki Sąd Administracyjny w Warszawie* (Regional Administrative Court, Warsaw) seeking the annulment of the decision by arguing the incompatibility of Article 57(1) with the Universal Service Directive. However, the Regional Administrative Court dismissed the action and ruled that the decision by the President of UKE did not constitute an erroneous application of the legal provision (i.e. Article 57(1)).<sup>207</sup> TP appealed that judgment before the *Naczelny Sąd Administracyjny* (Supreme Administrative Court), which referred a question for preliminary ruling on the compatibility of the introduction of a prohibition on making the conclusion of a service-provision contract contingent on the purchase of another service by the Member States.<sup>208</sup> The European Court recalled that under the Universal Service Directive, Member States must ensure that designated undertakings do not establish terms and conditions obliging the subscriber “to pay for facilities or services which are not necessary or not required for the service requested”.<sup>209</sup> Accordingly, the Court declared that the Framework Directive and the Universal Service Directive do not preclude national legislation “which, for the purpose of protecting end-users, prohibits an undertaking from making the conclusion of a contract for the provision of telecommunications services contingent on the conclusion, by the end-user, of a contract for the provision of other services”.<sup>210</sup>

In the joined Cases C-261/07 and C-299/07, the Court acknowledged that Directive 2005/29/EC precludes national legislation that imposes a “general prohibition” of combined offers made by a vendor to a consumer.<sup>211</sup> In the case-at-hand, there seems to be a clash of rationalities of the two different sets of rules emanating from the EU (horizontal *versus* sector-specific legislation). The different policy objectives of the horizontal rules in consumer protection have given rise to a paradoxical situation where horizontal legislation undermines originally afforded consumer protection by sector-specific regimes.

This example may serve to illustrate the complex co-existence of both regimes sector-specific and general contract law. Certain authors have already noted the difficulties of applying general contract regimes such as, by way of example, the Draft Common Frame of Reference (DCFR) to sector-related problems.<sup>212</sup> The application of more general principles of contract law would require a radical new interpretation of its rules because contract law is unable to

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<sup>206</sup> Decision of 28 December 2006 upheld by Decision of 14 March 2007.

<sup>207</sup> Para 16.

<sup>208</sup> Para 17.

<sup>209</sup> Para. 24.

<sup>210</sup> Para. 30.

<sup>211</sup> See Joined cases *VTB-VAB NV v Total Belgium NV* (C-261/07) and *Galatea BVBA v Sanoma Magazines Belgium NV* (C-299/07) [2009] ECR I-2949, Para 68.

<sup>212</sup> In the field of Energy, Bellantuono *supra* n 197.

accommodate a regulatory approach.<sup>213</sup> Until a new /paradigm of European Contract Law emerges – European (Regulatory) Private Law may serve as a placeholder– embodying perhaps such a perspective, the problems will be focused irreconciling the interaction of the two different regimes.<sup>214</sup>

## 6. Conclusions. The intrusion of goal-oriented (Regulatory) Private Law

Under the configuration of the European Regulatory Framework for electronic communications, telecommunications regulation meets private law. This is mainly due to the fact that the shift towards the liberalization of telecoms sector coincides with a shift towards its privatization. As such, telecommunications regulation encompasses contractual provisions concerning, typically, private law relationships in wholesale and in retail markets. This chapter has displayed the implications of such approach.

Following the institutional design displayed in the previous chapter, the analysis of the substantive provisions concerning private law relationships reveals a clear orientation towards the achievement of the regulatory objectives of telecommunications sector-specific regulation. Against this background, whilst regulatory goals are European, traditional private law principles are embodied in national understandings.<sup>215</sup> Thus, on every occasion we talk about European private law, in relation to the private law provisions contained in EU regulated sectors such as telecoms, the harmonization of such regulatory goals requires special procedural rules, since the application of private law principles would distort the achievement of the regulatory goals as evidenced in chapter 3. In this regard, the present chapter has proved that private law provisions within telecommunications regulation are subordinated to public law and economic regulation; in short, to regulatory law. The Internal Market has been the driving force behind the European private law and contracts have become an instrument of such higher policy (and regulatory) objectives. Contract law becomes *competitive contract law*,<sup>216</sup> as part of serving a regulatory function. As such, private law is used for economic regulation under a public interest rationale (universal access and connecting everyone or end-to-end connectivity). Under this paradigm, the relevant question relates to the number of transformations private law has experienced. While in traditional contract law mandatory rules are the exception, in the telecommunications sector one might venture to suggest that they have become the rule. The boundaries between public and private law become blurred. Consequently, private law provisions in telecommunications are regulatory in nature. This chapter has addressed the particular private law implications for B2B (wholesale) and for B2C (retail) relationships.

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<sup>213</sup> Ibid.

<sup>214</sup> Bellantuono supra n 197. See also Ottow, A. (2012), "Intrusion of public law into contract law: the case of network sectors", *The Europa Institute Working Paper* 03/12.

<sup>215</sup> Comparato, G. (2014), *Nationalism and private law in Europe*. Bloomsbury Publishing.

<sup>216</sup> Competitive contract law implies that "the contract law rules are shape so as to allow effective competition between suppliers in the Internal Market" Micklitz, H.-W., (2005) "The Concept of Competitive Contract Law", *Penn State International Law Review*, 23(3) 549-586; see p. 555.

As to the contractual relationships between operators, private companies through mandatory provisions concerning access conditions now carry out the provision of former public services. The provision of these services has been, therefore, transferred to the market. By way of example, according to universal access, there is the obligation to contract and negotiate for the sake of competition and market inclusion safeguards. The lack of a fully-fledged EU contract law together with the absence of a properly harmonized private law among the member states concerning contract formation, negotiation, performance and remedies means that the EU cannot develop a regulation of access and interconnection under a single contract law.<sup>217</sup> This enterprise was, then, undertaken according to public law considerations –i.e. via telecommunications regulation– which indeed pursues different aims than those for which (traditional) private law stands, creating a tension between public and private law objectives.<sup>218</sup> As a result, the principles applied in the Regulatory Framework for telecoms (non-discriminated access) are substantively different to those underpinning contract law, based on freedom of contract. This is to say that NRAs, when imposing regulatory obligations, do not apply private law but regulatory standards; as opposed to civil courts which inevitably apply private law principles. It gives rise to a tension and potential divergent outcomes in the enforcement of telecommunications regulation.<sup>219</sup>

As to consumer protection, the Universal Service approach strives for the maintenance of a provider of last resort by imposing obligations to contract as a safety net for vulnerable consumers. This means that there is room for social policy elements within European Private Law, in contrast to the private law contained in the 19<sup>th</sup> Century Codes.<sup>220</sup> In this light, consumer-related provisions in regulated markets depart from the more horizontal approaches of private and consumer law.<sup>221</sup> One may query the permanent nature of sector-specific regulation: Whether sector-specific regulation aims to construct a new and basic architecture or is entirely an *ad hoc* construction? The answer to this question can be observed in the character of its provisions. Thus, whereas the *competition law approach* –number portability, information, etc. – may eventually exempt the need of sector-specific regulation in favor of competition law or, in the field of private law, a broader contract law (e.g. Unfair Contract Terms and general consumer law); interconnection, access and price regulation in telecommunications indicate more embedded forms of special regulation.<sup>222</sup> Further, as a matter of fact, civil law regimes remain applicable to telecommunications contracts even by traditional judicial schemes of enforcement. Yet, different approaches yield different outcomes, because the different regimes are built according to different rationales. It is also noticeable that new (specialized) bodies have emerged for the enforcement of the sector-related provisions, especially for the resolution of disputes arising within the provision of telecommunications services. The succeeding chapter will address, then, the institutional design for

<sup>217</sup> Gijrath, S. (2006), *Interconnection Regulation and Contract Law*, dLex.

<sup>218</sup> Bergkamp, L. (2003). *European Community Law for the New Economy*. Intersentia nv.

<sup>219</sup> These issues are subject to extensive treatment in the following chapter.

<sup>220</sup> Micklitz, H.-W., (2011) ‘Universal Services: Nucleus for a Social European Private Law’, in Cremona, M. (ed.), *Market Integration and Public Services in the European Union*, Oxford University Press, pp. 63-102.

<sup>221</sup> Ottow, A. (2012), ‘Intrusion of public law into contract law: the case of network sectors’. The Europa Institute Utrecht, Working Paper 02/12.

<sup>222</sup> Möschel, W. (2009), “The Future Regulatory Framework for Telecommunications: General Competition Law instead of Sector-Specific Regulation—A German Perspective”, *European Business Organization Law Review*, 10(1) 149-163.

dispute resolution in telecoms and its implications for the enforcement of provisions that are, in principle, of private law nature.





## Chapter 5 – THE ENFORCEMENT OF EUROPEAN REGULATION VIA (ALTERNATIVE) DISPUTE RESOLUTION IN THE TELECOMMUNICATIONS SECTOR

### 1. Introduction

The liberalization trend has changed the telecommunications sector dramatically. The number of providers of telecommunications services has radically increased giving rise to new markets and services developing at a very high speed. As a result of market competition and the increasing number of market participants, a huge number of potential disputes take place in the telecoms sector in such a way that telecoms disputes have become *by-products* of the competition model in both wholesale and retail markets. Disputes related to the telecoms sector involve a wide range of issues, most importantly, and concerning private law, the failure to fulfill contractual obligations. Against this background, all these new processes and the way in which telecoms markets develop nowadays necessarily calls for rapid responsiveness when it comes to dispute resolution.

Effective enforcement of the European legal framework for the telecommunications sector, meaning the availability of effective mechanisms for dispute resolution provided by judicial or extrajudicial bodies, become essential for the achievement of the objectives of telecommunications regulation and policy. A lack of effective mechanisms for dispute settlement under telecommunications regulation would hinder the development of the market, obstruct the functioning of competition and, finally, endanger investment by reducing the flow of capital from investors.<sup>1</sup> Thus, the European Union –being aware of the significance of having effective alternative means of dispute resolution– has opted for fostering the availability of out-of-court bodies for the enforcement of the provisions contained in the regulatory framework for electronic communications services.

Drawing on the objectives of the EU Telecommunications rules, this chapter describes the institutional choice and the different approaches towards dispute resolution at the national level given the procedural autonomy principle. It then undertakes a comparative analysis of different EU Member States, looking at both the wholesale and retail levels.

First it is relevant to briefly recall the goals of the EU legal framework for telecoms. The main policy aims are to foster competition and achieve a single electronic communications network and services market in Europe. This *policy push* strives for the creation and development of a

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<sup>1</sup> International Telecommunications Union (2004), *Dispute resolution in the Telecommunications Sector. Current Practices and Future Directions* (Hereinafter, ITU Report).

genuine Internal Market for telecommunication in the EU. Therefore, as this dissertation has already displayed [Chapter 4], the competition and market-oriented approach has implied the establishment of rights and remedies that are aimed at setting up the conditions for achieving a truly competitive market. The underpinning rationale of the market is *access*. This idea of access is twofold: The opening of the market is deeply grounded on the idea of providing the conditions for operators to participate in the market (wholesale level), whereas at the retail level access conditions should enable the spread of telecommunications services to make them available to all citizens.<sup>2</sup> There is no doubt that in order to achieve these aims the rights and remedies provided for in the legislation concerning telecommunications must be properly and effectively enforced; not only for the achievement of the main purposes of the legislation, but also to succeed with secondary goals such as the fostering of investment via regulatory certainty.<sup>3</sup>

Be this as it may, we are dealing with sector-specific rights and remedies as opposed to civil and contract law rights and remedies. The latter find their most important manifestation when provided as the solution to a particular dispute. Accordingly, their effective enforcement will be very much based on the designed scheme for dispute settlement as long as civil courts will apply civil and contract law principles, whereas –as this chapter will show– the allocation of adjudicative powers to NRAs would imply the application of sectorial remedies and the adoption of decisions largely based on regulatory principles.

This chapter provides a snapshot of the current institutional scheme that has been designed in order to achieve the enforcement of those goals and objectives enshrined in the European legal framework. Further, this chapter analyzes how the EU scheme is enforced at the national level. To this end, this chapter looks at some Member States (Italy, Germany, Poland and the United Kingdom) as paradigmatic examples of how dispute resolution mechanisms have been put in place around Europe. However, this chapter deliberately sets aside the enforcement of competition rules. With regard to private law, this means the enforcement of competition law via commitment decisions, which is not subject of analysis here.

Telecommunications regulation relies on sector-specific institutional structures to build up a system of enforcement for telecommunications-related disputes, be they B2B or B2C. Here, a movement towards out-of-court dispute settlement –a service increasingly provided even by the different NRAs themselves– can easily be seen. This raises the question of the role (i.e. relative importance) of extrajudicial enforcement *vis-à-vis* the judiciary. The amount and technical complexity of telecoms-related disputes has favored the emergence of sector-specific schemes and

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<sup>2</sup> The aim of the Universal Service Directive (2002) –as stated in its Article 1– is to “ensure the availability throughout the Community of good quality publicly available services and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market”.

<sup>3</sup> For example, as it is stated in the Better Regulation Directive, *effective enforcement* fosters regulatory certainty which, in turn, implies an important factor for investment attraction. See Recital 51, Council Directive 2009/140/EC of 25 November 2009 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 L337/3711).

procedures specifically designed for disputes taking place in the telecoms sector. The questions that this chapter seeks to respond to concern the legal framework (section 2) and the institutional design of the actors involved in the enforcement process (section 3). It then provides two examples of dispute resolution in the wholesale (section 4.1) and in the retail (section 4.2) market. Accordingly, it tries to underline the issues resulting from enforcement design and how these impact upon the outcome of dispute settlement stemming from typically contractual problems that give rise to regulatory (administrative) interferences within the different layers of (EU) telecommunications law enforcement.

## **2. Setting the scene: Dispute resolution in the EU Regulatory Framework for Electronic Communications**

The liberalization of telecommunications implied the restructuring of the market with the emergence of new market operators. Yet, despite the fact that the telecommunications market is strongly characterized by economies of scale and scope, the simple liberalization of the sector does not suffice to avoid Significant Market Power situations hindering the enforcement of the rules contained in the regulatory framework. In this sense, it is necessary for the public authorities to closely monitor the functioning of the market. In so doing, public authorities may rely on three sets of rules: European competition law; national competition law; or sector-specific legislation.<sup>4</sup> Each legislative regime is applied (*differently*) by different institutions: European competition law is applied by the European Commission, National Competition Authorities (NCAs), national courts, and in some countries NRAs; the national competition regimes are monitored by NCAs, national courts, and possibly NRAs; and sector specific legislation is applied by NRAs (under the control of national Courts via judicial review procedures).<sup>5</sup> Hence, the analysis of the institutional design becomes crucial in order to fully grasp the how the enforcement of the rules applicable to issues arising in relation to the provision of telecommunications services functions.

In addition, dispute resolution is decisive for giving effect to the provisions contained in telecommunications regulations. Accordingly, the practice adopted and the enforcement design will have an indisputable impact on the effectiveness of the application of the regulatory scheme. This noted, the national procedural autonomy principle and the national procedural rules also play a relevant role in the effectiveness of the application of such provisions and the level of harmonization of the substantive provisions. In order to overcome potential obstacles resulting from the procedural design and the conflicting objectives between the EU and the national level and the application of sector-specific regulation, the European legislator has opted for fostering the establishment of sector-specific schemes for the enforcement of the provisions contained in the telecommunications legal regime via extrajudicial enforcement, mostly compelling Member States

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<sup>4</sup> Garzaniti, L. and M. O' Regan (eds.) (2010), *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, 3rd ed.; Sweet and Maxwell.

<sup>5</sup> De Streel (2004) 'Remedies in the European Electronic Communications Sector', in Geradin, D. (Ed.). *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation*, Intersentia, pp. 67-122.

to put in place extrajudicial mechanisms for dispute settlement. By establishing some procedural principles for extrajudicial procedures, the enforcement of EU telecommunications regulation surpasses potential conflicting problems among legal regimes arising from the application of national procedural rules.

The EU was not exclusively competent in the area of Alternative Dispute Resolution (ADR) and, therefore, it employed soft law mechanisms to establish minimum-quality criteria on ADR.<sup>6</sup> Since that time, it has been gradually pushing the harmonization in this field. The promotion of ADR mechanisms in the EU has been especially visible in regulated markets, where the EU has clearly opted for the establishment of out-of-court mechanisms for the settlement of disputes. Thus, not only in telecommunications, but also in the energy,<sup>7</sup> consumer credit,<sup>8</sup> or payment services sectors,<sup>9</sup> EU laws oblige Member States to set up ADR mechanisms, while in other sectors such as e-Commerce<sup>10</sup> or postal services<sup>11</sup> they only encourage such a step. This movement has culminated in the enactment of a EU Directive on Consumer ADR<sup>12</sup> and a Regulation on Consumer Online Dispute Resolution (ODR)<sup>13</sup> following a more horizontal approach by establishing certain procedural principles to cover a broad set of consumer disputes.

In the electronic communications sector in particular, within the EU regulatory framework two distinctive approaches for the two different markets levels (wholesale and retail) have been devised.

### **Wholesale market**

Generally, as the previous chapter of this dissertation has described, the most common conflicts between operators of electronic communications services and/or networks arise in the context of access and interconnection agreements. This is largely due to the fact that these contracts usually involve high technical requirements and this may easily lead to lack of clarity about the contractual terms. That is particularly the case when the service provider that has exclusive control over the essential facility fails to reach an interconnection agreement or to provide access to the network. Disputes originating from the contract terms or the performance of obligations arising from them

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<sup>6</sup> For example, the European Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC) and the European Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).

<sup>7</sup> Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (OJ L 211, 14.8.2009).

<sup>8</sup> Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers (OJ L 133, 22.5.2008, pp. 66–92).

<sup>9</sup> Directive 2007/64/EC of 13 November 2007 on payment services in the internal market (OJ L 319/1, 5.12.2007).

<sup>10</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17/07/2000).

<sup>11</sup> Directive 2008/6/EC of 20 February 2008 with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 28.2.2008).

<sup>12</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, (OJ L 165 18.6.2013).

<sup>13</sup> Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (OJ L 165 18.6.2013).

can be resolved either by the (civil) court or the NRA concerned. In particular, for disputes arising in wholesale markets, Article 20(1) of the Framework Directive provides that:

“In the event of a dispute arising in connection with existing obligations under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, or between such undertakings and other undertakings in the Member State benefiting from obligations of access and/or interconnection arising under this Directive or the Specific Directives, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months, except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority”.

Adjudication of the dispute by the NRA is generally the forum chosen for handling the issue.<sup>14</sup> Should the civil court have had the occasion to consider these issues, some argue that they would have done so “just as well as NRAs”.<sup>15</sup> The issue is controversial, but be that as it may, what becomes clear from the following analysis is that the potential involvement of different bodies in the absence of a common approach or single guidance on the applicable legal regime will likely lead to divergent outcomes. This is also the case when the judiciary is involved via the stipulated judicial review procedure.<sup>16</sup> The rationale of having a parallel settlement procedure as opposed involving the judiciary may indeed respond to the nature of the disputes, which are usually complex with high values at stake, involving various commercial, technical and legal aspects. The institutional and procedural aspects of sector-specific regulatory adjudication and their legal implications are analyzed below.

## Retail market

Consumer-related disputes in telecommunications are often related to billing, tariff transparency and internet quality. These issues generally represent the most frequent causes of telecommunication user complaints.<sup>17</sup> Disputes concerning billing are related to disagreements on the charges billed to consumers for the provision of the service(s). Very close to billing problems are issues related to tariff transparency, which involve the failure to provide clear information about the tariffs to be applied and the charges billed. Poor quality of services, usually Internet speed, are –together with service interruption– a common reason for consumer-related disputes. The different Member States have put in place quality measurement mechanisms (e.g. *Misura Internet* in Italy)<sup>18</sup> and quality service standards have been adopted.<sup>19</sup>

In order to solve these consumer-related disputes in a rapid manner, out-of-court dispute resolution is encouraged in the Universal Service Directive. Thus, according to its Article 34(1):

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<sup>14</sup> Gijrath, S. J. (2006). *Interconnection regulation and contract law*, DeLex. See pp. 395ff for the Dutch example.

<sup>15</sup> Ibid.

<sup>16</sup> See Section 4.1 below.

<sup>17</sup> Data from the analysis of the national experiences presented within the Framework of the Workshop *Private Law and the Telecommunications Sector: National Perspectives on EU Regulation* held in Florence, 7-8 December 2012.

<sup>18</sup> See Chapter 4.

<sup>19</sup> ETSI Quality Standards, see <http://www.etsi.org/technologies-clusters/technologies/quality-of-service>.

Member States shall ensure that transparent, non-discriminatory, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes between consumers and undertakings providing electronic communications networks and/or services arising under this Directive and relating to the contractual conditions and/or performance of contracts concerning the supply of those networks and/or services.

Such a procedure should be available for disputes between users and providers of services under the Universal Service Directive and for disputes related to the contractual conditions and/or performance of contracts concerning the supply of those networks or services.<sup>20</sup> The means of initiating such procedures should be clearly contained in the subscription contract.<sup>21</sup> Independent dispute resolution bodies must be established and must adhere to the minimum principles established by the Commission for out-of-court settlement of consumer disputes.<sup>22</sup>

The following sections are aimed at outlining different schemes for dispute resolution, either in B2B and B2C contract-related disputes. This analysis aims to shed some light on such schemes and to contribute to a better understanding of the foundations for the existence of sector-specific mechanisms for dispute resolution in the telecommunications sector in a manner isolated from general structures of private law and public law. As a matter of fact, this sector-specific enforcement design outlines a blueprint for an enforcement system that takes place away from the judiciary and the civil procedural rules. The judiciary would only come into play via judicial review procedures in case of appeal of the regulatory decision issued by the competent authority in the wholesale market or in cases where consumers decide to go to court when seeking consumer redress. The latter seems improbable.<sup>23</sup> Accordingly, the following section provides an overview of the different actors and procedures for dispute resolution in the context of telecommunications regulation.

### **3. Institutional design: Different (p)layers in the enforcement of telecommunications regulation**

As mentioned above, the designed legal and institutional schemes yield a landscape in which different institutions are in charge of enforcing different sets of rules. There is an interplay of judicial, administrative and out-of court settlements, and an interaction between the applicable rules, which gives way to a multilevel system of enforcement consisting in manifold (and networked) layers: first, we have European competition law, monitored by the European

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<sup>20</sup> Queck, R., de Streel, A., Hou, L., Jost, J., & Kosta, E. (2010), 'The EU Regulatory Framework Applicable to Electronic Communications', in Garzaniti, L. and O'Regan, M. (Eds.), *Telecommunications, Broadcasting and the Internet. EU Competition Law & Regulation* (3rd ed.), London: Sweet & Maxwell, pp. 3-262.

<sup>21</sup> Article 20(2) letter g Universal Service Directive.

<sup>22</sup> These principles are listed in the Commission Recommendation 98/257 of March 30, 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

<sup>23</sup> "Disputes that reach a court also seem to be the exception rather than the rule in the field of universal services", Micklitz, 2012, at 52. See also 2009 DG SANCO, *Study on the use of Alternative Dispute Resolution in the European Union* (Civil Consulting 2009) at: [http://ec.europa.eu/consumers/redress\\_cons/adr\\_study.pdf](http://ec.europa.eu/consumers/redress_cons/adr_study.pdf).

Commission, the European Competition Network (ECN), National Competition Authorities (NCAs), national courts, and –in some countries– a single regulator for markets and competition tasked with the combined role of applying competition and sector-specific rules; second, there are the national competition regimes, scrutinized by the NCA; finally, in those countries that have maintained distinct functions for the regulator and the competition authorities, sector-specific legislation is applied by the NRA. Courts also apply competition and sector-specific rules, but their role will be determined by the nature of the court.<sup>24</sup> Provided that disputes arise in connection with the contractual relations that bind the parties, the application of private law also comes into play.

