

# 1

## THE REGULATION OF ELECTRONIC COMMUNICATIONS IN THE EUROPEAN UNION

---

|  |       |  |       |
|--|-------|--|-------|
| <b>A. What Are Electronic Communications?</b>  | 1.01  | (6) The elimination of other regulatory restrictions   | 1.185 |
| <b>B. Historical Perspective</b>   | 1.09  | (7) Compatibility with general competition law and European law in general   | 1.189 |
| (1) Monopoly in national telecommunications  | 1.10  | <b>F. Basic Regulatory Principles</b>  | 1.194 |
| (2) Liberalisation by the Commission   | 1.11  | (1) Introduction   | 1.194 |
| (3) The debate between harmonisation and liberalisation  | 1.21  | (2) Constraints relating to objectives assigned to NRAs  | 1.201 |
| (4) The new regulatory framework   | 1.29  | (3) Constraints relating to instruments that may be used by NRAs   | 1.217 |
| (5) Subsequent amendments, including 2009 Revision   | 1.31  | (4) Constraints relating to the entities and the system concerned  | 1.234 |
| (6) Convergence in electronic communications   | 1.37  | <b>G. Issues Relating to Ownership and Public Control</b>  | 1.248 |
| <b>C. General Presentation of Applicable Instruments</b>   | 1.54  | (1) Public ownership   | 1.248 |
| (1) Sector-specific regulation   | 1.54  | (2) Limitation on the shares held by foreign investors   | 1.257 |
| (2) Liberalisation directives  | 1.70  | (3) Prohibition on foreigners acquiring more than a given threshold in the capital of a national undertaking               | 1.260 |
| (3) General competition law  | 1.71  | (4) Obligation to obtain an authorisation from a public authority prior to purchasing shares                               | 1.262 |
| (4) Concurrent application of rules  | 1.76  | (5) Ability of a public authority to control <i>ex post facto</i> the acquisition of shares by foreigners and/or nationals | 1.270 |
| <b>D. Institutions Involved in the Adoption and Application of Rules Regarding Electronic Communications</b> | 1.104 | (6) Special powers reserved to public authorities in the management of electronic communications operators                 | 1.274 |
| (1) European bodies with general responsibilities  | 1.105 | (7) Criteria for practitioners   | 1.282 |
| (2) European bodies specific to electronic communications  | 1.109 | <b>H. Main WTO Rules on Telecommunications</b>   | 1.286 |
| (3) National regulatory authorities—nature and composition   | 1.114 | (1) The WTO architecture   | 1.286 |
| (4) NRAs—procedural constraints  | 1.145 | (2) Specific provisions on telecommunications  | 1.290 |
| (5) NRAs—business confidentiality  | 1.151 | (3) Definition given to telecommunications networks and services   | 1.296 |
| <b>E. The Prohibition of Special and Exclusive Rights</b>  | 1.154 |  |       |
| (1) A key feature of the reform  | 1.154 |  |       |
| (2) Applicable instruments   | 1.156 |  |       |
| (3) Historical perspective   | 1.160 |  |       |
| (4) The prohibition of exclusive rights  | 1.162 |  |       |
| (5) The elimination of special rights  | 1.180 |  |       |

---

## A. What Are Electronic Communications?

**1.01 Electronic communications.** This book analyses the rules applicable to electronic communications networks and services in the European Union. A preliminary issue is to determine what electronic communications are. The concept of electronic communications is not explicitly defined in the Regulatory Framework (RF). A definition may, however, be extracted from definitions given to other concepts in the same framework. The concepts of electronic communications ‘networks’ and ‘services’ provide interesting indications in relation to three elements forming the core of electronic communications as envisaged in the RF (activity, electronic form, what is being transmitted). These are analysed in the following paragraphs.

*Electronic communications network.* ‘[T]ransmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.’<sup>1</sup>

*Electronic communications service.* ‘[S]ervices provided for remuneration which consist wholly or mainly in the transmission and routing of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks and services.’<sup>2</sup>

**1.02 Activities concerned.** Using these two definitions, electronic communications may be regarded as being closely connected with activities consisting in conveying, transmitting, or routing. A clear link exists between communication and transportation. ‘Something’ is taken from one place and transmitted to another one.