In the case of telecommunications services, the European regulatory framework has opted for providing a system of regulatory adjudication of disputes (for B2B disputes) and fostering the use of ADR (not only for B2B situations, but also for consumer disputes), thus giving rise to the displacement of civil courts to resolve *inter partes* conflicts. This design centralizes dispute resolution largely with the regulator. This procedural innovation draws on the expertise argument: The high level of technicality of the market of telecommunications leads to a situation where the resolution of disputes becomes a very complex task and expertise becomes essential for the resolution of dispute that are of a high technical nature. Therefore, it happens that regulatory and legal institutions are not always sufficiently endowed to handle telecoms disputes in an efficient and effective manner.<sup>25</sup> Accordingly, the legislator has relied on the technical, economic and legal expertise of NRAs for the effective enforcement of the telecommunications framework. Expertise has also favored the emergence of *sector-related ADR providers* for consumer-related disputes, such as Co.Re.Com in Italy or CISAS in the UK.<sup>26</sup>

In the wholesale market, there is also a wide catalogue of dispute resolution techniques, ranging from regulatory adjudication to the use of ADR mechanisms. NRAs often encourage parties to try to resolve disputes before approaching the regulator due to the lack of resources in some cases, as well as expertise limitations. There might also be NRAs that simply refuse to resolve the case by redirecting or delegating them to specific schemes set up specifically by the regulator for the resolution of these kinds of disputes. Under this sector-specific setting, there is also room for *non-official* mechanisms for dispute resolution to be used, giving rise to *private* schemes of *pure private* enforcement.

In view of this multilevel system of manifold actors and legal regimes, the question that arises concerns the role of NRAs when deciding disputes within the framework of their mandates as adjudicators. The legislation does not clearly state whether their mandate stands to act as a safeguard for EU regulatory principles over national contract law –so that NRAs act in their administrative capacity as *European enforcers*– or if, on the contrary, the applicable rules for the determination of the dispute are left entirely to their discretion within the limits and safeguards of national legislation. A third alternative would be that the application of the transposed legislation is

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<sup>24</sup> See below, Section 4.1.

<sup>25</sup> ITU Report.

<sup>26</sup> See below, Section 3.

to be read through the lens of local considerations –including national private law– in combination with the overarching (European) principles that guide telecommunications regulation. This latter interpretation seems the most plausible in the view of the case-study examined below.<sup>27</sup>

As a result of this institutional design, in both wholesale and retail markets the enforcement of telecommunications regulation via dispute resolution can take place in three different ways by three different players: regulatory dispute resolution by the regulator; ADR mechanisms; or the judicial route. The resulting different layers in the enforcement of telecommunications regulation via dispute resolution are examined in this section.

### **3.1 Regulatory dispute settlement by NRAs**

The European Regulatory framework for Electronic Communications engages NRAs in the enforcement of the sector-related provisions. In this regard, apart from market supervision, regulators also play a role in (private) dispute settlement.

#### **3.1.1 The role of NRAs in the enforcement of telecommunications regulation**

Sector-specific national regulators are actively involved in the resolution of telecoms-related disputes. At the wholesale level, NRAs have a specific mandate to act as dispute adjudicators, whereas in the case of consumer disputes, even though there is no formal obligation the authorities often set up and/or monitor sector-specific mechanisms for dispute settlement.

#### ***B2B disputes***

In the event of a telecom-related dispute between telecoms undertakings that is associated with obligations arising from telecommunications regulation (“regulatory obligations”), the Regulatory Framework for electronic communications provides that the national regulator is responsible for the resolution of the dispute.<sup>28</sup> More specifically, parties can request the intervention of the authority to impose a solution on the parties:

In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. National regulatory authorities should be able to impose a solution on the parties. The intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services in a Member State should seek to ensure compliance with the obligations arising under this Directive or the Specific Directives.<sup>29</sup>

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<sup>27</sup> Section 4.1.

<sup>28</sup> Article 20(1) of the Framework Directive.

<sup>29</sup> Recital 32 Framework Directive.



Article 20 of the Framework Directive narrows the mandate of NRAs, which enjoy broad discretion with regard to the procedure put in place to decide on the dispute.<sup>30</sup> NRAs are solely required to issue a binding decision within a time frame of 4 months.<sup>31</sup> Yet, the different mechanisms may vary from “formal procedures, including court-like hearings with oral or written evidence, to much more informal or ‘legislative’ approaches to fact finding and determination”.<sup>32</sup> As to the procedure for statutory dispute resolution by the NRA, telecommunications legislation usually establishes the procedural framework, but it may also be the case that this procedure is subject to administrative regulation. This said, it is not uncommon for the agency to be entitled to decide the most appropriate procedure according to the dispute at stake.<sup>33</sup>

### *National experiences*

By way of example, Italy has developed the following mechanism for the settlement of disputes among operators. According to Article 23(1) of the recently amended *Codice delle comunicazioni elettroniche* (Electronic Communications Code),<sup>34</sup> if a dispute arises concerning their obligations under the Code between undertakings providing electronic communications networks or services, or between such companies and other businesses that benefit from the imposition of obligations for access or interconnection arising from the Code, the Authority (AGCOM, *Autorità per le Garanzie nelle Comunicazioni*), at the request of any party, shall adopt as soon as possible and in any event within a period of four months (except in exceptional circumstances) a binding decision to resolve the dispute. The entire procedure is regulated in the resolution 352/08/CONS.<sup>35</sup> This regulation provides for an initial attempt at conciliation by the parties in the first hearing of the procedure.<sup>36</sup> If conciliation succeeds, the authority responsible for the proceedings must prepare the minutes of the special agreement concluded, to be signed by the parties that reached the agreement.<sup>37</sup> Such agreement can be amended during the procedure. As a characteristic of the conciliatory nature of the procedure, the regulation provides the possibility for the official in charge of the procedure to propose, upon request of one party, one or more alternatives for a possible amicable settlement of the dispute.<sup>38</sup> The proposals put forward for this purpose are totally without effect if they are not accepted and they are not binding in any way on the body competent to settle the dispute.<sup>39</sup> During the investigation phase, the officer leading the proceedings may freely formulate questions to the parties at the hearing in order to clarify the facts in support of their claims, defences and

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<sup>30</sup> For a deeper analysis of the different ADR techniques in business-to-business disputes and their application in a comparative perspective, see Warwas, B. A. (2014), “ADR in B2B Disputes in the EU Telecommunications Sector: Where Does the EU Stand and What Does the EU Stand for?”, *EU Working Paper Series LAW 2014/12*.

<sup>31</sup> Article 20(1) Framework Directive.

<sup>32</sup> ITU Report (2004); pp. 5-6.

<sup>33</sup> ITU Report.

<sup>34</sup> Decreto legislativo 1° agosto 2003, n. 259, modifica da Decreto legislativo 28 maggio 2012, n. 70.

<sup>35</sup> Delibera N. 352/08/CONS, Regolamento concernente alla Risoluzione delle controversie tra operatori di Comunicazione Elettronica (Regulation concerning the resolution of disputes between operators of electronic communications). In particular, the procedure is regulated in Annex A (*Allegato A*) of such Regulation.

<sup>36</sup> Article 9.

<sup>37</sup> Ibid. Para. 4.

<sup>38</sup> Ibid. Para. 6.

<sup>39</sup> Ibid.

exceptions, or to clarify the points of the dispute.<sup>40</sup> Unless otherwise advised by the Commission for infrastructure networks Authority (*Commissione per le infrastrutture e le reti dell'Autorità*), the definition of disputes relating to the provision of purely financial and commercial matters, not related to issues of regulation, is normally delegated to the Director of networks and electronic communications services (*Direttore della Direzione reti e servizi di comunicazione elettronica*).<sup>41</sup> This means that the adjudication of disputes concerning commercial and contractual matters of a non-regulatory nature rests in the hands of the Director. The Regulation mandates that the decision in which the solution is adopted must be justified and must pursue the regulatory objectives contained in Article 13 of the Telecommunications Code.<sup>42</sup> Such a decision enjoys a binding nature.<sup>43</sup>

In Poland, according to the Polish Telecommunications Law<sup>44</sup> Act, the President of the Polish Office for Electronic Communications (*Urzędu Komunikacji Elektronicznej*, UKE) is the body responsible for resolving disputes related to network access by alternative telecommunications operators, either upon a request of the parties involved in the negotiations for the conclusion of Telecommunication Access Agreement (if any) or *ex officio*.<sup>45</sup> Should negotiations prior to an interconnection or access agreement have taken place, both parties are entitled to submit a request to resolve the dispute to the President of UKE, who will have to specify the deadline for concluding the negotiations leading to the agreement. This period shall not be longer than 90 days, starting on the day that the request was submitted to the authority.<sup>46</sup> In case of a lack of prior negotiations, in situations where they have not been concluded during the specific time period or simply when they fail, any of the parties may request the President of the authority to issue a decision on the dispute or to determine the conditions for cooperation.<sup>47</sup> The particularity of this scheme is that the determination of the regulator usually replaces the Telecommunications Access Agreement between the parties involved in the dispute.<sup>48</sup> The adjudicator may also, of its own motion, require a modification to the scope of the agreement. In particular, Article 29 provides: “[T]he President of UKE may *ex officio*, by means of a decision, modify the content of a telecommunications access agreement or oblige the parties to the agreement to modify it in cases justified by the need to protect the interests of end users and to ensure effective competition or

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<sup>40</sup> Article 10.

<sup>41</sup> Article 11, para. 4.

<sup>42</sup> Ibid. Para. 5.

<sup>43</sup> Ibid. Para. 6.

<sup>44</sup> The Act of 16 July 2004. Telecommunications Law (OJ 2014, item. 243) is the basic act of national law establishing a legal framework for the operation of the telecommunications market and the scope of activities of the regulatory authority in Poland. Available at <http://en.uke.gov.pl/telecommunications-act-77>.

<sup>45</sup> Polish Telecommunications Act, Article 27.

<sup>46</sup> Ibid. Article 21(1).

<sup>47</sup> Ibid. Article 21(2).

<sup>48</sup> Ibid. Articles 28 and 29.

interoperability of services’;<sup>49</sup> i.e. it subordinates the individual terms and conditions of the access agreement to achieve the regulatory objectives (as enshrined in Article 8 Framework Directive).<sup>50</sup>

Notwithstanding this *adjudication mandate*, NRAs may decline to solve the dispute.<sup>51</sup> In such an event, Member States must ensure that other procedures have been put in place and that these would better contribute to the resolution of the conflict.<sup>52</sup> These “non-official” or “delegated” schemes refer to those procedures involving “arbitrators, mediators, and negotiators, who do not hold permanent government or judicial appointments” as opposed to representative from a public (official) authority who act as the guarantor of the legality principle and due process.<sup>53</sup> Accordingly, the involvement of “non-official” actors clearly impacts on the enforcement of the devised policy aims for telecommunications. However, there is no clear-cut distinction between the two schemes. There are many variations by which official and non-official actors complement each other. Delegation is often used and the official sector can still retain a certain degree of control over the procedure.<sup>54</sup> However, this distinction is important particularly in the context of judicial review. The Framework Directive (Article 4) establishes a mandatory right of appeal against NRAs’ decisions. Yet, the judicial review of decisions by non-official bodies is not required.

Thus, and continuing with the Italian example, besides the dispute resolution scheme provided by the Italian regulator (AGCOM), OTA-Italia<sup>55</sup> also discusses problems among operators on a voluntary basis. OTA-Italia is a body established by AGCOM that aims to facilitate implementation, ensure non-discriminatory terms, and simplify technical and operational processes for access to the fixed network of *Telecom Italia* (the former monopolist) by alternative operators. OTA-Italia, in cases of dispute and litigation, also has the task of acting as a mediator to find solutions reasonably satisfactory to both parties in conflict.<sup>56</sup> Parties are free to voluntarily adhere to the scheme provided by OTA-Italia. Accordingly, OTA-Italia intervenes on the basis of a voluntary agreement between Telecom Italia and alternative operators (*Accordo di Adesione*, Adhesion Agreement) with respect to technical and operational issues that may arise in relation to accessing fixed network services in order to facilitate the implementation of the different processes. As to the procedure followed, having heard the operators involved in a dispute, OTA-Italia

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<sup>49</sup> For an in-depth assessment of the procedure for dispute resolution in Poland, see Warwas, B. A. (2014), ‘ADR in B2B Disputes in the EU Telecommunications Sector: Where Does the EU Stand and What Does the EU Stand for?’, *EU Working Paper Series LAW 2014/12*.

<sup>50</sup> See Case C-42/14 *Prezes Urzędu Komunikacji Elektroniczej, Telefonia Dialog sp. z o.o. v T-Mobile Polska SA*, Judgment of the Court (Third Chamber) of 16 April 2015 nyr, at para. 45: “It must also be borne in mind (i) that Article 20(3) of the Framework Directive provides that, in resolving a dispute, the NRA is to take decisions aimed at achieving the objectives set out in Article 8 of that directive, (ii) that Article 7(1) of that directive provides that, in carrying out their tasks under that directive and the Specific Directives, NRAs are to take the utmost account of those objectives, including in so far as they relate to the functioning of the internal market, and (iii) that it is apparent from Article 5(1) and (4) of the Access Directive that, with regard to access and interconnection, the intervention of the NRAs also has the aim of pursuing and securing those same objectives. According to Article 8(3)(d) of the Framework Directive, the NRAs are to contribute to the development of the internal market by, inter alia, cooperating with each other and with the Commission in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of that directive and the Specific Directives”.

<sup>51</sup> Article 20(2) Framework Directive.

<sup>52</sup> *Ibid.*

<sup>53</sup> ITU Report (2004).

<sup>54</sup> *Ibid.*

<sup>55</sup> <http://www.ota-italia.it/>.

<sup>56</sup> Article 1 Delibera N. 121/09/CONS, “Istituzione dell’OTA Italia” (Establishment of OTA-Italia).

prepares a draft regulation intended to define –together with the means of dialogue with operators– the procedural rules to be followed by OTA-Italia to perform the conciliation and to define the dispute by recalling the requirements of the regulations of the Authority applicable to operators and, where necessary, proposing appropriate and necessary adjustments.<sup>57</sup> This means that even if the designated dispute settlement body follows the requirements already established by the NRA, the procedure in front of OTA-Italia is more flexible as it allows for adjustments to be made to the proposed procedure as a result of the dialogue with the parties. The procedural rules also provide that OTA-Italia will arrange the contractual schemes to which parties adhere (*Accordo di Adesione*).<sup>58</sup> The contractual scheme *must* provide for the commitment of operators to comply with the requirements of the Rules for the functioning of OTA-Italia and their annexes. It also requires operators to not submit an application to the Authority (AGCOM) for the resolution of the dispute in accordance with Article 23 of the Electronic Communications Code before the conciliation has been –unsuccessfully– attempted.<sup>59</sup> The requirements of the regulations of the Authority shall prevail over any conflicting contractual terms and are still applied in the event of questions of interpretation.<sup>60</sup> This entails that even though OTA-Italia provides for a more *private* scheme for dispute resolution, the designed system does not greatly differ in practice from the official procedure offered by the NRA, AGCOM. It is merely a *delegated reproduction* of the official procedure. This *outsourced* regulatory adjudication is a practice also used in other Member States, e.g. in the UK (OTA2, *Office of the Telecommunications adjudicator*).

### *B2C disputes*

As for consumer-related disputes, the national regulator may also act as the settlement facilitator or even the adjudicator of consumer disagreements. As aforementioned, Article 34 of the Universal Service Directive requires Member States to have in place “transparent, non-discriminatory, simple and inexpensive out-of-court procedures” for the resolution of consumer-related disputes. Apart from the establishment of ADR procedures which will be examined in the following section, some NRAs have set their own sector-specific mechanism for the resolution of B2C disputes.

### *National experiences*

The Italian legal framework has provided a procedure for the resolution of consumer-related disputes using a tiered process with two phases.<sup>61</sup> The first stage involves a compulsory attempt at conciliation (*tentativo obbligatorio di conciliazione*).<sup>62</sup> In the event of unsuccessful conciliation, the parties –or even one of them upon request– may jointly ask for the definition of the dispute, a

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<sup>57</sup> Ibid. Article 2(1).

<sup>58</sup> Ibid. Article 2(2).

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> *Regolamento in materia di procedure di risoluzione delle controversie tra operatori di comunicazioni elettroniche ed utenti*, approvato con delibera n. 173/07/CONS. Testo consolidato con le modifiche apportate con delibera n. 597/11/CONS, delibera n. 479/09/CONS, delibera n. 95/08/CONS e delibera n. 502/08/CONS.

<sup>62</sup> On the nature and effects of this compulsory conciliation procedure, particularly for access to justice see Section 4.2 below (*Alassini Case*).

procedure that culminates with the adjudication of the dispute by the regulator. The procedure is characterized by the existence of a “Procedure Regulation” containing the procedural rules that the parties and the dispute settlement bodies are required to apply.<sup>63</sup> According to Article 3 of the Italian Regulation on the procedures for settling disputes between electronic communications operators and users,<sup>64</sup> judicial recourse is precluded until the mandatory conciliation attempt has taken place before one of the competent bodies. In order to carry out the compulsory conciliation, Italian users can choose among the existing dispute settlement bodies, provided that they operate free of charge and comply with the principles of transparency, fairness, and effectiveness as per Recommendation 2001/310/EC.<sup>65</sup> In this regard, the Italian regulator has put in place a specific mechanism for the attempt at a conciliation procedure, which is thereby conducted by the NRA under regional delegated authorities: Co.Re.Com. (Regional Committee for Communications, *Comitati Regionali per le Comunicazioni*, delegated by AGCOM).<sup>66</sup> In those cases where an agreement is reached during the conciliation stage, the outcome takes the form of *accordo transattivo* (contractual agreement). This contractual agreement is compiled/registered in an official form.<sup>67</sup> In this form, the parties may indicate the partial solution on which they agree. It is, therefore, an agreed solution fixed in a “public” (administrative) document. This written form is signed by the public officer, and by the two parties of the dispute. The outcome of the conciliation (if any) is documented, printed and signed in the moment. It enjoys the nature of an executive title (*titolo esecutivo*).<sup>68</sup> In this regard, it is important to highlight that in case of agreement, parties reject the possibility to go to the Court, even to seek further redress for damages.<sup>69</sup> The agreement has the effect, thereby, of *res judicata*. However, in those cases where the Authority decides on the case (i.e. second phase: definition of the dispute), the parties still retain the possibility to bring the case in front of a court to claim for redress for damages. Although courts are exclusively competent for damage redress, the procedure does allow for small compensations and reimbursements to be decided directly by the public official.<sup>70</sup>

<sup>63</sup> Regulations on the procedures for settling disputes between electronic communications operators and users, approved by Resolution 173/07/CONS, modified by Resolutions no. 95/08/CONS, 502/08/CONS, 479/09/CONS and 597/11/CONS. (*Regolamento in materia di procedure di risoluzione delle controversie tra operatori di comunicazioni elettroniche ed utenti*, approvato con delibera n. 173/07/CONS. Testo consolidato con le modifiche apportate con delibera n. 597/11/CONS, delibera n. 479/09/CONS, delibera n. 95/08/CONS e delibera n. 502/08/CONS).

<sup>64</sup> Delibera n. 173/07/CONS, *Regolamento sulle procedure di risoluzione delle controversie tra operatori di comunicazione e utenti*.

<sup>65</sup> In line with *Alassini* case.

<sup>66</sup> There are regional authorities in each Italian region (21 regions), which are delegated by AGCOM to carry out the conciliation attempt procedure. Co.Re.Com. is a body that, upon delegation by AGCOM, the Italian regulator. This authority deals with attempts at conciliation, settlement of disputes and urgent reactivation of telephone line (or pay TV). The procedure in front of the Co.Re.Com. is free of charge for users; both consumers and businesses, and also top-level businesses.

<sup>67</sup> Document A, See Annex.

<sup>68</sup> Articolo 2, comma 24 lettera b) della legge n. 481 1995: “[...]Il verbale di conciliazione o la decisione arbitrale costituiscono titolo esecutivo”. AGCOM Representative (Autorità per le Garanzie nelle Comunicazioni, Italy). Speech at the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012: “it is a piece of paper which has direct legal effect. We say *titolo esecutivo* (executive title), which means that you can... it is like a check. You can ask for money upon it without going to the Judge”.

<sup>69</sup> The agreement provides: “*le parti danno atto quanto sopra dichiarandosi integralmente soddisfatte e di non avere niente altro a che pretendere in qualsiasi sede, anche giudiziale, per le questioni di cui all’odierna istanza*”. (“the parties acknowledge the above declaring themselves fully satisfied and having nothing else to claim in any site, also judicial, for the matters referred in today’s instance”, see Annex, Document A)

<sup>70</sup> Delibera n. 173/07/CONS, *Regolamento sulle procedure di risoluzione delle controversie tra operatori di comunicazione e utenti*. Article 19(5).

In the event of unsuccessful conciliation, the parties jointly or the user alone may ask for the definition of the dispute. In such a case, the person conducting the proceedings draws up a report in which he notes that the dispute has been subject to a conciliation attempt and acknowledges that no agreement has been reached. Thus, if the same parties have not already brought the same subject matter before the judicial authorities, the parties jointly or the user can – within 3 months – ask Co.Re.Com itself to settle the or go directly to the Communications Regulatory Authority (AGCOM) for settlement. The time-limit for the conclusion of the procedure is 180 days from the date of submission of the request submission. At the hearing, the parties are authorized to orally explain their positions and may be assisted by advisers or representatives of consumer associations. If, based on the statements of the parties, the possibility of reaching a settlement agreement emerges, the hearing of the proceedings may serve as a second attempt at conciliation where agreement can be reached.<sup>71</sup> If not, in those cases in which it is found that the petition is well-grounded, the AGCOM (via the delegated authorities Co.Re.Com) may sentence the operator to refund amounts that have been proven not to be owed, or the payment of indemnities in cases envisaged by the contract and/or service charter, as well as in cases identified by the regulatory provisions or AGCOM resolutions. This system is based on standard indemnities.<sup>72</sup> This means that for every infringement of the contract, there is a fixed compensation amount;<sup>73</sup> it is not therefore a system based on fairness or equity, although in very particular cases the decision might be based on (very discretionary) fairness. In the period April 2013-April 2014, AGCOM has participated in adjudication of 1,994 cases.<sup>74</sup>

The German NRA (*Bundesnetzagentur*, BNetZA) is not only the telecoms regulator, but its mandate encompasses also energy and transport issues. In the field of telecommunications it is competent to act as mediator in consumer-related disputes, as provided by the German Telecommunications Act (TKG).<sup>75</sup> According to the BNetZA, the aim is “to find a solution that is acceptable to both parties and to provide an efficient and cost-effective alternative to legal disputes”.<sup>76</sup> Unlike the Italian example, the number of requests for dispute resolution submitted to the regulator is very low; with a total of only 866 requests submitted in 2013.<sup>77</sup> Moreover, with the

<sup>71</sup> The outcome of the agreement is similar to that resulting from the conciliation procedure; i.e. it is an executive title (*titolo esecutivo*).

<sup>72</sup> AGCOM Representative (Autorità per le Garanzie nelle Comunicazioni, Italy). Speech at the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012: “So you see that for each kind of, let’s say, infringement of the contract, there is a specific standard [...] penalty. So, for delay activation of the service it is 7,5 € per day and there are then the declinations [...] so this is available to you. We can see that these are based on standards penalties. It is not a system based on fairness or equity. Sometimes we also decided based on fairness, in very particular cases, but this decision on fairness is too discretionary. Everyone deciding seems to give too much discretion, this is not good for standards and uniform decisions in a system where you have involved a standard body like AGCOM or a number of regions”.

<sup>73</sup> Approvazione del regolamento in materia d’indennizzi applicabili nella definizione delle controversie tra utenti ed operatori e individuazione delle fattispecie di indennizzo automatico ai sensi dell’articolo 2, comma 12, lett. g), della legge 14 novembre 1995, n. 481. <http://www.agcom.it/default.aspx?DocID=5863>.

<sup>74</sup> According to the AGCOM Annual Activity Report, “[t]he average value of agreements reached at hearings amounted to Euro 1,161, while the average value of the transactions was Euro 669. The sum of the amounts recognized to users, as a result of the Authority’s decisions was therefore more than Euro 1,000,000.00 net of administrative fees and sums reimbursed for bills claimed as unjustified by the user”.

<sup>75</sup> Section 47a of the German Telecommunications Act. *Telekommunikationsgesetz*, hereinafter TKG.

<sup>76</sup> BNetZA Annual Report 2013, p. 81.

<sup>77</sup> Ibid.

2012 amendment to the TKG, now it is possible to initiate dispute resolution proceedings in relation to contract law disputes where consumer rights are provided in the TKG.<sup>78</sup> The rules of the procedure for the settlement of consumer-related disputes are also contained in the TKG<sup>79</sup> and further specifications are provided for in a BNetZA regulation that contains the rules of procedure for conciliation. To carry out the settlement, the regulator shall consult the users and providers. It should work towards an amicable settlement between the subscriber and the provider. The conciliation procedure ends in those cases where: the arbitration complaint is withdrawn; the participant and the provider have reached a solution and reported it to the regulator; the participants and providers consistently explain that the dispute has ceased; the regulator decides that there is no possibility to reach an agreement via a mediation process; or when the regulator does not identify any breach of contract from those provisions listed in the TKG. According to the procedural rules provided by the German regulator, the settlement panel, which is composed of three NRA officials, verifies the request. Should it fulfill the requirements of admissibility mentioned above, the request is sent to the operator, which will have to respond to the claim within four weeks.<sup>80</sup> The procedure does not provide for any extensive means of collecting evidence beyond requesting details from the parties. The consumer is invited to respond to the operator's determination within 3 weeks. The operator may respond to that also within the time frame of 3 weeks. Under this scheme, the regulator proposes a non-binding solution to the parties that the parties may then accept or decline. Should the proposal be accepted, it constitutes an amicable settlement contractually enforceable. In the event of unsuccessful conciliation, the parties can refer the dispute to the civil court. In such case, the dispute cannot be addressed again in front of the regulator.<sup>81</sup>

Consumers in the UK can refer their complaints to the telecoms regulator (Ofcom),<sup>82</sup> but the *resolution* of telecoms-related disputes corresponds, since 2011, to an Ofcom-approved Alternative Dispute Resolution (ADR) scheme,<sup>83</sup> to which operators must adhere to. There are two ADR schemes approved by the UK regulator: the Communications and Internet Services Adjudication Scheme (CISAS) and the Office of the Telecommunications Ombudsman (OTELO).<sup>84</sup> Since these are ADR schemes provided by independent bodies, they are analysed in the following section (3.2) of this chapter.

In Poland, the mediation procedure for telecoms consumer-related disputes is conducted by the President of the Office of Electronic Communications (*Urzędu Komunikacji Elektronicznej*, UKE). According to Article 109 of the Polish Telecommunications Act,<sup>85</sup> a civil law dispute between a consumer and a provider of publicly available telecommunications services may be ended in a conciliatory manner during the course of mediation proceedings. Mediation proceedings

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<sup>78</sup> Ibid.

<sup>79</sup> Section 47a.

<sup>80</sup> Representative of Deutsche Telekom AG, Germany. Speech at the Workshop 'Private Law and the Telecommunications Sector: National Perspectives on EU Regulation' held in Florence, 7-8 December 2012.

<sup>81</sup> Ibid.

<sup>82</sup> Office of Communications.

<sup>83</sup> Communications Act 2003, Section 14(7).

<sup>84</sup> For an extensive analysis of the two schemes, see Hodges, C., Benöhr, I., & Creutzfeldt-Banda, N. (2012). *Consumer ADR in Europe*. Hart Publishing.

<sup>85</sup> Law of 16 July 2004, Telecommunications Act.

shall be conducted by the President of UKE at a consumer's request or *ex officio* where the protection of consumer interests so requires. During mediation proceedings, the President of UKE shall inform the telecoms provider concerned about the existence of a consumer's claim, the law applicable to the particular case, and provide possible proposals for a conciliatory resolution of the dispute by the parties. The President of UKE may specify the deadline for reaching a conciliatory solution of the case by the parties themselves.<sup>86</sup> The President of UKE must abandon mediation proceedings if the case has not been resolved in a conciliatory manner within the specified time limit as well as when at least one of the parties states that it does not agree to resolve the case in a conciliatory manner.

In a similar vein, in the Czech Republic, the National Regulatory Authority (*Český Telekomunikační Úřad*, CTU) must resolve disputes between telecommunications operators and users, on the basis of a motion filed by any of the parties to the dispute, as far as the dispute relates to obligations imposed by, or on the basis of the Czech Telecommunications Act.<sup>87</sup> An administrative fee is charged for the submission of the claim.<sup>88</sup> The authority awards to the party who fully succeeded in the proceedings a compensation for the costs required for effective application of law, or defense thereof, against the losing party to the proceedings. In the event that a party succeeded only partially in the proceedings, the Authority may split the compensation for the costs into appropriate proportions, or may decide that neither of the parties is entitled to such compensation.<sup>89</sup> Even in the case that a party succeeded only partially, the authority may award full compensation for such costs to that party provided that it was unsuccessful in only a negligible part of the proceedings, or that the decision on the amount to be discharged depended on an expert opinion or was at the discretion of the authority.<sup>90</sup>

### 3.1.2 Public v private enforcement

Traditionally, NRA's decisions have been considered administrative measures. Despite this, dispute-resolution in the telecommunications sector makes reference to a dispute arising from two private parties, where the nature of the dispute is generally purely contractual. It can happen, therefore, that the system of enforcement is designed under an administrative structure, for instance when the NRAs host the dispute settlement procedure in its premises and under its own rules, or where even the regulator acts as adjudicator of the dispute. In such cases, the judicial review of the decision adopted by the NRA concerned is performed by an administrative court, given that in the

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<sup>86</sup> UKE representative (Office of Electronic Communications, Poland). Speech at the Workshop 'Private Law and the Telecommunications Sector: National Perspectives on EU Regulation' held in Florence, 7-8 December 2012: "Generally, the President, when she receives a claim on the consumer, sends this claim to the operator and waits for the opinion and, usually 75% of the cases are resolved in this manner".

<sup>87</sup> Act No. 127/2005 Coll., on Electronic Communications and on the Amendments to the Other Acts (*Zákon o elektronických komunikacích*, Electronic Communications Act). Section 129.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.



end what is being reviewed is a decision from a body which is part of the administrative structure and, hence, subject to the principles and procedures of administrative law.

Lawyers find difficulties in accommodating such procedures within the private or administrative law domains. The grounds for the dispute are contract-related, but the procedure – especially in cases of adjudication by the regulator – is purely administrative. The identification of the domain where these dispute settlement mechanisms fall is crucial in order to determine the applicable legal regime. The application of public law standards and principles differs from the use of private law logic. Accordingly, it is necessary to carry out an analysis that identifies the rationalities involved; i.e. whether they follow public or private law discourses. It may happen that the scheme comprises of elements of both, e.g. whereas the source of the dispute is private, the procedural design is built entirely upon an administrative understanding. The latter is more visible in the case of dispute settlement between operators of telecommunications networks and/or services in wholesale markets. These two elements (substance + procedure) shape, then, a *hybrid* system between private and public law. Furthermore, the EU rules establishing the legal framework for telecoms do not provide specific guidance on how these procedures are to be designed, giving rise to a large range of dispute resolution mechanisms which vary from country to country and where, depending on the approach chosen, the tools and instruments of public and private law also differ. There are even some disparities within single Member States on a case-by-case basis.

Be that as it may, the issue at stake here is the suitability of private or non-official mechanisms to deal with public policy concerns. In particular, where there is a conflict between the public policy aims and the resolution of a privately negotiated or arbitrated dispute.<sup>91</sup> In those cases, where the public goal may be compromised, regulators must guarantee the availability of an official process.<sup>92</sup> The regulatory framework for telecoms in Europe endorses the adjudication of B2B disputes to National Regulatory Authorities. By so doing, the European Union is relying in a model of *regulatory adjudication*.<sup>93</sup> This resolution of disputes between undertakings is also considered to be an “additional form of regulatory intervention”.<sup>94</sup> Such account is due to the fact that NRAs are required to solve the disputes securing the objectives of Article 8 of the Framework Directive.<sup>95</sup> Accordingly, NRAs *should* enforce the rights and obligations contained in the regulatory framework through the imposition of regulatory obligations, but also via the imposition of binding decisions in case of a dispute.

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<sup>91</sup> Recital 6 Access Directive: “[...] National regulatory authorities *should have the power to secure*, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users [...]”.

<sup>92</sup> ITU Report.

<sup>93</sup> See below.

<sup>94</sup> Walden, I. (2012), ‘Telecommunications Law and Regulation: An Introduction’, in I. Walden (Ed.), *Telecommunications Law and Regulation*. (Fourth Edition) New York: Oxford University Press, p. 17 citing the UK Competition Appeal Tribunal in the Case *T-Mobile, BT, H3G, C&W, Vodafone & Orange v Ofcom* [2008] CAT 12, at paras. 89 and 94.

<sup>95</sup> Article 20(3) Framework Directive and Article 3<sup>17</sup> of the Access Directive.

On the other hand, the existence of delegated dispute resolution in the context of telecommunications regulation raises the question of the extent to which non-official bodies are entitled to correctly interpret and apply the regulatory objectives of the regulatory framework while, at the same time, safeguarding the private nature of these mechanisms without undermining the effectiveness of the enforcement of telecommunications rules. Thus, in issues concerning key policy objectives, NRAs may decide not to delegate the scheme to private entities, so that public policy consideration can be taken into consideration.<sup>96</sup>

In view of the above, in the enforcement of telecommunications regulation, NRAs function as a hybrid between private and public “courts”. In the exercise of regulatory dispute settlement prerogatives, regulators can even grant compensation for damages.<sup>97</sup> The particularities of the different regulatory models of dispute resolution have been put on the table during debates about the nature of enforcement of contract-related telecommunications provisions via sector-specific mechanisms for dispute resolution: are they private or public enforcement? And, most importantly, are they law?

Under the Italian model, the Co.Re.Com scheme provides a sort of mixture procedures between mediation and arbitration (hybrid form). However, in the event of the procedure reaching the second stage, i.e. when the Co.Re.Com decides on the case (*definizione*), it is pure arbitration (*arbitrato puro*). As such, it can be considered as an administrative arbitration, given that an administrative authority issues the decision. However, its procedural design evidences otherwise. For instance, by and large, conciliation –either in the conciliation procedure or in the hearing proceedings corresponding to the definition of the dispute– is a more flexible procedure. The agreements arising from a procedure of dispute settlement in Italy is of a contractual nature. Despite this, they are formulated in the form of a public document that is directly enforceable (see annex). Parties can agree as much as they want to, whereas when deciding on the dispute, the authority has no margin to decide beyond the documentation and the standardized redress compensation scheme. This raises the question of the extent to which the agreement can be considered to be of a private or of a regulatory nature, insofar as the public official participating in the settlement signs and stamps the document granting it and allowing the full exploitation of the guarantees deriving from its character as “enforceable title” (*titolo esecutivo*), it is therefore based on contractual compromises embodied in the form of a public document.

The legal effects of voluntary agreements beyond the scheme provided by an administrative document undersigned by the authority remains to be discussed: To what extent do these agreements have to comply with legality requirements? Is this an epitome of the return of private law and private autonomy over regulatory law? Furthermore, the regulatory decision in case

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<sup>96</sup> ITU Report.

<sup>97</sup> See Ottow, A. (2012), “Intrusion of public law into contract law: the case of network sectors”, *The Europa Institute Working Paper* 03/12, *KPN case*. As such, in this particular case, compensation is granted in application of telecommunications regulation and attending to regulatory objectives within the context of the administrative sanction procedure.

of a lack of agreement is a pre-settled (statutory/standardized) compensation by law.<sup>98</sup> It seems that the Italian system is quite legalistic, so they do not decide on the basis of fairness but on the basis of the law and standards in order to get uniform decisions.<sup>99</sup> In this regard, the Italian scheme of regulatory dispute adjudication could resemble an administrative procedure and, as such, be subject to administrative judicial review.<sup>100</sup> Nonetheless, its functioning in practice brings it closer to a judicial procedure in front of a civil court. By way of example, the regulatory procedure provides an action for injunction to be adopted while the dispute is being decided.<sup>101</sup> A second distinctive feature of the emergence of sector-specific dispute settlement mechanisms is the necessity of technical advice. The complexity of the cases justifies the existence of sector-related bodies endowed with the appropriate expertise.<sup>102</sup>

As to the Polish scheme, even though there is a mediation procedure for the settlement of consumer-related disputes, most of the cases are solved through completely informal conciliation schemes. There is no procedural rule regulating the conciliation procedure or the legal effect of its outcome. Accordingly, the conciliation outcome consists of a privately negotiated contract that does not derive from any legal provision. As a matter of fact, around 80% of the disputes are solved via this mechanism.<sup>103</sup>

At the other end of the spectrum we find the Czech model. The Czech Telecommunications Office started claiming that the large number of cases to deal with, due to the fact that it was a relatively new institution, overwhelmed them.<sup>104</sup> The Czech NRA was established in 2000 and

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<sup>98</sup> Delibera n. 73/11/CONS. Approvazione del regolamento in materia di indennizzi applicabili nella definizione delle controversie tra utenti ed operatori e individuazione delle fattispecie di indennizzo automatico ai sensi dell'articolo 2, comma 12, lett. g), della legge 14 novembre 1995, n. 481

<sup>99</sup> AGCOM Representative (Autorità per le Garanzie nelle Comunicazioni, Italy). Speech at the Workshop 'Private Law and the Telecommunications Sector: National Perspectives on EU Regulation' held in Florence, 7-8 December 2012: "All of this is written down in a *guidance for the regions* which I will show you. So, in this guide, you find the sintetic explanantion of the decision and the list of the decisions on the same case. So, a civil servant involved on this activity can just click on it, because it is online, and you can open all decisions, possible with some rationale in the decision, and then you issue your proposal for the decision in the region to the collegial body in the region, because the collegial bodies... the regions are structured more or less like AGCOM centrally. So, this is a very powerful tool in order to avoid that there is a deviation, not uniform decision. The last version dates back August 2010, but –anyway- everyday we receive calls from our colleagues in the regions in order to have explanations and so on. So there is a kind of back-office services for the regions and this is very important in order to have *quality of the decisions*. So, everyday we receive phone calls and mails and we issue, let's say, to a certain mailing list, a kind of daily guidelines on specific cases". Emphasis added.

<sup>100</sup> The competent court to decide on the appeal of Co.Re.Com decisions is Tribunale Amministrativo Regionale (TAR) in the region of Lazio.

<sup>101</sup> Concurrently with the proposal of the request for the experiment of conciliation or settlement of the dispute, or in the course of the relevant procedures, the user can ask the authority for the communications or the Co.re.com. delegates for the adoption of temporary measures aimed at ensuring the continuity of service or eliminating forms of abuse or improper operation by the operator of telecommunications until the end of the settlement procedure. Article 21 Delibera n. 73/11/CONS.

<sup>102</sup> AGCOM Representative (Autorità per le Garanzie nelle Comunicazioni, Italy). Speech at the Workshop 'Private Law and the Telecommunications Sector: National Perspectives on EU Regulation' held in Florence, 7-8 December 2012: "So, those involved in these activities of decision must be very well prepared on this matter. So, we regularly update and make information and training with this people working in the regions. And these are mainly lawyers, most of them, *even though some disputes need some technical advice since the sector is particularly difficult in certain disputes*, especially when they involve business. So, this is just a slide listing the decisions we adopted in a time about quality of services which is one of the topics which is causing disputes, the low quality". Emphasis added.

<sup>103</sup> UKE representative (Office of Electronic Communications, Poland). Speech at the Workshop 'Private Law and the Telecommunications Sector: National Perspectives on EU Regulation' held in Florence, 7-8 December 2012

<sup>104</sup> Representative of Ministry of Industry and Trade, Czech Republic. Speech at the Workshop 'Private Law and the Telecommunications Sector: National Perspectives on EU Regulation' held in Florence, 7-8 December 2012.

before that telecommunications were dealt with by a part of the Ministry, so there was no independence.<sup>105</sup> As a result of the second package of EU telecoms regulation, a new Act was enacted in 2005. This Act entrusted the NRA with the competence to make administrative decisions about the payments in cases of dispute. The NRA was exclusively competent to decide on the issue. To some extent, there was even some confusion about the role of civil courts in such matters.<sup>106</sup> A second relevant issue is that represented by the transfer of disputes related to payment obligations to civil courts. This type of dispute is most representative when it comes to consumer-related issues in the Czech telecoms market.<sup>107</sup> It certainly represents, as mentioned above, an enormous administrative burden, especially if the authority is underdeveloped. Thus, given their civil character, they have been redirected to civil courts, given that they “do not necessarily relate with performance of regulation and control in electronic communications sector”.<sup>108</sup> This resulted in the downsizing of staff within the NRA.<sup>109</sup> Does this mean that here we are dealing with an administrative procedure for dispute resolution? There is not actually an administrative decision, even though the authority has to follow the administrative procedure.<sup>110</sup> The issue of unpaid bills represents an example of this.<sup>111</sup> However, the existence of a mechanism to follow administrative procedure without taking an administrative decision does not represent the substance of an ADR procedure either. Accordingly, even though these mechanisms are indeed *alternative* to judicial redress, they are not administrative procedures or ADR mechanisms.<sup>112</sup>

The next section focuses on the different out-of-court mechanisms for the settlement of telecoms-related disputes different via ADR techniques.

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<sup>105</sup> Ibid.

<sup>106</sup> Representative of Ministry of Industry and Trade, Czech Republic. Speech at the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012: “So you would have a dispute concerning the payment of the service that is provided by third parties. And they are the only ones who can decide on the topic. So, if you are an operator and you send one [...] receipt and in the receipt you have payments for transport and then in the same receipt you have a bill for the telephone, you have to split the bill and ask for procedure in the Czech Telecommunications office and the civil court for the second bill. Not for the same matter. Well, *I don’t know the details but it is confusing what is what even for the people working in the Czech Telecommunications Office*”. (Emphasis added).

<sup>107</sup> EU Digital Agenda Scoreboard 2012.

<sup>108</sup> EU Digital Agenda Scoreboard 2012 and 2014.

<sup>109</sup> EU Digital Agenda Scoreboard 2012: “The transfer of disputes related to a payment obligation to a civil court will mean releasing of capacities for performance of regulation, on the other hand possible reduction of approximately 100 employees from 2013”.

<sup>110</sup> Representative of Ministry of Industry and Trade, Czech Republic. Speech at the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012.

<sup>111</sup> In such cases, a public institution (the Authority) is taking care of the debt to be collected by private companies (statutory debt collection). This is resulting in telecoms operators using the procedure for debt-collecting, given that it is a quicker, cheaper and faster mechanism than the civil courts. This is a particularly attractive mechanism for telecoms operators especially because, in some instances, the Czech Telecommunications Office issues payment orders. Representative of Ministry of Industry and Trade, Czech Republic. Speech at the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012.

<sup>112</sup> Representative of Ministry of Industry and Trade, Czech Republic. Speech at the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012: “I do not see any alternative dispute resolution in this procedure I have to say”.

### 3.2 Alternative Dispute Resolution in telecommunications

ADR is distinguished from traditional litigation and also from administrative adjudication. The underlying idea behind the promotion of ADR mechanisms for the settlement of disputes is to privately (and amicably) negotiate agreements in order to avoid contentious litigation, so that the commercial relationship is not affected by the existence of an adversarial procedure that escapes to the control of the parties.<sup>113</sup> This is true particularly concerning disputes between telecommunications operators.

The telecommunications sector is subject to constant evolution and hence rapid changes. In particular for businesses usually engaged in long-term commercial relationships, it is crucial that potential disputes can be solved in a flexible and rapid manner. It also so happens that dispute resolution techniques are evolving to new modes and practices that are useful and effective as ways to put an end to the disagreements between the parties involved in the dispute. A large number of extrajudicial mechanisms have been designed in order to accommodate the settlement of disputes arising within the telecoms sector. As a result of the procedural autonomy principle, National Regulatory Authorities enjoy considerable flexibility when it comes to designing the procedures for B2B dispute settlement. For consumer-related disputes there is also a wide array of consumer ADR methods. This leads to a situation where we can find different techniques and procedures for the extrajudicial settlement of disputes at both the wholesale and retail market levels.

#### *ADR in B2B disputes*

In compliance with the mandate of Article 20 of the Framework Directive, NRAs have put in place different procedures to adjudicate disputes between operators concerning the obligations arising from sector-specific regulation. Some national regulators have provided for an *internal* mechanism, including the establishment of delegated bodies for dispute resolution. These procedures have been addressed in the previous section. Still, besides from these regulatory adjudication schemes and in parallel to them, different schemes for extrajudicial settlement have emerged. Given that the EU legal framework requires NRAs to solve disputes within 4 months, the use ADR mechanisms has been encouraged.<sup>114</sup> The proliferation of out-of-court procedures entails an abundant taxonomy which, in some cases, it is also characterized by variations of regulatory adjudication, arbitration, mediation or negotiation.<sup>115</sup> Usually, the regulator adjudicates B2B disputes via the use of ADR-alike techniques. However, these practices have not been widely extended beyond the regulator.<sup>116</sup>

#### *ADR in B2C disputes*

Unlike disputes arising in wholesale markets, ADR techniques have flourished significantly when it comes to the resolution of consumer-related disputes in telecoms. As aforementioned, Article 34 of the Universal Service Directive requires member states to ensure the availability of “transparent,

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<sup>113</sup> ITU Report.

<sup>114</sup> Article 20(1) Framework Directive.

<sup>115</sup> On the different schemes and the ADR techniques adopted to solve B2B disputes see Warwas (2014), *supra* n 49.

<sup>116</sup> *Ibid.* See also Gijrath *supra* n 14, at p. 429.

non-discriminatory, simple and inexpensive out-of-court procedures”.<sup>117</sup> This requirement does not restrict Member States to providing a single model of ADR. Thus, while in a majority of Member States, out-of-court procedures have been provided by the national regulators, in some Member States other bodies are in charge of dealing with procedures involving consumer protection that are also applicable to resolving consumer disputes in the electronic communications market. Furthermore, a number of measures aiming at facilitating the resolution of consumer complaints have been introduced across the EU.<sup>118</sup> In short, there is a large catalogue of out-of-court mechanisms for disputes in the telecommunication sector, which are aimed at achieving a prompt settlement at the speed required for this ever-developing market.<sup>119</sup>

### *National experiences*

ADR methods have been developed and strongly promoted in Italy.<sup>120</sup> As to this movement towards consumer out-of-court dispute settlement for consumer redress, the CJEU has considered that the establishment of a mandatory process of dispute settlement, prior to bringing a judicial action before the court, does not infringe the principles of equivalence, effectiveness and effective judicial protection. This was essentially the ruling given by the CJEU in the *Alassini* Case<sup>121</sup>, concerning the adoption of Italian legislation that prescribed that a mandatory attempt at conciliation is required prior to initiating court procedures. In this case the defendants argued that the actions against them were inadmissible because the applicants (consumers) had not first initiated the mandatory attempt to settle the dispute before the settlement bodies, as was required under Italian law.<sup>122</sup> As a consequence of this requirement, since the 1990s different ADR mechanisms emerged in the Italian legal landscape for consumer-related dispute settlement.<sup>123</sup> Thus, apart from the conciliation procedure carried out before the regulator,<sup>124</sup> consumers can alternatively request Chambers of Commerce to attempt the compulsory conciliation<sup>125</sup> or –under the acclaimed conciliation procedure– *Conciliazione Paritetica*.<sup>126</sup> The latter is a particular model of ADR that provides for the establishment of a Conciliation Commission formed jointly by a representative of a consumer association representing the consumer and one representative of the

<sup>117</sup> Article 34(1) Universal Service Directive.