**1.03 A communication with an electronic form.** A second element is that, to be covered by the framework, the communication must take the form of an electronic activity. It may be distinguished in this regard from other types of transmission having a more ‘physical’ nature. As regards electronic communications, objects are not transmitted in their original form. They are translated, or transformed, into ‘signals’. These signals are then conveyed through networks. When they reach their destination, they are transformed back into their original form.

**1.04 Irrespective of technology or network.** The technology used for the transmission of communications is not relevant, as long as the communication has an electronic form. All forms of technology allowing this kind of transmission are considered: wire, radio, optical fibre. All sorts of networks are included, to the extent that they convey electronic communications: satellite networks, fixed and mobile terrestrial network, electricity cable systems, networks used for radio and television broadcasting, and cable television networks.

---

<sup>1</sup> Framework Directive, Art 2(a).

<sup>2</sup> Ibid, Art 2(c).

**Signals.** The definitions above do not provide much information about what is transmitted in an electronic communication. They refer rather vaguely to ‘signals’. Generally, three types of signal may be distinguished in this context. **1.05**

*(a) Sounds.* Historically, telecommunications began with the transmission of Morse code through copper wires (telegraphy). The technique was thereafter refined to allow voice transmission. The use of this new possibility remained limited, however. Transmissions were limited in the first place to short distances. Amplifiers were installed to regenerate weakening sounds. They successively made it possible to convey voice messages over increasingly long distances. With these devices, communications were eventually made possible from one part of the globe to any other. **1.06**

*(b) Images.* Another traditional example is broadcasting. The transmission of images is considered a form of electronic communications under the RF. No distinction is made, in this regard, between the communication of sounds and images. **1.07**

*(c) Data.* A third category is the transmission of data via electronic means. Data consists of pieces of information stored on a computer and sent electronically to others. Originally, data mainly encompassed texts and graphics. Progressively, however, sounds and images came to be expressed in computer language (digitalisation). As a result, they can also be stored on computers. In the light of these developments, the expression ‘data’ now usually includes any piece of information in digital form, whatever its nature (visual, audio, text, etc). In this sense, ‘data’ has now become a synonym for ‘piece of information’. **1.08**

## B. Historical Perspective

**Several steps.** The present section contains a brief overview of the developments which have taken place in the European Union in the last 20 years. It is not possible, or advisable, to be exhaustive in such an overview. The purpose is not to provide a full account of the numerous episodes that have taken place, but rather to give a schematic review of how and why the current situation has been reached. In this book this evolutionary process is presented as encompassing four steps. *(a)* The starting point was the situation that existed in the Member States before the reform was undertaken. *(b)* The process starts with initiatives taken by the Commission to open the sector to competition. *(c)* The Member States acting in the Council reacted with harmonisation measures, thereby giving rise to a second—in some respects concurrent—set of rules applicable to telecommunications. *(d)* The rules were then reviewed and a new—intentionally more consistent and coherent—regulatory framework was laid out. **1.09**

### (1) Monopoly in national telecommunications

**National operators.** For decades, the telecommunications services (and terminals) markets were characterised by national monopolies in Europe. Member States had entrusted one undertaking—often a department within their administrations—with the task of installing and operating a network on the national territory. That undertaking was also charged with providing services over the infrastructure. The services were in many instances limited to voice telephony. The monopoly undertaking had an exclusive right to sell terminal equipment. It was also vested with the right to establish the technical requirements to be satisfied for connection to the network and more generally to determine what rules applied in the sector. **1.10**