<sup>118</sup> Garzaniti, L. and O'Regan, M. (Eds.), *Telecommunications, Broadcasting and the Internet. EU Competition Law & Regulation* (3rd ed.), Sweet & Maxwell.

<sup>119</sup> An overview of different sector-related extrajudicial schemes is provided below [Section 3.2].

<sup>120</sup> A digest of the Italian legislation on ADR can be found at: [http://ec.europa.eu/civiljustice/adr/adr\\_ita\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ita_en.htm).

<sup>121</sup> ECJ joint cases: C-317/08, C-318/08, C-319/08 and C-320/08, [2010] ECR I-02213

<sup>122</sup> For a deeper analysis on the case, see below [Section 4.2].

<sup>123</sup> Legge 14 Novembre 1995, n. 481, *Norme per la concorrenza e la regolazione dei servizi di pubblica utilità. Istituzione delle Autorità di regolazione dei servizi di pubblica utilità* (Antitrust provisions and the regulation of public utilities. Establishment of regulatory authorities for utilities). Article 2(24) let b).

<sup>124</sup> Examined above, section 3.1.1.

<sup>125</sup> There are 105 Chambers of Commerce in the whole Italian territory. In this case, the procedure is not free for the consumer, who has to pay a low fee in case the conciliation it is finally reached: starting at € 40,00 (+IVA). *Indennità del servizio di mediazione e criteri di determinazione.*

*spese di avvio*; fees available at: <http://www.pc.camcom.it/regolazione-del-mercato/camera-di-conciliazione/ulteriori-approfondimenti/indennita-del-servizio-di-mediazione>.

<sup>126</sup> In 1995 the European Union recognised the procedure as a “pilot project for consumer access to justice”. Representative of Telecom Italia, Consumer protection Department. Speech at the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012.

telecommunications operator involved in the dispute.<sup>127</sup> In addition to these mechanisms, consumers can also refer their case to a specific mediation mechanism for disputes with the incumbent.<sup>128</sup>

*Conciliazione paritetica* provided by Telecom Italia (the former incumbent) also relies on its own rules of procedure contained in a Procedural Regulation containing procedural rules that the parties sign and that the conciliation commissions are required to apply.<sup>129</sup> This particular out-of-court mechanism has some characteristics that differentiate it from all other models of Alternative Dispute Resolution.<sup>130</sup> These features make it particularly effective in handling disputes with entities such as large service companies that need to offer a fast, efficient, free of charge settlement procedure to their customers.<sup>131</sup> The main feature of this procedure is the lack of a third party acting as a mediator. The Conciliation Commission (*Commissione di Conciliazione*) is composed of two conciliators, one representing Telecom Italia and one representative of the consumer.<sup>132</sup> The Conciliation Commission examines the case and the problem concerned and hears the complaints of the user, after which the Commission is allowed to fix a further hearing. After the examination of the case, the Commission proposes a solution to the client who has to accept or refuse the conciliation agreement. According to the procedural rules, the conciliation outcome here, unlike the outcome of the conciliation provided by the regulator, has the legal effect of a settlement agreement within the meaning of the Italian Civil Code (*accordo transattivo*).<sup>133</sup> The procedure usually concludes within 45 days of the application.

In the UK, there is a system of compulsory ADR, as communications providers are required –by the terms of the general authorization to which they are all subject and the requirements of Ofcom (UK telecoms regulator) under the Communications Act 2003– to put in place complaints handling and dispute resolution procedures.<sup>134</sup> In January 2012, Ofcom also delivered new rules to deal with consumer complaints.<sup>135</sup> As mentioned above, Ofcom receives and monitors complaints from consumers who are dissatisfied with their experience in the

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<sup>127</sup> The presence of a third party acting as a mediator or arbitrator it is not expected, insofar as the resolution of the dispute takes place exclusively between the parties. Telecom Italia introduced this mechanism in 1991. Nowadays, many providers operating in Italy are adhered to this procedure: Fastweb S.p.A., PosteMobile S.p.A., TeleTu S.p.A./ OpiTel, TIM S.p.A. (Telecom Italia Mobile), Vodafone Omnitel NV, and Wind S.p.A.

<sup>128</sup> Conciliation bodies under Article 141 of the Consumer Code (D. Lgs. 206/2005).

<sup>129</sup> The procedure provided by Telecom Italia can be found at [https://www.telecomitalia.it/sites/default/files/images/Regolamento\\_di\\_Conciliazione.pdf](https://www.telecomitalia.it/sites/default/files/images/Regolamento_di_Conciliazione.pdf).

<sup>130</sup> Although it complies with the procedural principles enshrined in the European Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC), OJ L 155, 17.04.1998.

<sup>131</sup> Representative of Telecom Italia, Consumer protection Department. Speech at the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012.

<sup>132</sup> For instance, Telecom Italia has subscribed a Protocol with 20 Consumers’ associations belong to the CNCU (National Organism of Consumers Associations).

<sup>133</sup> *Regolamento di Conciliazione Servizi Telecom Italia. Articolo. 7 Conclusione della procedura di conciliazione: “Nel caso in cui la Commissione abbia individuato la proposta di soluzione accettata dal cliente, la procedura si conclude con la sottoscrizione di un verbale di conciliazione che ha efficacia di accordo transattivo, ai sensi dell’art. 1965 cod. civ.”* [Regulation of Conciliation Telecom Italy. Article. 7 Conclusion of the conciliation procedure: “In the event that the Commission has identified the proposed solution accepted by the customer, the procedure ends with the signing of a statement of conciliation that has the legal effect of a settlement agreement, pursuant to art. 1965 civil code”].

<sup>134</sup> Section 52.

<sup>135</sup> Available at <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/customer-code-practice/>

communications sector; it does not, however, handle individual complaints. Out-of-court dispute settlement is provided by sector-specific bodies. There are two Ofcom-approved ADR schemes: Ombudsman Service Communications (OS:C), and the Communications, and Internet Services Adjudication Scheme (CISAS). Currently there are minor procedural divergences between the ADR models provided by the two established systems.<sup>136</sup> The customer must apply to the scheme to which his/her operator is adhered. This means that the consumer cannot select between the two existing regimes. As to membership of one scheme or the other, around 50% of providers belong to the existing schemes, but this parity is not reflected in market share terms.<sup>137</sup> For instance, British Telecom (BT), which accounts for most of the market share for fixed telephony services, belongs to the Ombudsman Services scheme. However, for mobile and Internet the division is more equal, with around 50% per scheme. Ofcom provides information on which of the two available schemes is used each operator in the UK.<sup>138</sup>

Given that this section is based on empirical material gathered, the observations made hereinafter concern the ADR scheme provided by the Communications, and Internet Services Adjudication Scheme (CISAS).<sup>139</sup> The scheme provides its own procedural rules, although these are monitored by Ofcom.<sup>140</sup> Individual customers of the telecoms service can initiate the procedure provided to the scheme where their communications operator is adhered to a particular scheme, and SMEs up to 10 employees. In order for the procedure to come into play, there must have been a previous attempt to settle the dispute with the company within eight weeks of first complaining to the company or, where the company has previously agreed in writing, that the dispute should be settled under the scheme.<sup>141</sup> Furthermore, to be eligible for the adjudication scheme, the dispute at stake has to be related to bills, the quality of customer service received or communication services provided to customers.<sup>142</sup> In any case, the adjudicator alone retains the authority to determine whether the dispute falls within the scope of the scheme.<sup>143</sup> The use of the scheme is free of charge for the consumer, as mandated by Ofcom.<sup>144</sup> A fixed subscription fee maintains the cost of the scheme for the operator plus a fee according to the number of cases stemming from that adhered telecoms operator. The request may include a request for compensation, which must be no more

<sup>136</sup> For an extensive analysis of these ADR schemes, see Hodges et al. *supra* n 84.

<sup>137</sup> Hodges et al. *supra* n 84: “The two ADR providers in the sector are CISAS 244 and OS:C. 245 Some 206 providers use the former (now run by CEDR Disputes Group) and around 250 companies use OS:C. The former has 70 per cent of internet service providers, the latter 95 per cent of fixed line providers, with mobile services split roughly equally”.

<sup>138</sup> <http://consumers.ofcom.org.uk/phone/problems-and-complaints/adr-schemes/>.

<sup>139</sup> Further and much more comprehensive information about the UK scheme and the approach of Ofcom as to complaint handling can be found in Hodges et al. *supra* n 84. .

<sup>140</sup> The procedural rules can be found at: <http://www.cisas.org.uk/downloads/CISAS%20RULES%202013%20-%20Final%20Nov%202013.pdf>.

<sup>141</sup> *Ibid.* Section 1, let. c).

<sup>142</sup> Section 2, let. a). The following issues are excluded from the scope of application of the scheme (let. b): Claims for more than a total value of £10,000 including VAT; Disputes involving a complicated issue of law; Disputes relating to equipment faults; Disputes that are the subject of an existing or previous court action or existing or previous valid application made under the scheme; - Cases where it has been longer than twelve months since the customer first complained to the company. CISAS can extend this period in exceptional circumstances if both the customer and the company agree or if, in our opinion, the company has unreasonably delayed handling the complaint; Cases where it has been less than eight weeks since the customer first complained to the company (unless the company has agreed in writing that the dispute should be settled through the Scheme).

<sup>143</sup> Section 2, let. e).

<sup>144</sup> Section 1, let. f).



than £10,000 (including VAT).<sup>145</sup> The claim will be subject only to the remedies set out in the application form.<sup>146</sup> The appointed adjudicator will have to make a decision on the grounds of the information provided by the parties within 6 weeks from the request,<sup>147</sup> unless it requires independent technical advice to be provided by an expert.<sup>148</sup> Such a decision must be fully reasoned and be made on grounds of the principle of fairness, and –provided that they are line with the law– the codes of conduct and the contract between the parties.<sup>149</sup> To conclude, the adjudicator’s decision is only binding if the customer accepts it within six weeks. The decision cannot be appealed against and it can only be accepted or rejected and only by the customer.<sup>150</sup>

In a similar vein, Polish consumers, apart from referring their telecoms disputes to the regulator for mediation, have the possibility to submit a dispute to the Permanent Consumer Arbitration Court at UKE (Polish NRA). Thus, according to Article 110 of the Polish Telecommunications Act, permanent consumer arbitration courts must be established under the supervision of the President of UKE (“arbitration courts”). The arbitration courts are created via agreements concerning the functioning and procedures of such courts concluded between the President of UKE and non-governmental organizations representing consumers, telecommunications undertakings or postal operators. The aforementioned agreements shall specify, in particular, the rules for covering arbitrators’ remuneration costs and the return of costs borne in relation to the performance of arbitrator activities.<sup>151</sup>

The national models presented above provide quite a broad overview of the existing divergences since –as a result of the national procedural autonomy principle– different models of ADR can be applied. For instance, whereas Italy has established a “consumer friendly” scheme via the imposition of a mandatory attempt at conciliation that is easily accessible, quick and free for consumers so that they do not have to through the (slower and more expensive) Court system, the United Kingdom has opted for a more pragmatic approach by establishing two different arbitration schemes involving consumer-related telecommunications disputes (Ombudsman Services and CISAS) that are decided on a good faith basis. At the far end of the spectrum, we find Eastern countries such as Czech Republic and Poland, which have not yet fully developed proper ADR mechanisms. These two latter countries rely heavily on administrative structures and, in the case of the Czech Republic, most of the cases are redirected to civil courts –especially pecuniary ones. These divergences are the result of the different speeds at which the telecommunications sector develops in the different Member States. A more developed market enables consumer choice and makes consumers more aware of their rights. It triggers a more complainant consumer, which requires of a proper structure dispute settlement that is quicker, cheaper and a real alternative to civil justice; i.e. it demands the creation of ADR mechanisms such as the ones developed Italy or the United Kingdom.

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<sup>145</sup> Section 3, let. b).

<sup>146</sup> Section 3, let. e).

<sup>147</sup> Section 4(5), let. a).

<sup>148</sup> Section 5, let. c).

<sup>149</sup> Section 5, let. a).

<sup>150</sup> Section 4(5), let. d), e) and f).

<sup>151</sup> Article 110 of the Polish Telecommunications Act.

### 3.3 Judicial enforcement

The traditional way of enforcing rights is in a court of law. In the case of contractual or consumer rights, an action in front of the court is expected to provide redress for the applicant. However, in the enforcement of telecommunications regulation, we have already seen how NRAs and ADR mechanisms are fostered as “best ways” to resolve disputes. Thus, whereas judicial procedures are not always sufficiently operational to decide on highly complex disputes in an efficient and effective way, extrajudicial mechanisms –particularly sector-related schemes– are better suited and feature the necessary expertise to resolved disputes in a timely and proficient manner. Taking this assumption as a starting point, the role of courts in adjudicating disputes is becoming reduced as a final resource for less policy-related disputes.<sup>152</sup>

Be this as it may, the role of the judiciary in the enforcement of telecommunications regulation cannot be disregarded. Parties in both wholesale and consumer-related disputes can still enforce their rights stemming from telecoms rules in front of the civil judge. In addition, the role of the judiciary is equally relevant when it comes to decisions adopted in the framework of regulatory adjudication. Against this background, the adjudication is subject to (administrative) judicial review. This judicial control, despite being administrative, also impacts the enforcement of private law rights.

#### 3.3.1 Civil actions (wholesale & retail)

##### *Judicial redress in B2B disputes*

Under the EU regulatory framework for telecoms, the resolution of B2B disputes in the different Member States generally falls to the sector-related regulator.<sup>153</sup> Nonetheless, dispute resolution powers granted to NRAs do not preclude either party from bringing an action before the courts.<sup>154</sup> The issue here lies in determining whether a judicial procedure of dispute resolution can be regarded as a civil action. The issue is controversial due to the principle of procedural autonomy, under which Member States set up their own national procedural rules. Under these circumstances, there are divergences amongst the different procedural systems establish along the European Union. Thus, while in some Member States the resolution of disputes between telecommunications operators are considered to be a civil action and therefore subject to the civil rules of procedure (e.g. France), in some other Member States parties are required to initiate an administrative procedure (e.g. the Netherlands).<sup>155</sup> The nature of the procedure is particularly important for instance when it comes to disputes concerning tariffs, where one of the parties seeks the refund of the amount already paid to the other party. In such cases, the party concerned should wait until the regulatory decision or the appeal (where applicable) in order to claim the reimbursement in front of

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<sup>152</sup> ITU Report.

<sup>153</sup> Article 20(1) Framework Directive.

<sup>154</sup> Article 20(5) Framework Directive.

<sup>155</sup> Ottow, A. (2003), “Dispute Resolution under the New European Framework”. Paper based on comparative study of the British Institute of International and Comparative Studies (London) and workshop held on October 30, 2003 by the British Institute in London.

the civil court.<sup>156</sup> Notwithstanding this, some Member States have put in place a procedural model where NRAs have been entitled to grant private law remedies, such as compensation, as noted above.

Apart from this procedural disparity, a second issue concerning the resolution of B2B disputes by the judiciary is related to the interpretation of the legal provisions. It has been noted that the judiciary reaches different interpretations from those used within the regulatory practice.<sup>157</sup> This may result in long proceedings and legal uncertainty,<sup>158</sup> precisely the opposite from what telecommunications regulation aims to achieve.<sup>159</sup>

Within this context, understanding B2B dispute resolution as adjudication or regulation clearly impacts on the role to be given to civil law as opposed to the contractual rules contained within sector-specific regulation.<sup>160</sup>

### *Judicial redress in B2C disputes*

As in the wholesale market, the availability requirement of extrajudicial mechanisms for the resolution of consumer-related disputes enshrined in the Universal Service Directive, does not preclude either party from bringing a civil action in front of the court.<sup>161</sup>

There is no consolidated data on the number of telecommunications-related cases that end up in front of civil court. However, data on consumer complaints in Europe shows that more than the 90% of consumer complaints (all consumer complaints, not only related to telecommunications) are channelled by procedures other than the court system.<sup>162</sup> This data can be extrapolated to the telecommunications sector, since around 50% of consumer complains are related to Information and Communications Technology (ICT).<sup>163</sup> Accordingly, it can be concluded that the vast amount of telecommunications-related consumer cases does not reach the judiciary.<sup>164</sup> Courts are expensive and slow and, therefore, where there exist extrajudicial means for consumer

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<sup>156</sup> Ibid. See also Ottow, A. (2012), "Intrusion of public law into contract law: the case of network sectors", *The Europa Institute Working Paper* 03/12.

<sup>157</sup> See Andenas, M., and Zleptnig, S. (2004), "Telecommunications Dispute Resolution: Procedure and Effectiveness" *European Business Law Review*, 15, pp. 477-663. This issue of the different interpretation of sector-related provisions have been extensively treated in the next section [section 4.1].

<sup>158</sup> Ibid.

<sup>159</sup> Article 20(1) Framework Directive: "(...)in the shortest possible time frame".

<sup>160</sup> Scott, A. (2015), 'Dispute resolution: adjudication or regulation?' *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS*, 2015/05. See Section 4.1 below.

<sup>161</sup> Article 34(4) Universal Service Directive: "This Article ['Out-of-court dispute resolution'] is without prejudice to national court procedures.

<sup>162</sup> Eurobarometer Survey – *The 2015 EU Justice Scoreboard*. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2015) 116 final.

<sup>163</sup> Extracted from the analysis of the data provided in the Workshop 'Private Law and the Telecommunications Sector: National Perspectives on EU Regulation' held in Florence, 7-8 December 2012.

<sup>164</sup> Extracted from the analysis of the data provided in the Workshop 'Private Law and the Telecommunications Sector: National Perspectives on EU Regulation' held in Florence, 7-8 December 2012.

Representative of Deutsche Telekom AG, Germany. Speech at the Workshop 'Private Law and the Telecommunications Sector: National Perspectives on EU Regulation' held in Florence, 7-8 December 2012: "ADR and customer care lead to the situation that the number of court cases is really minimal. In a year, it is lower than 3 digit number of court cases that our customers bring up before court against DT. So, it is a very low number. Just keep in mind how many million customers with lasting relationships we have".

redress, consumers avoid having to go to court.<sup>165</sup> The latter is particularly true for small claim cases.

Notwithstanding this, there are cases that do reach civil courts. It is important to remark that these cases are representative of situations where consumers face systematic problems; in such situations, consumers seek redress through the courts, mostly represented by consumer associations in class actions procedures.<sup>166</sup> Following empirical research conducted, consumer-related court cases arising in the context of telecommunications services are essentially related to unfair contract terms or unfair commercial practices.<sup>167</sup> In such cases, the interpretation of the rules and the interplay of sector-specific regulation with the more horizontal consumer protection rules means that the participation of the judge in order to develop a process of exegesis is not only appropriate but also necessary, in particular with relation to the functioning of the sector. The interpretative role of the judiciary is also desirable from the position of the industry.<sup>168</sup> Accordingly, the sector, and the consumer problems arising in connection with the sector, usually function on the grounds of *sector-specific* understandings and, therefore, under *sector-specific* mechanisms of consumer redress. Nonetheless, the intervention of the judiciary becomes a tool for the interpretation of sector-related regulation and its integration within the dynamics of the market.

This shift from judicial to administrative (and soft) enforcement and extrajudicial means for dispute resolution brings about the “access to justice” debate. The configuration of the different means for consumer redress in telecommunications relegates the role of civil courts. As aforementioned, the vast amount of consumer complaints is dealt with outside of courts. In this regard, and in order to ensure procedural guarantees, the analysis of the procedural safeguards of the extrajudicial procedures put in place becomes very significant. Access to justice is enshrined in the Charter of Fundamental Rights (Article 47) under the principle of effective judicial protection. At the national level, the most controversial issue has been the introduction of mandatory ADR as a pre-requisite before seeking redress in front of the court.<sup>169</sup> At the European level, the European Court of Justice has confirmed its position on the matter by declaring that the establishment of a mandatory attempt of conciliation is in compliance not only with the principle of effective judicial

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<sup>165</sup> Newman, E. (2012), ‘Consumer Protection and Telecommunications’, in Walden, I. (Ed.), *Telecommunications law and regulation*. Oxford University Press.

<sup>166</sup> Extracted from the analysis of the data provided in the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012.

<sup>167</sup> By way of example, Cases C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, ECR [2009] I-09579; C-522/08, *Telekomunikacja Polska SA w Warszawie v Prezes Urzędu Komunikacji Elektronicznej*, ECR [2010] I-02079 and C-388/13, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel*, nyr.

<sup>168</sup> Extracted from the analysis of the data provided in the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012.

Representative of Deutsche Telekom AG, Germany. Speech at the Workshop ‘Private Law and the Telecommunications Sector: National Perspectives on EU Regulation’ held in Florence, 7-8 December 2012: “There are even cases where we want to be taken it to Court because we want to have clarity on the law. Because the whole telecoms industry it is so innovative and changes so much, introducing so many new products and services which require new terms and conditions, which requires new contractual arrangements that something just has to be clarify. That is not the law maker, the legislator, to legislate every new service, of course, but it is done before court, it is done before civil courts actually”.

<sup>169</sup> The most prominent example is found in Italy, where the Italian Constitutional Court has decide on the constitutionality of the established mandatory conciliation procedure.

protection, but is also compatible with EU telecommunications regulation.<sup>170</sup> Furthermore, the application of procedural safeguards is ensured by the procedural principles contained in the ADR Directive, which are also applicable to telecoms-related out-of-court dispute settlement procedures.<sup>171</sup>

### 3.3.2 Judicial review of regulatory decisions

The Framework Directive (Article 4) requires Member States to put in place mechanisms for the appeal of regulatory decisions.

Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.

Given that regulatory adjudication of disputes between undertakings takes place by a decision of the authority, this will be also subject to judicial review. The appeal mechanism put in place is not only a mere judicial review; the appeal body must also take into account the merits of the case concerned. This means that the judiciary steps into private disputes arising in connection with contractual disagreements between two parties. The nature of the court involved in such procedures is administrative, inasmuch as it reviews regulatory decisions.<sup>172</sup> This results in an administrative court deciding on what would otherwise be a private law case. Accordingly, here again there is a process of administrative enforcement of disputes concerning the relationship of private parties. A practical example of the implications of the process of administrative judicial review is displayed following section.

As for consumer-related disputes, those schemes where the NRA via a regulatory decision has carried out the adjudication of the dispute, an administrative court will usually perform the appeal. By way of example, in Italy, the decision of the regulator over a B2C dispute can be appealed in front of the Italian Highest Administrative Court.

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<sup>170</sup> ECJ joint cases (C-317/08, C-318/08, C-319/08 and C-320/08), *Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA*, [2010] ECR I-02213. See below, section 4.2.

<sup>171</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, (OJ L 165 18.6.2013). Recital 19: “[S]ome existing Union legal acts already contain provisions concerning ADR. In order to ensure legal certainty, it should be provided that, in the event of conflict, this Directive is to prevail, except where it explicitly provides otherwise. In particular, this Directive should be without prejudice to Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (1), which already sets out a framework for systems of mediation at Union level for cross-border disputes, without preventing the application of that Directive to internal mediation systems. This Directive is intended to apply horizontally to all types of ADR procedures, including to ADR procedures covered by Directive 2008/52/EC”.

<sup>172</sup> With the exception, for instance, of France, where the competent court for the appeal is a civil court. Ottow, A. (2003), “Dispute Resolution under the New European Framework”. Paper based on comparative study of the British Institute of International and Comparative Studies (London) and workshop held on October 30, 2003 by the British Institute in London.

## 4. Case-studies

This section aims at displaying how extrajudicial procedures for the settlement of disputes related to telecommunications services develop in practice. It will show the legal implications of the (sector-specific) enforcement techniques of telecommunications regulation via two case studies.

Now that the roles of NRAs in dispute resolution have been analyzed under the limited comparative approach used in this chapter, we can move to the first case-study, which reflects – from a private law viewpoint– the different understandings of the applicable framework for the resolution of a dispute and the different outcomes reached depending on which body is to apply the rules (telecommunications regulation vis-à-vis contract law in B2B disputes). At the retail level, the second case-study –via the analysis of the *Alassini* case<sup>173</sup>– seeks to show the interplay of sector-specific mechanisms for the resolution of consumer-related disputes with the procedural guarantees put in place and their comparability vis-à-vis judicial procedures of consumer redress.

### 4.1 Wholesale market: From Civil Litigation to Regulatory Dispute Resolution via NRAs

The case examined in this section concerns a dispute between some telecommunications operators in the UK and British Telecommunications (BT) that arose from the inclusion of a price revision contract clause in the context of a price adaptation by BT of an already existing Standard Interconnection Agreement between the parties.<sup>174</sup>

The resolution of disputes arising from such a contract binding the parties no longer primarily falls within the jurisdiction of civil courts or the application of private and contract law principles *stricto sensu* because the power to resolve disputes between undertakings arising in the context of regulatory obligations has been allocated to NRAs.<sup>175</sup> This is the generally case except in those situations where Member States have provided NRAs with the possibility to decline to resolve the dispute where alternative mechanisms exist that “would better contribute to the resolution of the dispute in a timely manner in accordance with the provisions of Article 8 [of the Framework Directive]». <sup>176</sup> More specifically, the case at hand concerns a judicial review process for the determination of a dispute between undertakings involving a regulatory decision made by the UK’s NRA, Ofcom.<sup>177</sup> The dispute at issue subsequently reached the UK Supreme Court through a procedure of judicial review.

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<sup>173</sup> ECJ joint cases (C-317/08, C-318/08, C-319/08 and C-320/08), *Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA*, [2010] ECR I-02213.

<sup>174</sup> *British Telecommunications Plc v Telefónica O2 UK Ltd and Others*, [2014] UKSC 42. Para 3.

<sup>175</sup> Article 20(1) Framework Directive.

<sup>176</sup> *Ibid.* Para. 2.

<sup>177</sup> Ofcom’s Determination to resolve a dispute between BT and each of Vodafone, T-Mobile, H3G, O2 and Orange about BT’s termination charges for 0845 and 0870 calls. Final Determination. Issue date: 10 August 2010; available at [http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/761146/Final\\_Determination.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/761146/Final_Determination.pdf). (“Ofcom’s Determination”).

Leaving aside the technicalities involved, by focusing on the institutional design, this case study aims at drawing attention to the clashes and different outcomes achieved depending on *who* is adjudicating the dispute. The issues at stake relate to the nature and role of the NRA and the judiciary when deciding regulatory disputes. Thus, this section sheds some light on the nature of dispute resolution in the wholesale market for telecommunications as long as it directly impacts on the substantive provisions of the EU Regulatory Framework for Electronic Communications.<sup>178</sup> Accordingly, the case concerned provides evidence of the role and effect of NRA's *binding* decisions vis-à-vis the judiciary; in other words, regulatory arbitration versus state court litigation.

### *Grounds of the dispute*

The dispute arose between British Telecommunications Plc (BT) and four Mobile Network Operators (MNOs) in the United Kingdom, Telefónica O2 Ltd, EE Ltd, Vodafone Ltd and Hutchison 3G UK Ltd. It concerned termination charges (the rates that network operators charge to other operator for terminating calls on their networks) imposed by BT. Whereas in Chapter 3 this dissertation dealt with the determination of maximum termination rates by the operator, the present example instead concerns termination price set between two contractual parties. In this case, BT charges the defendants for putting calls through to BT's fixed lines with associated 08 numbers. To put it simply and in terms of monetary transactions, the telecoms operator will collect a termination charge from the mobile network operator from which it receives the call.

The source of the dispute was the introduction of *additional* termination charges by BT for calls to 0845 and 0870 non-geographic numbers hosted on its own network.<sup>179</sup> The new pricing scheme consisted of the pre-existing termination rates (fixed charges) applied to all calls terminated on BT's network, plus a new charge that was to vary depending on the average retail price of calls to the relevant number range charged by the mobile network operator to its customers (variable charge). This modification responds to the terms provided in the Standard Interconnect Agreement with BT. Clause 12 of the disputed contractual agreement provides that:

12.1 For a BT service or facility the Operator shall pay to BT the charges specified from time to time in the Carrier Price List.

12.2 BT may from time to time vary the charge for a BT service or facility by publication in the Carrier Price List and such new charge shall take effect on the Effective Date, being a date not less than 28 calendar days after the date of such publication, unless a period other than 28 calendar days is expressly specified in a Schedule.

BT notified MNOs this new scheme on 2<sup>nd</sup> October 2009 and the charges took effect from 1<sup>st</sup> November 2009 (NCCN 985 and NCCN 986).<sup>180</sup> The defendants rejected the introduction of these

<sup>178</sup> For an extensive study of the effectiveness of dispute resolution in telecoms regulation, see Andenas and Zleptnig *supra* n 157.

<sup>179</sup> "[N]on-geographic number' means a number from the national telephone numbering plan that is not a geographic number. It includes, inter alia, mobile, freephone and premium rate numbers". Article 2 let. f) Universal Services Directive.

<sup>180</sup> NCCN 985: Network Charge Control Notice 985 issued by BT on 2 October and applicable

additional termination charges and submitted the issue to Ofcom under Section 185 of the Communications Act. On 4<sup>th</sup> March 2010, Ofcom decided that it was appropriate to handle the dispute.<sup>181</sup> According to Ofcom's Determination, the scope of the dispute was defined as being whether it is fair and reasonable for BT to apply new termination charges as specifically set out in BT's NCCN 985 and NCCN 986.<sup>182</sup> Ofcom rejected the introduction of the revising scheme for termination charges.<sup>183</sup> The Competition Appeal Tribunal ("CAT") overturned that decision<sup>184</sup> which was, in turn, overridden by the Court of Appeal (civil division), which restored the original Ofcom determination.<sup>185</sup> Therefore, the appeal of the Ofcom decision to the CAT runs –on points of law only- to the Court of Appeal, and from there to the UK Supreme Court.<sup>186</sup>

### *Comment*

#### **Implications for private law. Conflicting jurisdictions vis-à-vis dual applicable law (vertical and horizontal conflicts)**

The institutional design of the enforcement of telecommunications regulation should not be neglected when it comes to the impact that it may have on the application of private law principles. The following analysis looks at the reasoning of each of the bodies involved in the resolution of the dispute in the UK, that is to say the regulator (Ofcom) as well as the judiciary via a procedure of judicial review of the (administrative) adjudication of the private dispute (Competition Appeals Tribunal, Court of Appeal and Supreme Court).

Even if at first sight this appears only to be about some "pennies",<sup>187</sup> the individual sums involved in the dispute are highly relevant in monetary terms when multiplied by the number of transactions operated in the telecommunications market: pennies might translate into millions of pounds. The judicial review procedure also plays an interesting role when repayments are at stake, since interest accrual can also be significant.

This sub-section examines the question of whether NRAs (via their adjudicatory powers) restrict freedom of contract in a more restrictive way than the judiciary when applying private law principles and reading them in the light of Article 8 regulatory goals of the Framework Directive. To this end, rather than focusing on an extensive and complex examination of the wide array of the issues at stake due to the technical nature of the dispute, the analysis will focus solely on the application of the potentially applicable regimes (i.e. regulatory against private law principles) and how these affect contractual freedom and any implications on the private law dimension of the case.

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from 1 November 2009; NCCN 986: Network Charge Control Notice 986 issued by BT on 2 October and applicable from 1 November (Network Charge Change Notice, "NCCN").

<sup>181</sup> Pursuant to Section 186(3).

<sup>182</sup> Ofcom's Determination, Section 1.8.

<sup>183</sup> Ofcom's reasoning is examined below.

<sup>184</sup> [2011] CAT 24 and 26.

<sup>185</sup> [2012] EWCA Civ 1002.

<sup>186</sup> *British Telecommunications Plc v Telefónica O2 UK Ltd and Others*, [2014] UKSC 42. Para 3.

<sup>187</sup> Variable charges according to NCCN 985 and NCCN 986 range from 2.0 to 15.00 pence per minute.



i. Institutional design that matters. Mapping the actors involved

Decisions of NRAs only bind the parties to the dispute. Hence, the role of the NRAs when deciding disputes between operators one of adjudication.<sup>188</sup> Nevertheless, it is expected that third parties read across and follow the decisions when faced with similar legal problems. Also, in the UK, the Competition Appeals Tribunal must follow Court of Appeal and Supreme Court Judgments on similar cases. Institutional design matters, as does the allocation of decision-making powers. Accordingly, this section tracks the actors involved in the judicial review of regulatory decisions when their object is adjudicate a dispute. This mapping exercise is also relevant for the purpose of determining the nature of dispute resolution functions themselves. In this regard, the UK Supreme Court examines the extent to which dispute regulatory powers are of an adjudicatory or regulatory character.<sup>189</sup> The configuration will impact not only on the contractual nature of the –current and future– relationship of the parties involved in the conflict, but also on third parties outwith the dispute but who may enter into similar contracts.

*NRA's reasoning: The Role of Ofcom in Dispute Resolution*

The involvement of Ofcom in the dispute described above derives from the conferral made by the parties under the Standard Interconnect Agreement, which provides that the failure to resolve a dispute by agreement of the parties entitles either party to refer it to Ofcom.<sup>190</sup> However, the role of the NRA and its impact on private law matters not only extends to regulatory obligations at the time of “contract-making” or when parties are seeking redress via regulatory adjudication, it also touches upon contractual amendments. The Standard Interconnect Agreement provided by BT that gave rise to the case at stake provides evidence of the influence of NRA's decisions and determinations in the contractual relationship between the parties involved. Pursuant to the Agreement:

12.5 As soon as reasonably practicable following an order, direction, determination or consent... by Ofcom of a charge (or the means of calculating that charge) for a BT service or facility, BT shall make any necessary alterations to the Carrier Price List so that it accords with such determination.

[...]

12.9 If there is a difference between a charge for a BT service or facility specified in the Carrier Price List and a charge determined by Ofcom, the charge determined by Ofcom shall prevail.

The Supreme Court reads the combination of Clauses 12 and 26 as that the unilateral alteration of charges by BT takes effect “automatically from the date proposed, subject to the counterparty's right to object (...) Meanwhile, the variation is treated as provisionally valid”.<sup>191</sup> In the case we are analyzing, all the notifications of the revised tariffs via the NCCN made by BT to its counterparties were disputed and referred to Ofcom for resolution.

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<sup>188</sup> See Scott, A. (2015), “Dispute resolution: adjudication or regulation?”, *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS*, 2015/05.

<sup>189</sup> Ibid.

<sup>190</sup> Clause 26 of the disputed contract.

<sup>191</sup> UKSC para. 17.

By way of its Determinations, Ofcom concluded that it would allow the modification of the charges only if they were “fair and reasonable”.<sup>192</sup> In particular, Ofcom grounds its decision in a balancing exercise governed by three principles that the Supreme Court summarizes as follows: Principle 1 entails that mobile network operators should be able to recover their efficient costs of originating calls to the relevant numbers. Principle 2 –so-called “welfare test” – is grounded on the assumption that the new charges should (i) provide benefits to consumers, and (ii) not entail a material distortion of competition. Finally, Principle 3 provides that the implementation of the new charges should be reasonably practicable. The Supreme Court rightly points out that these principles can be related to the regulatory principles contained in Article 8(2) of the Framework Directive. It also notes that, so far, these principles have not been challenged as an “appropriate analytical framework”.<sup>193</sup>

Again without entering into technical details, Ofcom applies the welfare test and distinguishes three potential effects on consumers: the “direct effect” on consumer prices as a result of the variation, the “indirect effect” as a consequence of improved services, and the “mobile tariff package effect” (“waterbed effect”) by which MNOs might potentially compensate for the increase of the charges by raising prices elsewhere.<sup>194</sup> As to the direct effect, Ofcom concluded that it is likely that the proposed scheme of charges which links the variable charge in proportion to the price charged to consumers yields benefits to the caller as long as it might lead MNOs to reduce the charges to callers.<sup>195</sup> Ofcom also determined that an indirect effect might also eventually take place. However, it cast some doubt on the fulfillment of Principle 2(i), since the “waterbed effect” is likely to occur.<sup>196</sup> The second part of Principle 2 (“competition test”) did not entail a problem for Ofcom as it considered that the risk of material distortion of competition as a result of the changes proposed by BT under its contractual freedom was “relatively low”.<sup>197</sup> As a result, and given that in Ofcom’s view the requirements of Principle 2 were not fulfilled, it concluded that British Telecom should not be entitled to introduce the new pricing scheme as the extent to which MNOs would be able to compensate the increase in the charges<sup>198</sup> could not be determined and therefore it would not be “fair and reasonable”.<sup>199</sup> An appeal against this decision was lodged in the Competition Appeal Tribunal. Before proceeding to the analysis of the Competition Appeal Tribunal, should be noted that, in the period 2013-2014, Ofcom has been involved in the adjudication of 7 disputes, only one of which was appealed. To date, from this 2014-2015 exercise, Ofcom has issued 6 determinations, one having now been appealed to the Competition Appeal Tribunal.<sup>200</sup> This demonstrates that only a few cases reach the judiciary.<sup>201</sup>

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<sup>192</sup> Ofcom’s Determination, Section 1.8.

<sup>193</sup> UKSC, para. 20.

<sup>194</sup> For an extensive view on the assessment of the principles see Section 5 of Ofcom’s Determination.

<sup>195</sup> See Section 5.25 and 5.26 of Ofcom’s Determination.

<sup>196</sup> Ibid. Section 5.28.

<sup>197</sup> See Section 8.157.

<sup>198</sup> Ibid. Sections 9.16 to 9.43.

<sup>199</sup> Ibid. Section 9.55.

<sup>200</sup> Scott *supra* n 188.

<sup>201</sup> To date, the Competition Appeal Tribunal has dealt with 25 appeals under the EU Regulatory Framework dispute resolution regime. From these, only a minority of CAT judgments are appealed on points of law to the Court of Appeal

### *The role of the Competition Appeal Tribunal*

As explained above, pursuant to Article 4 of the Framework Directive, Section 195(2) of the UK Communications Act, the appeal to the Competition Appeals Tribunal is not limited to a mere judicial review or to points of law. Rather, it is an appeal “on the merits”.<sup>202</sup>

In the case at issue, the conclusions reached by the Competition Appeal Tribunal (“CAT”) were substantially similar to and in agreement with Ofcom’s approach and its balancing principles. Still, the CAT<sup>203</sup> departed from a different hypothesis: that BT is *prima facie* entitled to modify the charges pricing system.<sup>204</sup> In the view of the CAT, as summarised by the Supreme Court, BT’s contract power to vary prices is grounded on three things: first, BT had a “contractual right» to modify the tariffs to be charged to MNOs under its contractual freedom, as long as Ofcom could issue a decision in case of dispute (ex-post control); second, that the introduction of “innovative charging structures was itself a mode of competing, and that [regulatory] interference with it would restrict competition”; and third, that “price control is an intrusive form of control which, elsewhere in the 2003 Act, can only be introduced by SMP condition”.<sup>205</sup> On the latter issue, the Tribunal acknowledges that the application of a “stringent test” to introduce the proposed variation in charges Ofcom is “significantly restricting communication providers’ commercial freedom to price which –absent the Dispute Resolution Process– is not constrained by regulation”.<sup>206</sup> Despite these considerations, the CAT still emphasizes that it is not the nature of the assessment (referring to the “welfare test”) what it is considered particularly “stringent”, but the lack of empirical evidence about the impacts that charges modification would have on the market and the complexity of the issue the distinctively show that it would be beneficial for consumers.<sup>207</sup> Be this as it may, the Tribunal actually concluded in a similar way to Ofcom concerning the welfare test insofar as both found that the test yields an *inconclusive* result.<sup>208</sup> Yet, it is on this particular point –i.e. the uncertainty arising from the welfare test– that the CAT is at odds with Ofcom. Here, very importantly, the Tribunal asks what a regulator is to do in the context of such uncertainty. There are two possibilities from the Court’s viewpoint:<sup>209</sup>

- (1) To prevent change unless it can be demonstrated that the change is beneficial- in which case it may well be said that the dead hand of regulation is constraining behaviour which may actually be beneficial to consumers. We stress that our conclusion regarding Principle 2(i) was that the welfare assessment was inconclusive, not that consumers would be harmed.

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and just once has a case been subject to a further appeal in front of the UK Supreme Court. Source: Competition Appeal Tribunal.

<sup>202</sup> UKSC 42 at para. 24. Also acknowledged in Case *British Telecommunications Plc v OFCOM* (Ethernet Determinations) [2014] CAT 14, at para. 64.

<sup>203</sup> *British Telecommunications PLC (Termination Charges: 080 calls) v Office of Communications* [2011] CAT 24.

<sup>204</sup> Para 261: [...] Mobile network operators are, therefore, free to price as they will; but it does not follow from that that such freedom should inhibit BT in its freedom to price.

<sup>205</sup> See, para. 442: “[...] None of the parties to the dispute were subject to regulatory control as regards the prices for 080, 0845 or 0870 calls nor as regards the prices for terminating such calls”.

<sup>206</sup> Para. 395.

<sup>207</sup> *Ibid.*

<sup>208</sup> Para. 379.

<sup>209</sup> Para. 396.

(2) Alternatively, to allow change despite the uncertainty, even though there is a risk that the change may result in a disbenefit to consumers, recognising that an undue fetter on commercial freedom is itself a disbenefit to consumers.

Although Ofcom opted for preventing the change even if the welfare test yielded an inconclusive result, the CAT considers that this course of action “places undue importance on Ofcom's policy preference, at the expense of the two other relevant factors that we have identified as forming a part of Principle 2 [...] and BT’s private law rights”.<sup>210</sup> Further, the Judgment explicitly recognizes that even though there are circumstances that may alter the legal rights of the parties by giving way to regulation over private law (e.g. regulatory obligations over players with Significant Market Power and the dispute resolution process itself), “private law rights are relevant factors to take into account”.<sup>211</sup>

The outcome from the CAT’s ruling is therefore that, in principle, contractual changes are allowed unless regulatory principles are clearly breached. Yet, the Court still draws attention to the role of Ofcom when deciding disputes, in particular, when balancing its statutory obligations against the freedom of undertakings to negotiate the terms and conditions. To this end, the CAT invokes the Judgment given in the T-Mobile case<sup>212</sup> where it held that Ofcom failed in exercising its discretion as regards the manner in which it resolves disputes. In the CAT’s view, the starting point of Ofcom when deciding a dispute is the existence of *ex ante* obligations applicable to the parties in an attempt to ensure that the parties’ “freedom to determine their price is curtailed only insofar as necessary and proportionate to fulfill the objectives of such obligations”, by considering “whether there are any overriding policy objectives which should be taken into account”.<sup>213</sup> In particular, the Tribunal considered that:

“[...] This approach represented, in the Tribunal’s judgment, a fundamental error as to the task facing Ofcom in determining these disputes. Ofcom failed to recognize that dispute resolution is itself a third potential regulatory restraint that operates in addition to other *ex ante* obligations and *ex post* competition law”.

Accordingly, the Tribunal concluded that, Ofcom should apply a test under which it can first “determine what are *reasonable* terms and conditions as between the parties”.<sup>214</sup> Here the Tribunal asks about what is to be understood by reasonable. In dispute resolution, “reasonable” would entail “a fair balance to be struck between the interests of the parties to the connectivity agreement”. It would therefore call for the same kind of adjudication that any privately appointed arbitrator by the parties could undertake. However, given that Ofcom is a regulator bound by its statutory duties and the EU regulatory requirements it is also required to achieve a “reasonable” balance that ensures that those objectives and requirements are achieved.<sup>215</sup>

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<sup>210</sup> Para. 447.

<sup>211</sup> Para. 444.

<sup>212</sup> Judgment *T-Mobile(UK) Ltd v Office of Communications* [2008] CAT 12.

<sup>213</sup> CAT on the *T-Mobile* case, at. Para. 87.

<sup>214</sup> Para. 101. Emphasis added.

<sup>215</sup> Ibid.

### *The role of the Court of Appeal*

The decision by the CAT was appealed to the Court of Appeal, which restored the decision reached by Ofcom.<sup>216</sup> Lloyd LJ (leading judgment) rejected outright the CAT's starting hypothesis as to the mistake in considering a *prima facie* BT's right to change its prices. He considered that if there are matters to be decided under a dispute resolution procedure, these are subordinated to Ofcom's determination. Lloyd LJ also held that it is wrong to find that a restraint of BT's freedom to vary prices would distort competition. Finally, he argued that the CAT was not correct when it took the view that *ex ante* control of prices only applies in circumstances where undertakings hold Significant Market Powers on a relevant market. In line with Ofcom's reasoning, it is for BT to justify its charges to be "fair and reasonable".

In the view of the Court of Appeal, it is also relevant to scrutinize the nature of the function of Ofcom with regard to dispute resolution.<sup>217</sup> In this regard, Lloyd LJ notes that

"[...] The purpose of dispute resolution is to provide a solution where a deadlock is reached in commercial negotiations between parties. Ofcom's task, where it undertakes the resolution of the dispute, is to impose a solution that meets the public policy objectives of the CRF, as set out in article 8 of the Framework Directive, and therefore *goes beyond deciding disputes on the basis of the parties' respective contractual rights*. Dispute resolution is a form of regulation in its own right [...]"<sup>218</sup>

Dispute resolution by Ofcom is viewed as a regulatory function. This was widely recognized.<sup>219</sup> However, the Supreme Court draws the attention on the description of dispute resolution by the Court of Appeal as "a form of regulation in its own right". The Court considers that it requires some analysis.<sup>220</sup> The Supreme Court discusses such a function (below).

From the Court of Appeal's judgment, the relevant question is what the rights of BT under the Interconnection Agreement are and how disputes resolution impacts on such rights. Lloyd LJ holds that any change that takes place can be overridden (or not) by Ofcom's dispute resolution jurisdiction.<sup>221</sup> This has since led to the Supreme Court to draw the conclusion that in the view of the Court of Appeal, "the terms of the Interconnection Agreement were of little *if any* relevance because their effect was that any new charges introduced by BT were liable to be overridden by Ofcom in the exercise of its regulatory powers".<sup>222</sup> Accordingly, the Court of Appeal considered interconnection charges as regulatory in nature.<sup>223</sup>

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<sup>216</sup> Judgment on case *Telefonica O2 UK Limited and others v British Telecommunications PLC* [2012] EWCA Civ 1002.

<sup>217</sup> See paras. 58ff.

<sup>218</sup> Para. 63. Emphasis added.