(2) Liberalisation by the Commission

- 1.11 Initiative by the Commission.** The situation described above (national monopolies) was not deemed satisfactory by the European Commission.<sup>3</sup> It is often said that this line was motivated by a comparison with the state of affairs in the United States. American customers seemed to have access to better communications at lower prices. American companies appeared to have a technological advantage to which Europe would not be able to respond without immediate action.<sup>4</sup> Regulatory moves were being undertaken in the United States to encourage further development in the communications sector in that country. It was feared that Europe would be left behind if no similar moves were made on this side of the Atlantic.
- 1.12 The 1987 Green Paper.** On this basis the Commission published a Green Paper<sup>5</sup> in which it outlined measures to be taken in order to support and develop electronic communications (then, telecommunications) in Europe. Among other measures, the Paper suggested the introduction of competition in telecommunications markets (liberalisation).
- 1.13 Two liberalisation directives.** This proposal did not, to say the least, raise enthusiasm among most of the Member States. It was indeed perceived as a threat to the system that had governed electronic communications for decades on national territories. As stated above, these activities had been the exclusive preserve of one undertaking in virtually every Member State. The European Commission was proposing to set that system aside. Under its proposal, all interested undertakings would be allowed to enter the market. Member States voiced their opposition, but the Commission went ahead. It adopted several directives in succession, which enshrined in law the liberalisation process envisaged in the Green Paper. Pursuant to these directives, competition was introduced successively on the markets for terminals,<sup>6</sup> services,<sup>7</sup> and infrastructure.<sup>8</sup> As a result of these instruments, the Member States were compelled to remove all privileges (special and exclusive rights) previously granted to national operators.
- 1.14 Article 106(1) TFEU.** As a legal basis for these instruments, the Commission used a Treaty provision that had hardly been examined earlier—Article 106 TFEU. The first paragraph of that Article provides that Member States must respect Treaty provisions as regards undertakings with which they have close relationships. These may be in the form of a share in the capital of these entities. They may also derive from regulatory advantages granted to these undertakings in order to facilitate their activities (special or exclusive rights). Pursuant to Article 106(1) TFEU, Member States may not take in respect of these undertakings any

<sup>3</sup> European Commission, 'Towards a dynamic European economy', Green Paper on the development of the common market for telecommunications services and equipment, Brussels, COM(87) 290 final (30.6.1987).

<sup>4</sup> Innovation in communications is essential for sustaining economic growth. First, communications are an important sector in the wider economy. Growth in that sector has a substantial impact on general economic activity. Second, innovation in communications has an impact on other activities depending on information and data exchange.

<sup>5</sup> 'Towards a dynamic European economy', Green Paper on the development of the common market for telecommunications services and equipment, Brussels, COM(87) 290 final (30.6.1987).

<sup>6</sup> Commission Directive (EEC) 88/301 of 16 May 1988 on competition in the markets in telecommunications terminal equipment [1988] OJ L 131/73 ('Terminal Equipment Liberalisation Directive').

<sup>7</sup> Commission Directive (EEC) 90/388 on competition in the markets for telecommunications services [1990] OJ L 192/10 ('Liberalisation Services Directive').

<sup>8</sup> Commission Directive (EC) 96/19 amending Directive 90/388 with regard to the implementation of full competition in telecommunications markets [1996] OJ L 74/13.

measure contrary to the Treaty. All rules contained in the Treaty are concerned, but those relating to competition are explicitly mentioned.

*Article 106(1) TFEU.* ‘In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 18<sup>9</sup> and Articles 101 to 109.’<sup>10</sup>

**Article 106(2) TFEU.** The second paragraph of Article 106 TFEU concerns undertakings entrusted by the Member States with the operation of services of general economic interest. According to that provision, these undertakings may be granted an exemption with respect to the rules of the TFEU, including those on competition. In cases where an exemption is granted, the undertakings concerned escape the application of the Treaty rules. An exemption may be granted only where a legitimate objective is pursued. It applies only insofar as it is useful and necessary to allow these undertakings to perform the particular tasks assigned to them, in connection with an objective of general interest. **1.15**

*Article 106(2) TFEU.* ‘Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.’