<sup>219</sup> Also by the CAT in Judgment *T-Mobile(UK) Ltd v Office of Communications* [2008] CAT 12.

<sup>220</sup> UKSC, para. 31.

<sup>221</sup> See paras. 68-70.

<sup>222</sup> Supreme Court at Para. 30. Emphasis added.

<sup>223</sup> *Ibid.*

### *The role of the UK Supreme Court/ reasoning of the court*

From a pure private law perspective, the role of the UKSC is to determine whether BT's proposed charges exceed the limits of its contractual discretion.

In this particular case, British Telecommunications does not hold position of Significant Market Power, but yet its capacity (i.e. freedom) to vary prices is limited by the English Law of contract *and*, in addition, by the EU regulatory framework for telecommunications.<sup>224</sup> Consequently, BT was obliged to act:

- a. "in good faith and not arbitrarily or capriciously";
- b. "consistently with its contractual purpose"; and
- c. "within limits which are fixed by the objectives of Article 8 of the Framework Directive."

For the UK Supreme Court, the starting hypothesis is that the Ofcom is "bound to start from the parties' contractual rights" and that it "may override them only if that is required by Article 8 of the Framework Directive".<sup>225</sup>

As to the welfare test, the reasoning of the Supreme Court coincides with that of the CAT.<sup>226</sup> The Court holds that the EU regulatory framework for telecoms is "market-oriented and essentially permissive". Thus, it concludes that it is inconsistent to apply "an extreme form of the precautionary principle to a dynamic and competitive market". Yet Ofcom should not refrain "from blocking a price variation which on a balance of probabilities was unlikely to be adverse, but which if things went wrong could be catastrophic".<sup>227</sup> However, the Supreme Court considers that the application of the three principles and the welfare test was inconclusive, so Ofcom should in fact have permitted the price variation proposed by BT.

- ii. The impact of EU law (EU Regulatory framework for Electronic Communications) in the resolution of national disputes

"Interconnection agreements are made in a regulated environment".<sup>228</sup> This statement presupposes that any change in the regulatory framework affects the contractual relationship. In the view of the Supreme Court, this configuration also assumes that the intention of the parties is to comply with the regulatory scheme and that it "necessarily informs the scope and operation of any contractual discretion". Hence, the discretion conferred by virtue of Clause 12 of the Standard Interconnection Agreement is restricted by the regulatory principles contained in Article 8 of the Framework Directive so that, contractually, BT's power to change the already existing charges scheme will be framed within the limits delineated by the regulatory objectives.<sup>229</sup>

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<sup>224</sup> Recall Case C-192/08 *TeliaSonera Finland Oyj v iMEZ Ab*, ECR [2009] I-10717; para. 62.

<sup>225</sup> UKSC para. 38.

<sup>226</sup> Paras. 42 and 43.

<sup>227</sup> Para 44.

<sup>228</sup> Lord Sumption in UKSC at para. 37.

<sup>229</sup> *Ibid*.

According to this interpretation, the principles contained in Article 8 of the Framework Directive act as a guideline for solving disputes but also as a limit to the freedom of contract. Thus, for example, the UK CAT permits contractual changes as long as “principles” (understood as the objectives set out in Article 8) are respected.

On the other hand, Article 7(1) of the Framework Directive (‘Consolidating the internal market for electronic communications’) prescribes that:

1. In carrying out their tasks under this Directive and the Specific Directives, national regulatory authorities shall take the *utmost account* of the objectives set out in Article 8, including in so far as they relate to the functioning of the internal market.<sup>230</sup>

Despite the fact that there is no definition of what “utmost account” should be taken to mean or what is its legal effect is, it is in any case clear that the policy objectives and regulatory principles contained in Article 8 of the Framework Directive act as a guideline for the NRAs performance, also when resolving disputes between undertakings. This is a requirement also of Article 8 itself,<sup>231</sup> and Article 5 Access Directives reinforces and concretize such a mandate.<sup>232</sup> From the reading of the regulatory principles and objectives and the reading of Article 1 of the Access Directive, which harmonizes the regulation of access and interconnection for the relationships between telecommunications operators, the Court understands that the “key element” of the system for achieving the policy goals of the regulatory framework is the “legal relationship” between telecommunications providers.<sup>233</sup> The Court acknowledges that the rationale of the designed framework is “embodied in the interconnection terms” agreed between the parties.<sup>234</sup> It emphasizes that the achievement of Article 8 principles and objectives takes place via the terms contained in the interconnection contracts.<sup>235</sup> Yet parties enjoy a certain margin to negotiate the interconnection agreements in good faith under the principle of minimum regulatory interference, provided that these terms are consistent with the regulatory obligations imposed, which include the obligation to secure Article 8 policy objectives.<sup>236</sup> Under this interpretation, Lord Sumption found that this requirement for interconnection terms to be compliant with the Article 8 objectives is a condition that “must be *available to any* electronic communications operator which asks from them”.<sup>237</sup>

The application of the price control restriction where there is Significant Market Power (SMP) is also relevant. The Supreme Court clarifies an important difference between, firstly, the exercise of a regulatory power to impose price control on SMP operators or, secondly, the

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<sup>230</sup> Emphasis added.

<sup>231</sup> Para 1: “[...]national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4 [...]”.

<sup>232</sup> New paragraph 3 as amended by Directive 2009/140/EC: “Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified in order to secure the policy objectives of Article 8 of Directive 2002/21/EC (Framework Directive), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive)”.

<sup>233</sup> UKSC 42 at para. 8.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid. at para. 10.

<sup>236</sup> Ibid. and Article 5(4) Access Directive.

<sup>237</sup> Ibid. This is in line with the interpretation provided by the CJEU in the Case C-192/08 *TeliaSonera Finland Oyj*, ECR [2009] I-10717 where it maintains a flexible interpretation of the regulatory obligations by extending the application - regulatory principles not only to SMP operators but to *any* operator (Para. 55).

determination of whether a particular price variation yields benefits to consumers as conditions upon which the right to vary the prices can be endorsed.<sup>238</sup> This said, the Supreme Court does not regard the lack of SMP condition upon the operator as a justification for disregarding the relevance of Article 8 objectives.<sup>239</sup>

An important finding regarding the application of EU policy objectives and the configuration of Article 8 as a guideline, as well as the framework under which the contractual discretion may operate, also act as catalysts for the harmonization of (regulatory) contract law at EU level. Thus, by way of this enforcement system subordinated to the mandate of Article 8, regulatory goals entail a tangible encroachment of the EU rules into the different contract laws of the Member States.<sup>240</sup>

### iii. Conclusions

From a purely private law perspective it is remarkable that Ofcom, in its reasoning, does not identify an actual and concrete harm for consumers derived from the contractual modification introduced by BT:<sup>241</sup>

Given the uncertainty which we have identified as to whether BT's NCCNs would result in a net benefit or net harm to consumers, and in light of our overriding statutory duties to further the interests of consumers, we consider it is appropriate for us to place greater weight on this potential risk to consumers from NCCNs 985 and 986.

Rather, it invokes higher interests than those of the parties to entitle Ofcom, upon the condition that it as acting as *guardian* of the interest of citizens and consumers,<sup>242</sup> to override freedom of contract. Thus, this Determination provides evidence that, when in doubt, for the NRA, regulatory principles take priority over contract law principles.

The Supreme Court itself recognizes the complexity of the case.<sup>243</sup> It is unlikely that the national (civil) judge has the appropriate knowledge and expertise to rule on a highly technical sector.<sup>244</sup>

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<sup>238</sup> Para. 48.

<sup>239</sup> Ibid. para. 48.

<sup>240</sup> Para 35 UKSC: "The contractual effect of the interconnection terms will of course depend on their proper law, and in some respects this may vary from one member state to another. But as far as the Article 8 objectives are concerned, there will be commonality between every member state because all of them have the same obligation to ensure that interconnection agreements are framed and applied in a manner consistent with those objectives, and the same obligation to require their national regulatory authorities to give effect to those objectives both in imposing or modifying terms and in resolving disputes about them".

<sup>241</sup> Ofcom Determination, Section 9.32.

<sup>242</sup> Section 3(1) and 51(1)(a) of the UK Communications Act 2003.

<sup>243</sup> Already at the very beginning (Para 1: [...]) "The dispute is a *highly technical one*, both factually and legally" and in the single paragraph (51) containing the conclusion: "[...] there was no justification for the Court of Appeal to set aside the careful analysis of the CAT on a matter lying very much within its *expertise* [...]"). Emphasis added.

<sup>244</sup> "In the UK, courts are not excluded, but civil law judges are surely not familiar with the Telecommunications Regulatory Framework". Adam Scott (CAT), Speech at the Seminar 'The role of the National Judiciary in the Single Market for Telecoms', organized by the Florence School of Regulation (EUI) and DG Connect (EU Commission), 20 November 2014, Brussels.



The overall conclusion to be drawn from this case-study is that institutional design in the enforcement of telecommunications regulation via regulatory dispute resolution is significant for private law matters. Evidence of this is that even though the NRA and the appeal bodies act in the light of the regulatory objectives contained in Article 8 of the Framework Directive, they reach different positions as to private and contract law. From the analysis, it follows that the different bodies have different understandings about the extent to which BT is entitled to vary prices within its contractual discretion and the impact of such use of contractual rights over the competitiveness of the market and consumer welfare.

These conclusions go together with an important caveat: one has to exercise caution, particularly in the enforcement of the substantive rules. For instance, it is important to draw a distinction between the setting of tariffs in wholesale markets following a review of a market that results in a situation of SMP (regulation) and tariffs that have been set as part of a dispute resolution process (adjudication). This differentiation is important in order to determine the scope of such tariffs in a litigation process and how the application of such tariffs operate with regard to the parties involved in a dispute resolution process. This question arises particularly in the context of appeals against the setting of tariffs by the regulator and the outcome will be different depending on whether it arises in the frame of *ex ante* regulatory decisions or in the determination of the regulator in dispute resolution. This becomes particularly important with regard to reversing the effects of the challenged decision. Thus, whereas within the framework of regulatory obligations, it is considered an *ex ante* intervention and therefore the consequences of what happened between the setting of an incorrect tariff by the NRA and its correction cannot be corrected by the appellate body (at least in the UK),<sup>245</sup> in the context of dispute resolution, the court may –at its discretion– render a decision through which some adjustments are made in order to palliate the effects of the contested measure.

#### **4.2 Retail market: ADR as the standard form of consumer redress? *Alassini* case**

As examined above, the Italian legislation establishes a mandatory attempt to settle the dispute as a requirement prior to bring a judicial action. To this end, the Italian NRA (AGCOM) has provided for a system of decentralized enforcement by setting up regional delegated authorities (Co.Re.Com) responsible for ensuring the provision of the procedure for extrajudicial settlement.

##### *Background of the dispute*

The system of mandatory conciliation attempt for matters concerning public utilities has existed in Italy since 1995 by virtue of Law no. 481/1995 establishing the Regulatory Authorities utilities and, in the telecommunications sector since 1997 by way of Law no. 249/1997 Institution of the Communications Authority (AGCOM).<sup>246</sup> Article 1, paragraph 11 of the said Law no. 249/1997

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<sup>245</sup> See *Hutchison* [2010] EWCA Civ 391.

<sup>246</sup> Legge 31 luglio 1997, n. 249, *Istituzione dell'Autorita' per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo*.

provides, before being able to seize the jurisdiction, the mandatory settlement before the NRA. This activity has been largely delegated to Co.Re.Com. In line with the constitutional interpretation proposed by numerous judgments and orders of the Constitutional Court intervening on the subject,<sup>247</sup> the mandatory settlement is confirmed by the Decree of August 1<sup>st</sup> 2003 n. 259 (Electronic Communications Code) that implements the Universal Service Directive into the Italian legal landscape.<sup>248</sup>

Italian legislation provides that disputes between telecommunications operators and users cannot be brought in front of judicial courts until a compulsory conciliation attempt has taken place. Such conciliation has to be completed within days 30 from the submission of the complaint to the Authority. To this end, the deadlines for action in the courts are suspended until the expiry of the deadline for the conclusion of the conciliation process.<sup>249</sup> After this period, the parties are free to apply to the judicial authority even if the settlement procedure has not yet concluded.

In the cases concerned, which related to an alleged breach of contract by the telecoms operator, the Co.Re.Com had not yet been set up in the region of Campania. This meant that the mandatory settlement procedure had to be brought before other bodies, namely those referred to in Article 13 of the dispute settlement rules, i.e. via Chambers of Commerce or *Conciliazione Paritetica*.

Against this background, the Magistrates Court from Ischia (*Giudice di Pace di Ischia*) referred the case to the CJEU via the preliminary reference procedure.<sup>250</sup> The questions referred asked the CJEU to verify whether those bodies providing out-of-court dispute settlement were in accordance with the principles set out in Recommendation 2001/310 and, in particular, the costs for the consumers in such procedure were to be considered at an appropriate level. In addition, it concerned the question of whether these alternative mechanisms were easy to use and properly advertised.<sup>251</sup> Nonetheless, the referring court casts doubts on the compliance of the mandatory nature of the settlement procedure provided by the Italian legislation with EU Law, insofar as it considers that it could impede end-users from exercising their rights. Accordingly, it poses the question of whether the transposition of Article 34 of the Universal Service Directive into Italian law has been carried out in compliance with EU Law, in particular with Article 6 of the European Convention on Human Rights (right to fair hearing), Universal Service Directive, Framework Directive and EU Recommendations 2001/310 and 98/257. Specifically, it aims at clarifying whether these rules:<sup>252</sup>

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<sup>247</sup> Italian Constitutional Court, Judgment 272, 6 December 2012.

<sup>248</sup> Marzocco, A.M. (2012), *Le controversie in materia di comunicazioni elettroniche. Contributo allo studio della giurisdizione condizionata*, Dike Giuridica Editrice.

<sup>249</sup> Ibid., Article 1(11).

<sup>250</sup> ECJ joint cases (C-317/08, C-318/08, C-319/08 and C-320/08), *Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA*, [2010] ECR I-02213. Para. 21.

<sup>251</sup> Para. 19.

<sup>252</sup> Para. 21.

[H]ave direct effect and must they be interpreted as meaning that disputes “in the area of electronic communications between end-users and operators concerning non-compliance with the rules on Universal Service and on the rights of end-users, as laid down in legislation, decisions of the Regulatory Authority, contractual terms and service charters” (the disputes contemplated by Article 2 of [the regulation annexed to] Decision No 173/07/CONS of the Regulatory Authority) must not be made subject to a mandatory attempt to settle the dispute without which proceedings in that regard may not be brought before the courts, thus taking precedence over the rule laid down in Article 3(1) of [the regulation annexed to] Decision No 173/07/CONS?’

### *Reasoning of the Court*

After finding the question to be admissible, the Court identified the relevant Community legislation. Notwithstanding that the Recommendations are not binding, but are also not entirely without legal effect,<sup>253</sup> the courts excluded the applicability of EU Recommendation 2001/310/EC concerning the procedures as they are simply an attempt to reunite the parties to convince them to find an amicable solution. In the opinion of the Court, the conciliation attempt provided for by Decision 173/07/CONS falls within those procedures that lead to the resolution of the dispute through the active intervention of a third party who proposes or imposes a solution. It therefore considered *only* the Recommendation 1998/257/EC is applicable to the case.<sup>254</sup> The Recommendation 1998/257/EC subjects extrajudicial procedures for the settlement of disputes to the principles of independence, transparency, adversariness, effectiveness, legality, liberty and representation. In addition, in the present case Article 34 of the Universal Service Directive that calls on States to ensure transparent, simple and inexpensive extrajudicial procedures to enable a fair and timely resolution of disputes was also deemed applicable.<sup>255</sup>

In addition, the court must examine the legality of the mandatory settlement in the light of the principles of equivalence and effectiveness on the one hand, and the principle of effective judicial protection on the other. The discretion of the Member States in the use of the national procedural principle is limited only by the principles of equivalence and effectiveness.<sup>256</sup> In this regard, the CJEU has held that the establishment of a mandatory process of dispute settlement prior to bringing a judicial action before the court, does not infringe the principles of equivalence, effectiveness and the principle of effective judicial protection. Particularly, the court states, the procedure put in place does not “make it in practice impossible or excessively difficult to exercise the rights which individuals derive from [the Universal Service Directive].<sup>257</sup> Here, the Court reasoning –following the Opinion of Advocate General Kokott<sup>258</sup>– was that the procedure at stake

does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the

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<sup>253</sup> Para. 40.

<sup>254</sup> Paras. 33-36.

<sup>255</sup> Para. 38.

<sup>256</sup> Paras. 48 and 49.

<sup>257</sup> Para. 53

<sup>258</sup> Ibid. Opinion delivered in November 19, 2009. Paras. 36 and 57.

parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.<sup>259</sup>

Accordingly, Member States are not limited in establishing mandatory out-of-court procedures for the settlement of disputes as a requirement for judicial redress, on condition that this does not affect the effectiveness of the Universal Service Directive.<sup>260</sup> Rather –the court continues–, in view of previous CJEU decisions, the designed scheme contributes to *strengthening the effectiveness* of the Universal Service Directive.<sup>261</sup>

As to the principle of fundamental judicial protection, the Court acknowledges that fundamental rights may be restricted, provided that the restrictions respond to further objectives of general interest and comply with the principle of proportionality, i.e. they do not involve a “disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed”.<sup>262</sup>

In the light of these considerations, the Court concludes that a mandatory settlement procedure is proportionate considering that a merely optional procedure would not be as efficient to achieve legitimate objectives in the general interest.<sup>263</sup>

### *Comment*

The analysis of the case at issue requires attention to be paid to three particular issues.

The first is the scope of the procedural principles contained in the Recommendations. The reasoning of the court follows the logic that the Recommendation 2001/310/EC does not apply to the case concerned because, in the view of the court, the mandatory scheme involves the active intervention of a third party proposing a solution, due to the Universal Service Directive. Accordingly, by the time the dispute took place, only the principles contained in the Recommendation 1998/257/EC were applicable. In this regard, it is interesting to note that, when it comes to the principle of legality, the scope of the Recommendation 1998/257/EC was broader than the principle of legality afforded by the Directive on Consumer ADR.<sup>264</sup> Following the court’s reasoning, such a principle as enshrined in the 1998 Recommendation is applicable to the procedure at issue.<sup>265</sup>

The second issue concerns the effectiveness of the Universal Service Directive. In the court’s view, the systematic resort to of out-of-court procedures for the settlement of disputes strengthens the effectiveness of the legislation to be enforced.<sup>266</sup> Regrettably, the court does not

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<sup>259</sup> See Paragraphs 53-58 *Alassini* judgement.

<sup>260</sup> Paras. 41-44.

<sup>261</sup> Para. 45.

<sup>262</sup> Para. 63.

<sup>263</sup> Paras. 64-65.

<sup>264</sup> Article 11.

<sup>265</sup> Paras. 33 and 39.

<sup>266</sup> Para. 45.

develop the argument further, so it cannot be ascertained whether it refers only to the procedures at stake or also to the substance of the provisions contained in the Universal Service Directive.

Last, but not least, it is important to emphasize the role of the objectives in the general interest. The court considers that the establishment of a mandatory out-of-court attempt at settlement like the one at issue entails a “lightening of the burden on the court system, and they thus pursue legitimate objectives in the general interest”.<sup>267</sup> This can be read as that the court equating the lessening of the court load to an objective of *legitimately* restricting a fundamental right, such as the right to effective judicial protection. Accordingly, this interpretation goes beyond the mere nature of the procedure itself and questions whether its design could be considered effective for the resolution of consumer-related disputes, but also the collateral effects that it encompasses for the judicial system. By so doing, the CJEU is backing the preemption of collective interests over individual ones as a preferable solution in the access to justice debate.

The established setting reveals an undertone that therefore needs consideration: the institutional design of the out-of-court dispute settlement mechanisms. The national institutional design of the mandatory attempt at conciliation procedure under a sort of “national ADR network” in which the Co.Re.Com (regional level) and even the main operators participate, allowing an effective procedure that enables a (somehow) *satisfactory* consumer redress.

Therefore, by way of the ruling given in *Alassini*, the CJEU is contributing to this movement towards out-of-court dispute settlement based on the grounds of effectiveness and efficiency. This matter is relevant for the self-sufficiency hypothesis because through the movement towards administrative enforcement, the enforcement of the EU rules comes to fall within the EU shadow as long as it becomes part of the enforcement network. This could also be considered a manifestation of an emerging “judicial activism”<sup>268</sup> coming from the CJEU, because this ruling has implied a tipping point in the case law concerning access to justice which aims to fill the remaining gaps in EU law in relation to its implementation within the national private legal orders.

#### *The EU push for ADR - The return of private law?*

One year after the *Alassini* ruling came to light, the European Commission launched a proposal for a Directive on Consumer ADR and a Regulation on Consumer ODR. These proposals were adopted in 2013.<sup>269</sup>

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<sup>267</sup> Para. 64.

<sup>268</sup> Expression used by Micklitz, H.-W. (2009), “The Visible Hand of European Regulatory Private Law--The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation”, *Yearbook of European Law*, 28(1) 3-59, at p. 19. On this account, see Renzulli, A. (2008) “Services of General Economic Interest: The Post-Altmark Scenario”. *European public law*, 14(3) 339-432, and Kelemen, R.D.(2011), *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Harvard University Press.

<sup>269</sup> Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ EU 2013, L 165/65; and Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ EU 2013, L 165/1.

While it is true that the establishment of a European network of ADR for multi-sectoral consumer disputes has little to do with the nature of the issue at stake, i.e. the mandatory nature of the procedure put in place as a condition for accessing “judicial justice”, the judgment given in *Alassini* has meant an step towards potential objections that may arise in the context of the implementation of the provisions contained in the ADR Directive concerning the procedures to be set up by the Member States under the national procedural autonomy principle. Hence, the establishment of mandatory ADR schemes might be appealing for those Member States that are seeking to lessen the load of their national judicial systems. The fact that the Directive establishes that the set up of the schemes must comply with certain requirements<sup>270</sup> opens the possibility to the emergence of private providers of consumer redress.

Against this background, ADR can emerge as a new layer for the enforcement of consumer rights. However, this shift from judicial to (non-statutorily) extrajudicial settlement, together with the possibility to establish mandatory out-of-court schemes as a pre-condition for access to the court, might mean a delegation to private parties to solve disputes themselves. Under this (private) scheme, the scrutiny of the principle of legality when it comes to the enforcement of consumer becomes a difficult task if we take the view that ADR does not seek a “strict application of the law”.<sup>271</sup> The application of the principle of legality would be a requirement only for those ADR schemes designed so that they impose a solution on the consumer.<sup>272</sup> Accordingly, those cases where the parties find a consensual resolution of the dispute would be functioning in a *quasi-legal limbo* where the application of whatever rules concerned might effectively yield a different outcome than which would be reached if the case had reached the court.

Be that as it may, one cannot envisage or assess at this moment whether the implementation of the ADR Directive will have an actual positive impact or not, but it can be considered as a very important step towards the facilitation of consumer redress as long as it does not preclude the possibility of going to court to get judicial redress. Further, a proper institutional setting would benefit “all kinds of consumers” including those who unfortunately cannot afford access to justice (e.g. those consumers that cannot afford judicial fees). Of course, it might be neither the fairest nor the most optimal of the models, but at least consumers can “still” find some sort of redress. In the end, we cannot equate ADR procedures to judicial proceedings before courts. This means that we cannot demand from ADR procedures the same level playing field that we expect from judicial courts in terms of fairness. This situation might be the result of the low-cost mindset; i.e. if one has to pay less, not only in terms of money but also in terms of time, to get a – more or less– satisfactory (and effective) solution, what he or she gets in return can be labeled as *low-cost justice*.

Accordingly, we should know where to draw the line in main aim of ADR: does it pursue the regulation and prevention of certain commercial practices or does it only seek the achievement

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<sup>270</sup> Directive on Consumer ADR, Chapter II, Articles 5-12.

<sup>271</sup> Wagner, G. (2014), “Private law enforcement through ADR: Wonder drug or snake oil?”, *Common Market Law Review*, 51(1), 165-194.

<sup>272</sup> Article 11 Directive on Consumer ADR.

of justice between two private parties? In the telecoms sector, we have seen how companies try to achieve compromised individual solutions via in-house customer care (e.g. Deutsche Telekom) until a particular case reaches the court, usually via the consumer association, so then the judge can curtail such practice. Therefore, we cannot conclude whether consumer ADR functions as a deterrent.<sup>273</sup> Nonetheless, the lack of motivation on the part of consumers to go to court for small claims gives leeway for undertakings not to fight against their misleading (unfair commercial practices),<sup>274</sup> although the data record of complaints collected by ADR may serve the purpose of setting precedents.<sup>275</sup> Therefore, the data collected may contribute as a deterrent in the market with regard to certain practices, and when it comes to consumer redress extrajudicial mechanisms imply an intermediary step before reaching the court that do not undermine the protection afforded by the principle of legality, even in those cases where such principle is not applicable. This is due to the fact that the design pattern contained in the ADR Directive and the envisaged procedural principles provide for the possibility for a consumer to go the court and require a “proper” application of the law if he or she is not satisfied with the result achieved by extrajudicial means.

Certainly, all these conclusions can be drawn from the analysis of the telecoms sector, however they might not serve to every sort of product or service offered in the market. The next step would be then to examine whether we could extend such view to products and services offered in different sectors of the market and whether the *EU procedural fairness rationale* that is found behind the market efficiency mindset actually undermines the fundamental procedural guarantees for consumers.<sup>276</sup>

## 5. Conclusions. The transformation of private law enforcement

The previous chapters have focused on the making and substance of European telecommunications, and how this has impacted national private law. This chapter has sought to identify the transformation(s) of private law operations as a result of the enforcement design of EU telecoms rules. The analysis of the European approaches towards enforcement and of the different national adaptations reveals a shift from judicial to administrative (and soft) enforcement and extrajudicial means for the resolution of contract-related disputes. Accordingly, it can be argued that the transformation of private law also implies that traditional private law adjudication of disputes is moving away from courts to extra-judicial enforcement, giving a significant role to Alternative Dispute Resolution and even administrative enforcement. But can it also be argued that ADR is

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<sup>273</sup> Wagner develops an (economic) analysis of this view in Wagner *supra* n 271.

<sup>274</sup> Kaplow, (1986) “Private versus social costs in bringing suit”, *Journal of Legal Studies*, 15, pp. 371–385. See also Shavell, S. (1981), “The social versus the private incentive to bring suit in a costly legal system”, *NBER Working Paper* No. 741.

<sup>275</sup> Can we talk about “ombudsprudence”? In this regard, see Langbroek, P. M., and Rijpkema, P. (2006), “Demands of proper administrative conduct; a research project into the ombudsprudence of the Dutch National Ombudsman”, *Utrecht Law Review*, II(2), 81-98.

<sup>276</sup> The policy pursued in other sectors seems to follow the same path as telecommunications. Thus, the EU rules concerning postal, financial, transport and energy services also promote the enforcement of their substantive law via ADR. For a deeper analysis on Consumer ADR in the different sectors and countries see Hodges et al. *supra* n 84.

private law enforcement alone? As a matter of fact, settlement in the wholesale market may be considered as a regulatory measure. So, again, the procedures involved entail a combined approach of public and private means. In addition to this, the normative grounds for such approach respond to the imperative of efficiency and the effectiveness rationales of the functioning of the market in that industry.

The movement towards ADR and regulatory adjudication respond to the European requirements for national enforcement given that enforcement by civil judges on grounds of national contract law would give rise to divergent solutions. So, by allocating sectorial dispute resolution, the system guarantees the uniform application and achievement of the sector-specific goals for electronic communications. Accordingly, it can be argued that the sector-specific legislation relies and draws at the same time on sectorial schemes for dispute resolution in order to achieve a consistent enforcement of EU regulatory framework for telecommunications via dispute resolution. By doing so, the EU is bypassing the enforcement deficit that stems from the national procedural autonomy principle.

The enforcement of the rights and obligations contained in the Regulatory Framework for Electronic Communications can emerge from a wide range of institutions. Yet, we can observe that these multiple institutions are at odds with each other. As demonstrated, the substantial outcomes under the sector-specific design (i.e. dispute resolution via the NRA) can be radically different than those achieved through traditional civil courts. It might also happen that the results obtained via the judiciary are eventually influenced by the understanding and rationales of alternative institutional designs. This spillover effect is –to a certain degree– certainly influencing the way in which contractual rights are enforced, and particularly the outcomes achieved, within regulated sectors such as telecommunications.

Given the detailed nature of regulation, its expertise level, technical considerations, the existence of sector-related schemes, etc. it is expected that NRAs are entitled to intervene in the resolution of disputes (particularly in the wholesale market) at the expense of the application of contract law principles, like good faith,<sup>277</sup> i.e. at the expense of *private law justice*. Furthermore, this regulatory intervention impacts on the role of contract law and autonomy at the time of resolving a dispute when parties have been forced to settle the dispute, be it by state or non-state bodies. It is about settlement as a way not to resolve the dispute via a settlement, but as a way to avoid litigation.

Extending Cappelletti's view on the civil procedure<sup>278</sup> to the telecoms sector, the design of the enforcement machinery determines the outcome of the settlement and constraints the behavior of the parties involved in the dispute in an attempt to implement (or rather integrate) the public policies at stake (mainly the policy aims contained in Article 8 of the Framework Directive). The

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<sup>277</sup> Gijrath *supra* n 14, citing Ottow at the District Court Rotterdam, January 31, 2003, Mediaforum 2003- 4, p. 139 (KPN/OPTA).

<sup>278</sup> Cappelletti, M. and Garth, B. (1987), Chapter 1: Introduction – Policies, Trends and Ideas in Civil Procedure, in: *International Encyclopedia of Comparative Law*, vol. XVI: Civil Procedure, edited by Mauro Cappelletti.



allocation of adjudication powers to actors beyond the courts (NRAs as state bodies or delegated institutions) represents an institutional choice aimed at safeguarding the effective enforcement of the EU regulatory goals for telecommunications. The extent to which private law and private autonomy still plays a role depends very much on the internal procedures designed for dispute resolution and the leeway left to parties within this process. From this perspective, negotiation solutions even assisted negotiations and modes of third party mediation that are not very intrusive—represent the return of private law given that private parties can reach private solutions without interfering with the achievement of the regulatory goals. At the opposite end of the spectrum we can see mechanisms of adjudication, in particular those performed by state actors (NRAs), insofar as the rules governing the procedure are intrinsically public as are the principles that guide their decisions and, where appropriate, there is public regulation of the procedure of judicial review. Whether the intervention of courts is aimed at protecting individual rights or, on the contrary, at safeguarding public (regulatory) policies will have to be proven on a case-by-case basis. The examples from the UK shows that even if private law and freedom of contract are at the core of the dispute, regulatory principles play a prominent role in the interpretation of the autonomy and the rights of the parties to freely govern their relationships via the contract. There are higher objectives beyond private autonomy that overshadow the role of the contract giving rise to the dispute, which becomes subordinated to the achievement of public policy aims.

Accordingly, it can be concluded that the EU is setting up a detailed system for the enforcement of EU rules via requirements on national procedural schemes outside the judiciary. This is giving rise to different layers of enforcement outside of the judiciary that are aimed at bridging the EU enforcement gap in private law.



## PART III – CONCLUSIONS

### Chapter 6 – TOWARDS THE SELF-SUFFICIENCY OF EUROPEAN REGULATORY PRIVATE LAW? AN EVIDENCE FROM TELECOMMUNICATIONS REGULATION

#### 1. Introduction

If “the European Union is odd”,<sup>1</sup> and EU Private Law is something different,<sup>2</sup> what are we talking about?

Taking into consideration that European Private law largely deviates from the traditional notion of private and contract law, and that the new regulatory structures governing the provision of Services of General Economic Interest are built according to novel legal patterns, and that legal values are –one way or another– imbuing the main sectors of the economy, one might want to wonder: Is (traditional) contract law *dead* in Europe?<sup>3</sup>

This dissertation has sought to provide answers to those questions by analysing the transformations of private law as a consequence of the (potential) self-sufficiency according to which sector-related regimes operate. Because self-sufficiency operates *from cradle to grave*, this research has traced the impact of telecommunications regulation in private relationships by scrutinizing telecoms regulation from its making to its enforcement, in an attempt to contribute to an overall project for the *reshuffle* of European Private Law: European Regulatory Private Law.

All things considered, this thesis proposes a model of private law to be found within telecommunications regulation, which yields and relies on different patterns to those belonging to the conventional private law contained in the private law codifications. In order to test the hypotheses, the structure of the thesis corresponds to the aims of the argument to systematize private law under the assumption of a transformation largely led by the self-sufficiency of telecommunications regulation. Chapter 1 and 2 set the scene for such an argument. Whilst Chapter 1 sketches the content of the thesis, and introduces the postulates, its aims and the reasons to validate the assumptions, Chapter 2 provides the theoretical framework upon which the main hypotheses are based. This works as an introductory and theoretical contribution. It presents the self-sufficiency idea, its drivers and the consequences for the conventional and normative

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<sup>1</sup> Davies, G. (2014), “Legislative control of the European Court of Justice”, *Common Market Law Review*, 51(6), pp. 1579–1607.

<sup>2</sup> Micklitz, H. W. and Patterson, D. (2012), “From the Nation State to the Market: The Evolution of EU Private Law”. *EUI Working Papers*, LAW 2012/15.

<sup>3</sup> Gilmore, G. (1974), *The death of contract*, Ohio State University Press.

understanding of the traditional functions of private law. It also identifies the different transformations of private law and their impact not only in the legal world, but also for the role and function of the State itself. The transformation is manifested in three different layers –making, substance and enforcement– whose main features are also displayed in Chapter 2. To conclude, the chapter asks whether, under those assumptions, one can conclude the validation of self-sufficiency as evidence of intrusion and substitution of European Regulatory Private Law contained in regulated sectors. This introductory and theoretical framework serves as the foundations for the core part of the dissertation, which has been featured in Part II.

The substantive part of the research (Chapters 3, 4 and 5) has been undertaken under a single methodology for the three chapters. These chapters have provided a descriptive account of the regulatory and institutional structures put in place when it comes to the regulation, functioning and application of the telecommunications regulatory framework. To simplify the analysis, and taking into account that this dissertation looks at the transformations operated in the regulation of business-to-business operations (B2B) and business-to-consumers (B2C) interactions, most parts of the thesis contain a differentiated treatment according to whether they concern wholesale or retail markets. The *functioning* is, in practice, reconstructed via empirical research and case-studies. Accordingly, whereas the descriptive parts analyse *black-letter law*, the substantial chapters have examined the main problems encountered in the real practice of telecommunications. These issues are usually reflected in the examination of the presented case-studies that concern relevant and timely issues for discussion.

Chapter 3 explored (law)making in telecommunications regulation. As regards private law, it portrays how the shift in the regulatory powers has entailed a transformation not only in the way private law is created, but also implemented and enforced by way of tracing the actors and procedures involved in law-making. This chapter thereby discloses the implications of new governance and experimentalist governance in the process of private law rule-making via sector-specific regulation.

In Chapter 4 this dissertation has treated the substantive provisions of telecommunications regulation that affect the interaction of private parties at both levels, wholesale and retail. By drawing on the different parameters introduced in the regulatory framework for telecoms with particular relevance for private law concerns, this chapter touches upon the different approaches of the legislator in the configuration of the substantive core of telecommunications regulation.

If Chapter 4 contains the regulatory solutions to sector-related problems, Chapter 5 describes the framework provided for the resolution of disputes arising from those problems. Given that there seems to be a contrast between the objectives of the regulatory framework and those corresponding to the traditional functions of private law, this chapter evidences the establishment of a parallel system of enforcement –via *sector-specific* extrajudicial means of dispute resolution– of the private law provisions contained in telecommunications regulation. To this end, given that institutional design is important in the enforcement of telecommunications regulation, Chapter 5

incorporates the mapping and performance of the competent actors who interfere in the procedure for the resolution of the dispute, be it the regulator or the judiciary by judicial review of regulatory decisions. The empirical evidence reveals a differentiated treatment of core principles of private law, such as freedom of contract, depending on who performs the role of adjudicator. Beyond this institutional structure, the shift towards more administrative and extrajudicial (administrative) structures and enforcement reflect a transformation in the pattern of the traditional enforcement of private law.

A detailed analysis of the conclusions of each of the chapters is the subject of the present chapter. As the title implies, this dissertation has sought to advance the argument that the sector-specific rules concerning private relationships in telecommunications operate in a *self-sufficient* manner. The conclusions of the thesis (Chapter 6) summarize the findings of the previous chapters and conclude with an answer to the research questions that motivates the dissertation: to what extent has EU telecommunications regulation impacted on private relationships and, if it has, does it give rise to a process of transformation of private law by yielding a self-sufficient understanding that does not require (traditionally) national structures for its operation?

## **2. *Self-sufficiency* as the epitome of a top-down Transformation (and Europeanization) of Private Law**

Much has been already said about self-sufficiency in this dissertation. Yet, before concluding whether the self-sufficiency hypothesis is substantiated or invalidated, it is necessary to examine the transformations on the different layers in order to assess the accuracy of its postulates. Particularly, it condenses the findings that provide an answer to the question as to what forces are transforming private law and to what extent.

### **2.1. The transformation via telecommunications regulation in “the making” of private law**

The liberalization of the sector has entailed a shift from national regulation to supranational law-making of former public utilities. In the European Union, once liberalization occurred, the regulation of Services of General Economic Interest (SGEIs) has been conducted mainly under the Internal Market competence (Article 114 TFEU, former Article 95 EC Treaty). Further, it has been accomplished according to a sector-related approach, which has given rise to the emergence of different vertical sectors. Because the EU took the lead in the liberalization process, the harmonization of these services within the Internal Market is the guiding light in the legislative development of telecoms regulation.

The strategic importance of the regulated networked industries, its complexity and technicality, explain the State-internal redistribution of power. Thus, the oversight functions lead to the delegation (outsourcing) of functions from the Congress to specialized agencies and to the private sector. A (decentralized) delegated implementation system is explained by the lack of

information and expertise on the part of legislatures, which gives rise to a “perplexingly diffuse administrative state”.<sup>4</sup> In telecommunications –as in the energy sector– the Internal Market project and the level of technical complexity of the sector has implied the establishment of National Regulatory Authorities (NRAs) to oversee the regulatory process at national level. Accordingly, NRAs were established as a way of securing liberalization via institutional design. This is the trend followed in Europe with the emergence of different generations of sector-specific regulation once the liberalization of the market has been attained. Competition law has not yet taken over entirely but also (sector-specific) regulatory goals are shifting from liberalization to broader goals like the achievement of a Digital Single Market for Europe.

Additional supervisory mechanisms at the EU level were put in place. This time, not with the aim of overseeing the liberalization process, but with the aim of achieving what turned out to be one of the overarching aims of the regulatory framework: the development of the Internal Market. To this end, the sector has developed towards the establishment of a network for cooperation in regulatory affairs. This network operates at both the national and the European level. The supranational dimension operates via networks of regulators. This network has reached its most advanced stage so far with the establishment of the Body of European Regulators for Electronic Communications (BEREC) in 2009. The BEREC is the outcome of the path dependency of a set of practices that was followed in the previous years, which first emerged as an informal cooperation (the birth of the Independent Regulators Groups) and that later was institutionalized under a formal organization fostered by the European Commission (European Regulators Group). While it is true that the BEREC was originally meant to be a European agency and that its current structure is the result of political fragmentation, the reality is that the BEREC, as a forum of regulators, together with other supervisory mechanisms (Article 7 Framework Directive) represents a high level of regulatory convergence bypassing complex political commitments such as those associated with the establishment of a European Agency and the complex task of endowing it with competences.<sup>5</sup> Furthermore, the empirical research conducted in the preparation of this chapter has demonstrated this claim, even though the governance strategy followed in telecoms depends on the idea of cooperation. In the interplay between the EU and its Member States via the national regulators, there is a kind of *shallow interdependence* insofar as the EU is actually the leading voice in this cooperative relationship, usually with Internal Market purposes.

The Internal Market-building project has been reinforced by the establishment of procedures to ensure the proper and consistent application of the Regulatory Framework at the national level: Article 7 and 7a of the Framework Directive procedures. The decision to establish a decentralized structure to monitor the proper implementation of the EU rules via NRAs responds to flexibility and efficiency motivations. In fact, national specialized agencies are potentially more efficient and flexible as opposed to the European Commission. In general, these authorities possess the necessary expertise and knowledge concerning local particularities. These distinctive features

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<sup>4</sup> As Somek has put it. Somek, A. (2014), *The Cosmopolitan Constitution*, Oxford University Press.

<sup>5</sup> By way of example, the conferring of powers to the European Securities and Markets Authority (ESMA), which gave rise to the Judgment of the Court (Grand Chamber) of 22 January 2014 (ESMA case), also C-217/04, ENISA.

enable NRAs to better respond to intricate and incipient problems.<sup>6</sup> Under Article 7 and 7a procedures, NRAs are required to notify the Commission of the adoption of regulatory measures or the imposition of regulatory remedies when they concern the development of the Internal Market. The analysis of a real case on the effects of a conflict between the national regulatory decision and a Commission's Recommendation reveals the pervasive nature and the practical implications of the mandate contained in Article 7a of the Framework Directive. In addition to this governance conflict, this case also evidences a jurisdictional (and hierarchical) conflict between the regulator and the national judiciary. In particular, the main conflict is between the regulator applying EU (soft)law *vis-à-vis* the national judiciary applying national law, which will be ultimately decided by the Court of Justice of the European Union (CJEU). Should the CJEU rule in favor of the legal impossibility to deviate from the Commission's Recommendation, it would be a landmark in the role and effect of EU soft-law. Yet, such interpretation would also reinforce the assumptions exhibited above based on the grounds of empirical research.

An additional major finding arising from the preliminary findings of this research is that, at least in telecoms, there is no clear distinction between decision-making, implementation and enforcement of its provisions. In particular, this is the result of the designed system for the implementation telecommunications rules, where the transposition of the EU rules in the national system gets blurred with enforcement. This is particularly true when it comes to the supervisory powers of the Commission and the role of NRAs as decision-makers, which must try to give shape not only to the implementation of the measures adopted at EU level, but also to their *consistent application*.

To conclude, these transformations in the governance of telecommunications, largely as result of the sector-related approach and linked to the technical complexity of the sector, have implied the emergence of new methods and actors in the regulatory process of private law. The legal basis and its implications for private law as for pricing regulation *vis-à-vis* the subsidiarity principle have been discussed in the analysis of the *Vodafone* case. Thus, from the research conducted we conclude that, from a private law perspective, in the telecoms sectors the traditional law-making process for private law has been displaced. We are far removed from the traditional approach where the legislator was the main –and only– actor in the legislative process.

The power shift from the legislator to the sector-specific authority and, most importantly, from the national level to the supranational EU level has not taken place via explicit legal delegation, rather it has occurred via *heterarchical* forms of accountability and legitimation as a result of the emergence of global administrative law as Ladeur has theorized it would/does.<sup>7</sup> Yet,

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<sup>6</sup> Interview with NRA expert. In the same vein, concerning competition law, see Svetiev, Y. (2010), 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?' in Sabel, C. F., & Zeitlin, J. (Eds.), *Experimentalist governance in the European Union: towards a new architecture*. Oxford University Press; and Svetiev, Y. (2015), 'Scaling experimentalism: from convergence to informed divergence in transnational competition policy', in Zeitlin, J. (ed.), *Extending Experimentalist Governance?: The European Union and Transnational Regulation*, 169.

<sup>7</sup> Ladeur, K.-H.(2010), "The Emergence of Global Administrative Law and the Evolution of General Administrative Law".

evidence suggests that the actual implications are comparable to those resulting from a genuine principal-actor delegation.

## **2.2. The substantial shift: from traditional to sector-specific and functionally oriented contract law**

In telecommunications regulation, private law seems to be used for economic regulation under a public interest rationale (universal access and end-to-end connectivity). In Chapter 4, we have seen that, as a result of the dual approach pursued by the legislator, the regulation of telecommunication services has influenced contracts in two ways. On the one hand, the Internal Market approach has developed contractual elements oriented to the empowerment of the consumer. On the other hand, the Universal Service approach has strived for the protection of the most vulnerable consumers (economically and geographically vulnerable). Under this process, the pertinent question is how many transformations have private law experienced? While in contract law mandatory rules should be the exception, in the telecommunications sector it appears they have become the rule.

Given that there is a disparity between the objectives of the Regulatory Framework and those of traditional private law, the private law provisions concerning telecoms regulation unveil, at least, three different transformations:

1. A shift in the regulatory paradigm: from the contract law rules contained in national civil codes or common law to sector-related regimes governing private relationships.
2. A move from freedom of contract to regulated autonomy: from autonomy to mandated (B2B) and universal (B2C) access as a result of a market-building project.
3. The transformation from civil law compensation to sector-related penalties.

The Internal Market has been the driving force behind European private law and contracts have become an instrument of higher policy (and regulatory) objectives. Contract law becomes competitive contract law.<sup>8</sup>

As for the contractual relationships between operators, the different aims and goals of the EU Regulatory Framework for telecoms are embodied in the way these contractual relationships have been configured. Thus, even though these relationships take their form from private contract, they are interpreted according to public law considerations (contracts as regulatory tools). Because the sector-specific rationalities create tensions between the public and the private domain (public *vis-à-vis* private principles), the lines between public and private law are blurred. Consequently, when addressing telecoms substantial provisions, both approaches should be seen “as a whole”, or new regulatory devices (hybrid nature), which escape the traditional public/private dichotomy.

As for consumer protection, the dual approach (autonomy/social) in telecoms is relevant because it epitomizes the movement towards the *self-sufficiency of European Regulatory Private*

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<sup>8</sup> Competitive contract law implies that “the contract law rules are shape so as to allow effective competition between suppliers in the Internal Market” Micklitz, H.-W., (2005) “The Concept of Competitive Contract Law”, *Penn State International Law Review*, 23(3) 549-586; see p. 555.



Law.<sup>9</sup> On the one hand, the Internal Market approach yields new elements for private law. A clear example is the right to switch of provider. On the other hand, the Universal Service approach is far removed from traditional private law, where the freedom of contract is the ultimate rationale. Quite to the contrary, the Universal Service approach strives for the maintenance of a provider of last resort by imposing *obligations to contract* as a safety net for vulnerable consumers. There is room for social policy elements within the European Private Law, in contrast to the private law contained in the 19<sup>th</sup> Century Codes. Accordingly, in regulated markets, contract law provisions are isolated from consumer law and although they further certain redistributive goals, contract law provisions in regulated markets are a *lex specialis*.