**Link between paragraphs 1 and 2.** A link may be established between the first and second paragraphs of Article 106 TFEU. As was the case for undertakings with an exclusive right, monopolies fall under the competition rules (first paragraph). That situation does not appear, however, to conform entirely<sup>11</sup> to the requirements of competition. Competition requires the presence of several undertakings, all competing to obtain resources from potential partners. To justify that apparent contradiction, Member States refer to the second paragraph of Article 106 TFEU. They say that exclusive rights are necessary to fulfil objectives of a public nature. According to the Member States, the monopoly holder must be protected against rivals. In the absence of such protection, the monopoly holder would not be in a position to achieve the public objectives set for it. Objectives of that nature could not be reached in a competitive environment.<sup>12</sup> An exemption is thus warranted, along the lines laid down in Article 106(2) TFEU. **1.16**

<sup>9</sup> This provision contains a prohibition on discrimination based on nationality.

<sup>10</sup> These provisions set out the European rules on competition.

<sup>11</sup> The European Court of Justice (ECJ) has repeatedly insisted that, as such, exclusive rights should not be considered contrary to competition rules. However, it has ruled that the exercise of these right may be abusive in violation of Art 102 TFEU (formerly Art 82 EC, abuse of dominant position). See eg Case 175/73 *Sacchi* [1974] ECR 409. It subsequently considered that the exercise of exclusive rights necessarily leads to abuses. According to the ECJ, the mere exercise of an exclusive right leads undertakings to abuse their dominant position. See eg Case C-179/90 *Merci* [1991] ECR I-5889. The ECJ has accordingly expressed its agreement with the general economic literature, pursuant to which an undertaking tends to increase prices and decrease output where it is in a monopolistic situation.

<sup>12</sup> The typical example is natural monopolies. Over a period of decades the Member States justified exclusive rights granted to their telecoms operators by stating that these rights merely expressed in the law a structure imposed by markets. In their view it was less costly for society to finance one infrastructure and concentrate demand on it. The alternative—allowing competitors to install their own network—would lead to redundancy, losses, and bankruptcy. Granting exclusive rights further allowed national authorities an opportunity to impose public policy objectives on undertakings holding monopolies. Eg, these undertakings were required in various Member States to wire the whole national territory irrespective of the cost. Profit or even financial balance were considered less important than establishing a national infrastructure.

**1.17 Article 106(3) TFEU.** In addition to regulating monopolies and the general interest, Article 106 TFEU contains an institutional measure (paragraph 3). Pursuant thereto, the Commission has the power to adopt directives or decisions as deemed necessary to implement the other provisions contained in the Article. The Commission is thereby granted the power to ensure the application of Treaty provisions to undertakings with special or exclusive rights (paragraph 1).<sup>13</sup> It is also assigned the power to verify that exemptions are conferred in accordance with the conditions laid down in the Treaty (paragraph 2).

*Article 106(3) TFEU.* ‘The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.’

**1.18 New organisation for the sector.** On the basis of Article 106 TFEU, the Commission claimed a legal mandate to organise the European telecoms markets on a competitive basis. Article 106(1) TFEU, it said, implies that competition be introduced on telecoms markets. Competition rules apply, according to that provision, to all sectors of the economy, even those where States have special links with undertakings. How should competition be introduced? For the Commission, a competitive environment implies that markets should be opened to new entrants. Exclusive rights had to be eliminated as they impeded entry.

**1.19 Derogations.** After the elimination of these privileges, it appeared that derogations could be granted on the basis of Article 106(2) TFEU. These derogations would result in the undertakings concerned being placed outside the reach of competition. Such a possibility would create risks for the project envisaged by the Commission. Competition would not be introduced if national operators could successfully claim the benefit of exemptions. To avoid such a result, the Commission construed strictly the conditions under which derogations can be granted. (a) As to scope, derogations must be limited to specific services. These services must qualify as a service of general economic interest. Qualification is granted by national legislation, but the criteria are laid down at European level (universal service obligations). (b) Derogations are to be made available to all undertakings without discrimination. No undertaking can be granted an automatic derogation in the name of the general interest. A procedure must be organised to determine who will provide the services covered by the derogation (universal service, where the result cannot be reached via market forces). It must be open to all interested undertakings. The selection must be based on merit.