One may inquire as to the permanent nature of sector-specific regulation. Whether sector-specific regulation is aimed at enduring or rather simply a constitutive regulatory approach can be observed in the character of its provisions. Thus, whereas the *competition law approach* –number portability, information, etc. – may eventually exclude the need for sector-specific regulation in favor of competition law or, in the field of private law, a broader contract law (e.g. Unfair Contract Terms and general consumer law); interconnection, access and price regulation in telecommunications indicate more embedded forms of special regulation.<sup>10</sup>

Further, while the “private law regime” contained within telecommunications regulation does not provide for European remedies, it is true that the introduction of the possibility to switch for free would serve as a basis for (intrusion) new remedies *in the light of* the European regulatory goals of sector-specific regulation replacing (substitution) national civil remedies; e.g. switching operators at zero cost as a sector-related remedy. Evidence towards this movement can be perceived from the latest Draft Regulation on telecommunications that proposed the possibility of enabling sector-specific regulators to impose compensation remedies in line with the Mifid II Directive.<sup>11</sup>

The self-sufficiency idea is based on, thus, the assumption that the provisions concerning consumer contract in this vertical sectors also diverge from traditional private law insofar as measures such as obligation to contract to preserve access conditions are not found anywhere within traditional private law, which is contained within the different national private legal regimes and because General contract law seems to be insufficient to fulfill the regulatory role of contracts in the telecoms sector. Indeed, private and civil law regimes remain applicable to telecommunications contracts even by traditional judicial schemes of enforcement. Yet, different approaches yield different outcomes, because they are built according to different rationales. It is also evident that new (specialized) bodies have emerged for the enforcement of the sector-related provisions, especially for the resolution of B2B and B2C disputes arising in connection to the provision of telecommunications services.

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<sup>9</sup> Micklitz, H.-W. and Svetiev, Y. (eds.) (2012), “A Self-Sufficient European Private Law - A Viable Concept?”, EUI Working Papers Law No. 2012/31.

<sup>10</sup> Möschel, W. (2009). The Future Regulatory Framework for Telecommunications: General Competition Law instead of Sector-Specific Regulation—A German Perspective. *European Business Organization Law Review*, 10(1)149-163.

<sup>11</sup> Draft Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent - COM(2013) 627, Article 30(8).

### 2.3. Enforcement via telecoms-related dispute resolution

This thesis has demonstrated a shift from judicial to administrative (and soft) enforcement and extrajudicial means for dispute resolution. The vast amount of telecoms-related disputes are resolved via extrajudicial mechanisms, be it via regulatory adjudication or via procedures of Alternative Dispute Resolution (ADR) in both market levels, wholesale (B2B disputes) and retail (B2C disputes). As exposed in Chapter 5, and partially due to the principle of national procedural autonomy, there is a wide array of available mechanisms for dispute resolution.

Apart from regulatory adjudication, regulators are also engaged in providing other non-adjudicative methods for dispute settlement. Thus, telecommunication regulators provide a wide range of instruments aimed at facilitating the extrajudicial settlement of disputes. These instruments vary from the simple provision of the regulator's premises to a more elaborated scheme where the regulator adjudicates disputes or simply fosters –as we have seen in some instances, even compulsorily– the meeting of the parties to find a satisfactory solution. To this end, NRAs enjoy significant freedom to design these schemes ranging from the use of horizontal public/private rules, to the design of specific rules and codes of practice containing the specific procedural rules and even standardized remedies and compensations. In any case, what is clear from the analysis is that either within a process of regulatory adjudication or as part of the judicial review of regulatory decisions, in resolving B2B disputes, Article 8 of the Framework Directive and the regulatory goals contained therein override the terms of the private contract between the parties.

The promotion of ADR for consumer-related problems might well function as a *parallel system of adjudication*, although thus far it seems to be used as one of the many others political strategies to advance the Internal Market-building processes.<sup>12</sup> It will remain to be seen, therefore, if it really enhances consumer confidence (and protection) in the market.

On the other hand, much debates has occurred as to whether the increasing availability of ADR mechanisms has really implied an important step in terms of *access to justice* for consumers. At the retail market level, the design of an effective system of enforcement represent an important challenge for striking a balance in the project of achieving a broader (and better) access to justice for consumers while, at the same time, reducing the workload of civil courts. Whereas the marginalization of judicial decisions entails a *relaxation* of the rule of law (where is the law? and the return of private law (section 4.2 of Chapter 5), this is not incompatible with the possibility to reach "satisfactory" solutions. This situation raises the question as to what extent access to justice can still be read as "(...) the most basic requirement – the most basic 'human right' – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all."<sup>13</sup> or whether the concept of justice needs to be re-shaped, at least in the field of utilities, or even replaced by a new understanding more in line with standards of expeditious, and satisfactory solutions provided via a set of mechanisms that provide neutral, easy (but also alternative) and

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<sup>12</sup> ADR as one of the levers to boost and strengthen the Internal Market, See COM (2011) 206 final, p. 9-10.

<sup>13</sup> Cappelletti, M. and Garth, B. (1987), Chapter 1: Introduction – Policies, Trends and Ideas in Civil Procedure, in: *International Encyclopedia of Comparative Law*, vol. XVI: Civil Procedure, edited by Mauro Cappelletti.

more efficient solutions as opposed to judicial adjudication only in those cases in which a third party adjudicates the dispute, but not where the parties reach a solution by themselves.

*Justice* in the field in telecoms, and not only with regard to the (alternative) understanding of justice by the EU (the concept of justice in the ADR Directive) for consumer matters may implying justice is no longer considered a public good but rather a *satisfactory solution*. If establishing a system of civil justice to deal with small claims is expensive: are we trading-off intrinsic values of justice for new values. Is the fairness (the principle of fairness) found in contract law sacrificed to the neo-liberal policies that were predominant in the UK during the Thatcher era?<sup>14</sup> Does this entailing the beginning of "another story"?<sup>15</sup> Can ADR means for dispute resolution be seen as alternative to the problem of the lack of resources of the judiciary to solve its deficiencies? The answer seems to be no.<sup>16</sup> Extrajudicial mechanism for dispute settlement should not be the alternative but the complement to judicial responses.<sup>17</sup> I conclude that it is not a bad thing, as it were, but is desirable, that is, to have alternative –yet not exclusionary– mechanisms available for the resolution of disputes involving small sums of money. Consequently, a cheap (low cost) mechanism for dispute resolution means cheap (low cost) justice. In fact, the reality is that in the end the majority of the population is not aware of the rights that assist them as consumers. It has been demonstrated that the decisive factor in the assessment of the satisfactory nature of alternative methods of law enforcement is their perceive fairness, over the costs involved, potential delays and even the result of the case.<sup>18</sup> In addition, individual are more enthusiastic about settling the dispute without entering into an adversarial legal procedure.<sup>19</sup> In any case, the establishment of monitoring measures can enhance the advantages of ADR and quality requirements aimed at minimizing the divergences in the perceived fairness of the procedure. To that end, the ADR Directive goes in the direction of standardizing (Europeanize) the procedural requirements. Yet, what is problematic is that the Member States are required to establish a networked structure of ADR mechanisms that require, to be sure, an investment (public cost) that has to be undertaken to solve sector-related problems.<sup>20</sup>

As regards class actions as the alternative to the shortcomings of associated with ADR, in the EU there are not many known cases in which affected consumers have taken part of a class action to solve recurrent issues. Rather, when they have taken place (usually with regard to issues unrelated to the sector, but involving problems of interpretation of more horizontal rules, *Invitel* and *RWE*), the solutions reached involve a negotiated solution between the parties, the undertaking and the consumer organization, dismissing and setting aside judiciary intervention in the end

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<sup>14</sup> See Mattei, U. (2007), "Access to Justice. A Renewed Global Issue", *Electronic Journal of Comparative Law*, 11.

<sup>15</sup> Caponi, R. (2015), "Just Settlement" or Just About Settlement? Mediated Agreements: A comparative Overview of the Basics", *Rabels zeitschrift für ausländisches und internationales privatrecht*, 79(1), 117-141.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Lind, E., MacCoun, R. J., Ebener, P. A., Felstiner, W. L., Hensler, D. R., Resnik, J., & Tyler, T. (1989). *The Perception of Justice*. RAND Institute for civil justice.

<sup>19</sup> Macaulay, S. (1963, "Non-contractual relations in business: A preliminary study", *American sociological review*, 28, pp. 55-67, at 61.

<sup>20</sup> These are already long-standing problems. See, for instance, Zander, M. (1997), 'Access to Justice – Towards the 21st Century', in Rawlings, R. (ed.), *Law, Society and Economy*, Clarendon Press.

(*Invitel*). Be that as it may, issues reaching the court do not, usually, concern the enforcement of sector-specific rules. Judicial redress remains as a safety valve for problems related imbalances of power between the parties entailing a breach of the framework of consumer protection beyond its basic standards according to the normal provision of the service.

Nor do substantive law provisions seem to be sufficient to put an end to the issue of increasing litigation in the field of utilities. It is disputed whether the setting up of a system of sector-related disputes by providing extrajudicial schemes for disputes resolution is wholly self-sufficient because the functioning of those mechanisms requires the embrace of judicial intervention in the enforcement of the solutions reached via out-of-court means (New York convention) or within a process of judicial review. Yet, given the nature of most of the disputes at stake (mainly small claims) this justifies the use of out-of-court procedures.

Be that as it may, the examination of the use of ADR for telecommunications-related problems could serve as an illustration of a process of *de-judicialization*<sup>21</sup>, insofar as the enforcement of the EU law is moving towards *softer* solutions coming from public bodies apart from courts. In fact, the vast amount of cases is no longer found in court. Accordingly, the new mechanisms of soft-enforcement and self-enforcement has fostered a shift in traditional litigation strategies and forums.

### 3. The limits and variations of Self-Sufficiency

The self-sufficiency hypothesis expands throughout substance and procedures. This dissertation has shown that self-sufficiency is a phenomenon that seems to follow similar patterns in the different Member States. As a matter of fact, the telecommunications-related problems experienced in one national market can be replicated in a broadly similar way in a different Member State.

#### Platforms of self-sufficiency: European and local self-sufficiency

Self-sufficiency in the interaction of European Regulatory Private Law operates in different platforms.<sup>22</sup> One platform is represented by the relation EU *vis-à-vis* the Members States. A second platform of self-sufficiency makes reference to the relationship as between vertical orders, whereas the other is more related to sector-specific regulation as opposed to more general branches of law, such as contract law or consumer law when it comes to private law interactions.

As to the first level, the EU has developed a mechanism of *self-enforcement* by tightening the leeway of National Regulatory Authorities by setting regulatory constraints on the national procedural autonomy principle –by way of narrow mandates–<sup>23</sup> together with the establishment of

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<sup>21</sup> Micklitz, H.-W. (2009), “The Visible Hand of European Regulatory Private Law--The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation”, *Yearbook of European Law*, 28(1) 3-59.

<sup>22</sup> Svetiev discusses the *dimensions* of self-sufficiency (Svetiev, Y. (2013), "Dimensions of Self-sufficiency", EUI Working Papers Law No. 2013/05 (ECR-ERPL 05)). I would rather describe them as *platforms*, as they can interact with each other in the different stages of a single process.

<sup>23</sup> Ibid.

sector-related supervisory mechanisms aimed at achieving the consistent application of the EU regulatory framework for the Internal Market. As a matter of fact, the institutionalization of the implementation mechanism of Article 7 of the Framework Directive epitomizes the formalization of these *self-enforcement techniques* under new modes of regulatory governance.<sup>24</sup>

The second platform is that one upon which self-sufficiency finds its *raison d'être*. It is the rationale of self-sufficiency. The individual purposes or functions to be achieved via sector-specific legislation have favoured a sectorial approach that endows each regulated market with sector-related contract rules (silo effect).<sup>25</sup> Be that as it may, the emergence of the telecoms *silo* is not an alternative to publicly (statutorily) provided law, per Bernstein's example.<sup>26</sup> Rather, the dynamics of the market itself have led to the creation of a sector-related understanding of an industry functioning under its own *rationale*.<sup>27</sup>

As set out in Chapter 2, by adopting Teubner's postulates as to legal autopoiesis,<sup>28</sup> this thesis has sought to verify the occurrence of the following features in order to validate the self-sufficiency hypothesis: i) closure of the system; ii) enforcement closes the gap from the perspective of market players; iii) from the perspective of rule and decision-makers, it would have to be the evidence by the existence of (self-referential) sector-specific supervisory mechanisms. From this point of view, Articles 7 and 8 of the Framework Directive stand as the key provisions that underpin these assumptions. On the one hand, by putting in place a sector-specific system for the monitoring of the implementation of regulatory obligations at national level, Article 7 bridges the gap between the European and national levels when it comes to implementing EU rules. On the other hand, Article 8 *tops off* the system by providing the guiding principles according to which the private law provisions contained in sector-specific regulation are interpreted, to the extent of constraining private autonomy and overriding contractual terms between private parties in order to achieve other interests, namely the regulatory goals enshrined in Article 8. In sum, an important finding of the thesis is that while Article 7 closes the gap *institutionally and procedurally*, Article 8 reinforces, *substantively*, the closure of the system.

#### 4. Normative Analysis: A (un)desirable transformation of Private Law?

The holistic approach upon which this thesis is based calls for an evaluation of its normative assumptions. Self-sufficiency, as it has been portrayed throughout the dissertation, implicitly denotes the coherence of a legal order. Under such approach, it would entail that the legal order has to produce coherent decisions in the application of the EU rules concerning private law in the

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<sup>24</sup> See Chapter 3.

<sup>25</sup> Svetiev *supra* n 22.

<sup>26</sup> Bernstein, L. (2001), "Private commercial law in the cotton industry: Creating cooperation through rules, norms, and institutions". *U Chicago Law & Economics, Olin Working Paper*, (133).

<sup>27</sup> Teubner, G., and Fischer-Lescano, A. (2004), "Regime-collisions: the vain search for legal unity in the fragmentation of global law", *Michigan Journal of International Law*, 25(4), 999-1046.

<sup>28</sup> Translating Teubner's autopoiesis, Teubner, G. (1993). *Law as an autopoietic system*, Blackwell Publishers.

provision of telecommunications services. In order to identify such legal coherence, it needs to occur in three different dimensions:

- Substantive (norms and legal principles)
- Institutional (Institutions, actors, interactions)
- Argumentative (Justification, Reasoning)

The first two have been already subject to scrutiny in the preceding chapters. Therefore, it remains to explore the argumentative foundations of the proposed normative model. Such argumentation calls for 1) an empirical formulation –what are the consequences/effects of the law; 2) a philosophical enquiry –what is law, when is it valid and how it develops; and 3) a normative justification –what is the final aspiration of such formulation (e.g. legal certainty).

Private law is not the main focus of the EU Regulatory framework for telecommunications. Private law is just a “side effect” of the Digital Single Market construction project. Here, private law is not only aimed at protecting the weakest parties or at establishing a system of remedies under a traditional private law understanding. Rather, private law here is used as haphazard element that happens to be present at the core of free movement inasmuch as, in the end, free movement is about enabling pan-European contractual transactions. In so doing, the EU does not place private autonomy at the core of the contractual dimension. It has been replaced by a transformed *framed autonomy* that only allows the pursuit of different degrees of efficiency (economic efficiency), since it empowers private parties to operate efficiently in the market and under assumptions of market access. Thus, we cannot talk about private autonomy in the traditional sense. In this new setting, private autonomy has been taken away from the parties in order to fulfil the objectives of the sector.

My view is that the driver of the transformation of private law in the telecoms sector is the Internal Market project, understood as that telecommunications regulation has to serve to the purposes of the fundamental freedoms.<sup>29</sup> The EU has “extended private autonomy across national borders”.<sup>30</sup> The paradox here is that while the EU has employed Internal Market harmonization to justify (legal basis) the regulation, a single market for telecoms has not been achieved to date.

Against this background(s), the desirability of the transformation of private law should be (optimistically) assessed in the way Tuori looks at the hybrids forms of transnational law. We have to break our mental boxes and open our minds to new categories boosted by the emergence of new social realities that the law have to accommodate and where traditional classifications are intermingled giving rise to new scenarios, chaotic for our understanding but somehow consistent. The traditional conception of (*idealistic*) legal unity is not valid anymore. As society has evolved, the law has changed too, and with it, its structures. Hence, the existence of new paradigms has

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<sup>29</sup> In line with Ladeur (in ‘The State in International Law’), Globalization has triggered the entire transformation process.

<sup>30</sup> Müller-Graff, P. C. (2001). ‘Basic freedoms—Extending party autonomy across borders’ in S. Grundmann, W. Kerber and S. Weatherill, (eds.), *Party Autonomy and the Role of Information in the Internal Market*, Walter de Gruyter, 133-156.

generated certain mismatch within our mental maps as lawyers, which must be re-configured, re-designed, in order to accommodate them to the novel landscape.<sup>31</sup>

## 5. Conclusions: Towards *self-sufficiency*?

Apart from the transformations operated in the *substance* of contract law, as a result of the experimental governance evidenced in the regulation of telecommunications services, three institutional and procedural transformations have also taken place:<sup>32</sup>i) a substantial policy change (the goals of the regulatory framework has shifted from liberalization to the harmonization of the Internal Market); ii) a procedural shift (the European Commission enjoys greater powers as a result of the consultation mechanisms); and iii) a process of mutual learning among the Member States (the “network approach” encourages harmonized solutions).

These shifts trigger a tension between private and public law. In particular, this is due to the fact that the “strategic comprehensive decision-making”<sup>33</sup> results in NRAs expected to understand, although not necessarily to apply, the impact of private law principles to disputes arising from interconnection agreements, for instance. Yet, in the event of a civil court adjudicating such dispute, it has to take into consideration not only private law, but public and policy options, beside highly technical economic issues. And –needless to say– the regulatory principles enshrined in the EU regulatory framework for telecommunications are considerably different to those guiding contract law; e.g. good faith and reasonableness.<sup>34</sup>

Notwithstanding these observations, and as a result of the findings yielded as a consequence of the research conducted, we should keep a dual understanding of self-sufficiency.

### A dual interpretation of self-sufficiency

At this stage, it is necessary to conclude that the present research has delivered two different interpretations. On the one hand, a superficial *descriptive analysis* would have concluded that there is no evidence of self-sufficiency as long as the functioning of the private law rules contained in the sectorial regimes requires its articulation within the (national) legal system. This assumption leads to a misguided conception of the actual functioning of the sector. Yet, on the other hand, the examination of the sector by way of *empirical analysis* seems to revert such assumption, to the extent that it can be concluded that self-sufficiency is a reality. This thesis has provided evidence of self-sufficiency in the functioning of the telecommunications sector.

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<sup>31</sup> The quotation that summarizes the message of the paper is that of Luhmann that Touri quotes through Teubner’s and Fischer-Lescano’s: “The sin of differentiation cannot be undone. Paradise is lost”, Tuori, K. (2014), “On legal hybrids and Perspectivism” in n Maduro, M., Tuori, K. and Sunkari, S. (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, at p. 36.

<sup>32</sup> Drawing on Zeitlin, J. (2011), ‘Is the Open Method of Coordination an Alternative to the Community Method?’, in R. Dehousse, *The Community Method: Obstinate or Obsolete?*, Palgrave Macmillan.

<sup>33</sup> Ladeur, K.-H. (2010), “The Emergence of Global Administrative Law and the Evolution of General Administrative Law”.

<sup>34</sup> Gijrath, S. (2006), *Interconnection Regulation and Contract Law*, dLex, at p. 5.

Self-sufficiency seems to be empirically supported. Hirhteto, even though self-sufficiency is taking place in some areas, it is still not fully operative in others. In fact, the institutional and procedural design of telecommunications regulation favours the existence of a set of rules particularly relevant for private actors. Yet, in the normal functioning of the sector the main problems are also related to more horizontal regimes of a cross-sectorial nature, which means that even though the private law rules embedded in the sector operate more or less independently –i.e. not requiring other rules or the involvement of national actors to a great extent– ERPL cannot (yet) be considered entirely self-sufficient. Thus far, self-sufficiency is not entirely intruding and substituting national private legal orders. However, this does not mean that we can deny *prima facie*, as it were, that we are moving towards the self-sufficiency of European Regulatory Private Law. Hence, should the self-sufficiency hypothesis be observed in other regulated sectors (energy and financial services),<sup>35</sup> we might conclude that private law is experiencing a process of transformation via the operating self-sufficiency upon which these legal regimes are based.

For all these reasons I argue that, when it comes to private law, by the introduction of provisions concerning contract law, sector-specific rules *replace*<sup>36</sup> general provisions of contract law and consumer protection, yielding a new outlook for contracts between undertakings and a particular status for telecoms users. Thus, the particularities of the whole market for electronic communications and the separate status of its players seem to imply a transformation in the national and European private law by a highly defined sector whose process –I claim– is hardly reversible.

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<sup>35</sup> Micklitz, H.-W. and Svetiev, Y. and Comparato, G. (eds.), European Regulatory Private Law – The Paradigms Tested, European Regulatory Private Law Project (ERC-ERPL - 07); *EUI Working Paper Series* LAW No. 2014/04.

<sup>36</sup> Please note that in the previous version the manuscript read as “taking over”.







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Regione Toscana  
**corecom**  
comitato regionale  
per le comunicazioni

A

**REGIONE TOSCANA**  
**COMITATO REGIONALE PER LE COMUNICAZIONI**

**CONTENZIOSO:**

***Giuseppe XXXX / Wind Telecomunicazioni S.p.A.***

**VERBALE GU14 n° .../13/REGIONE TOSCANA**

**Verbale udienza del 08/04/2014**

Il giorno 08/04/2014 presso la sede del CoReCom della Toscana si è tenuta l'udienza ai sensi degli artt. 14 e ss. dell'Allegato A della Delibera 173/07/CONS, nell'ambito del contenzioso di cui sopra, alla presenza del funzionario del CoReCom delegato all'istruttoria, Dott.ssa Elisabetta Gonnelli.

Per la parte istante è presente il Sig. Giuseppe XXXX.

Per Wind Telecomunicazioni S.p.A. è presente la Dott.ssa Rita XXXXXXXX, giusta delega in atti.

La Dott.ssa Elisabetta Gonnelli alle ore 12.00 dichiara aperta l'udienza prendendo atto dell'esito negativo dell'avvenuto tentativo di conciliazione, come da verbale allegato all'istanza e chiede alle parti se esista un procedimento giudiziale vertente sul medesimo oggetto del presente procedimento. Le parti confermano che non esistono procedimenti giudiziali in corso in ordine ai fatti di cui è causa.

La parte istante, come rappresentata, si riporta integralmente all'istanza introduttiva del presente procedimento.

Wind Telecomunicazioni S.p.A., come rappresentata, si riporta integralmente alla memoria difensiva depositata in atti e, tuttavia, in ottica di componimento bonario della controversia, in questa sede propone la corresponsione della somma onnicomprensiva di euro 825,00 mediante bonifico bancario da eseguirsi sulle coordinate IBAN dell'istante n. XXXXXXXXXXXX.

La parte istante, come rappresentata, accetta l'offerta come oggi proposta da Wind Telecomunicazioni S.p.A., come rappresentato.

Le parti danno atto di quanto sopra dichiarandosi integralmente soddisfatte e di non avere niente altro a che pretendere in qualsiasi sede, anche giudiziale, per le questioni di cui all'odierna istanza.

L'Ufficio del CoReCom, ai sensi dell'art. 16 comma 6 dell'allegato A della Delibera 173/07/CONS, prende atto dell'accordo transattivo intercorso tra le parti nei termini sopra descritti e dichiara chiuso il contenzioso.

L'istanza in oggetto viene pertanto contestualmente archiviata.

L'udienza si conclude alle ore 12.20.

Il presente verbale, redatto in n. 3 originali, costituisce titolo esecutivo ai sensi dell'articolo 2, comma 24, lettera b), della legge n. 481 del 1995.

Letto, confermato e sottoscritto

Sig. Giuseppe XXXXX

Per Wind Telecomunicazioni S.p.A.

Dott.ssa Rita XXXXXXXX

La sottoscritta Elisabetta Gonnelli dichiara che le firme delle parti sono state apposte alla sua presenza.

per il CoReCom

Il responsabile del procedimento

Dott.ssa Elisabetta Gonnelli