**1.20 Intervention by the ECJ.** The initiative taken by the Commission was not accepted by all Member States. An application for annulment of the liberalisation directives was submitted to the ECJ. The Court issued two judgments, one for each directive. In both decisions it confirmed the Commission’s power to act.<sup>14</sup> The position adopted by the ECJ substantially modified the *rapport de forces* between the Commission and the Member States. The ECJ in fact ruled that a legislative power was vested in the Commission to apply Treaty provisions to public monopolies. According to the ECJ, Article 106 TFEU entrusts the Commission with the power to specify by way of general instruments the consequences deriving from the Treaty for the organisation of economic activities carried out by those undertakings.

<sup>13</sup> As well as to public undertakings.

<sup>14</sup> Cases C-202/88 *France v Commission* [1991] ECR I-1223 and C-271/90 *Spain v Commission* [1992] ECR I-5833. Through these judgments, the Commission was authorised to take action in relation to the telecoms sector. Other liberalisation directives were adopted in their wake, supplementing and, in some regards, going beyond the ideas submitted in the Green Paper. Competition was extended to infrastructure whereas that step had not been envisaged earlier.

The judgments thus confirmed the Commission in its willingness to act as a legislative authority to organise services of general economic interest and/or services provided under derogations (special or exclusive rights).<sup>15</sup>

### (3) The debate between harmonisation and liberalisation

**Legislative reaction by the Member States.** As they did not win the judicial debate against the Commission, the Member States decided to adopt measures of their own. Their intention was to regulate markets themselves. They accordingly adopted harmonisation directives by virtue of the power originally granted to the Council by the Treaty. It was thereafter extended to cover also the Parliament, and both institutions now co-decide on most harmonisation matters. **1.21**

**The harmonisation process.** Harmonisation (officially called ‘approximation of laws’) is organised by several Treaty provisions. Among them, Article 114 TFEU provides the standard basis. Pursuant to that provision, approximation may be carried out where national rules affect the establishment and/or the functioning of the internal market. In most cases, the difficulty to be resolved through harmonisation originates from a discrepancy existing between national legislation. As a result of that discrepancy, undertakings must adapt their products to each national market. They are as a result prevented from taking full advantage of the internal market. Article 114 TFEU is meant to resolve that difficulty. It provides the Parliament and the Council with a legal basis to establish a common field where undertakings carry out activities on a similar basis. In the process of approximating the rules, these institutions have the opportunity to decide the rules applicable to undertakings throughout the Union. Harmonisation is thus a process whereby the European legislator regulates entire sectors of the economy. **1.22**

**Telecommunications harmonisation directives.** The Council and Parliament have adopted several telecommunications harmonisation directives. These instruments are presented briefly in the following paragraphs, on the basis of the markets concerned by the directives (terminal equipment, provision of services, Open Network Provision, behaviour of operators, social measures). **1.23**

**Terminal equipment.** Some directives regulate terminal equipment.<sup>16</sup> These rules establish the conditions under which terminal equipment may be marketed. They also set the **1.24**

<sup>15</sup> Before these judgments, some commentators considered that the legislative power was vested with the Council as regards the organisation of the sectors concerned. That attitude was in line with the general position that the Council was (then) the legislator in the European Community (that role is now shared with the European Parliament). Pursuant to the TFEU, the Council is made up of representatives of the Member States. It can thus be said that the Member States exercised legislative power on these matters through their representation in the Council, pursuant to the rules laid down in the Treaties. That competence had general scope, ie it was not limited to any given field. On the contrary, it applied to all activities directly or indirectly covered by the Treaty. That situation was admittedly modified subsequently with the adoption and ratification of the new Treaties. The principal modifications brought about by these Treaties did not, however, affect the institutional balance between the Council and the Commission. Rather, they promoted the position of the Parliament vis-à-vis both institutions: the Parliament was progressively given a greater say in the legislative process.

<sup>16</sup> Latest instrument, still in force: European Parliament and Council Directive (EC) 1999/5 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity [1999] OJ L 091/10. Prior instruments concerning terminal equipment were: Council Directive (EEC) 86/361 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment [1986] OJ L 217/21; Council Directive (EEC) 91/263 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity [1991] OJ L 128/1; Council Directive (EEC) 93/97 supplementing Directive (EEC) 91/263 in respect of satellite earth station equipment [1993] OJ L 290/1; European Parliament and Council Directive (EC) 98/13 relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity [1998] OJ L 74/1.

conditions governing the connection of terminals to infrastructure in the various Member States. The aim underlying these measures is to ensure that manufacturers do not have to adapt their products to specific technical requirements in force in each Member State. Technical standards are thus harmonised throughout the Union. The terminals manufactured in conformity with these standards must be accepted throughout the Union. The directives further harmonise the formalities that can be imposed at national level in order to assess conformity with these technical requirements.

- 1.25 Authorisation.** Similar measures were taken with regard to services. Where an undertaking wanted to provide services in several European countries, it had to comply with the rules applicable in each territory involved. As a result of that constraint, undertakings were not in a position to enjoy fully the benefits of the internal market. To avoid such a situation, a choice was made to determine at European level the obligations that could be imposed on undertakings providing electronic communications services. A rapprochement also took place with respect to the formalities that could be imposed on undertakings before they could start their activities in the different Member States.<sup>17</sup> Following these measures, the rules applicable in the Member States to the provision of services were brought into line. A common field was established where undertakings were subject to similar conditions and could thus compete on an equal basis.
- 1.26 Open Network Provision (ONP).** A third—and wider—set of measures was adopted with a view to opening networks throughout the Community. The goal was to ensure that networks could be interconnected easily across the Member States. Technical harmonisation was decided on for this purpose. The process facilitated transmissions involving several Member States, and measures were added to regulate the behaviour of former national operators vis-à-vis operators and service providers from other European countries.<sup>18</sup>
- 1.27 Behaviour of operators.** In the same context (Open Network Provision), the Council and the Parliament harmonised the conditions subject to which access was to be granted by network operators to service providers. The intervention was important to establish, throughout the European market, common conditions for access to existing facilities. It was not specifically related to network operators or service providers wishing to carry out cross-border activities. Through these measures, the Council and the Parliament simply regulated the behaviour of network operators. They determined, for instance, under what conditions interconnection should be granted. They imposed on operators an obligation to provide

<sup>17</sup> European Parliament and Council Directive (EC) 97/13 on a common framework for general authorisations and individual licences in the field of telecommunications services [1997] OJ L 117/15. Despite these measures, the situation remains that undertakings active on several territories are still subject to formalities in each Member State. The formalities carried out in one Member State accordingly do not provide a valid authorisation for the performance of activities on another national territory.

<sup>18</sup> Council Directive (EC) 90/387 on the establishment of the internal market for telecommunications services through the implementation of open network provision [1990] OJ L 192/1; Council Directive (EC) 92/44 on the application of open network provision to leased lines [1992] OJ L 165/27; European Parliament and Council Directive (EC) 97/33 on interconnection in telecommunications with regard to ensuring universal services and interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L 199/32; European Parliament and Council (EC) Directive 97/51 amending Directives (EC) 90/387 and 92/44 for the purpose of adaptation to a competitive environment in telecommunications [1997] OJ L 295/23; European Parliament and Council Directive (EC) 98/10 on the application of ONP to voice telephony and on universal service for telecommunications in a competitive environment [1998] OJ L 101/24.

some kinds of services or infrastructure. They also established accountancy constraints, so that activities would be easier to supervise.

**Social measures.** The Parliament and Council further adopted measures aimed at protecting certain categories of the population. In the telecoms sector, these social provisions pursued several goals. (a) Some provisions were adopted in consideration of handicapped persons or other groups deserving special protection.<sup>19</sup> Special services were to be made available to them. A possibility was provided for Member States to grant tariff reductions for some categories of the population. (b) Beyond these measures directed at specific groups of the population, a more general system was set up to ensure the provision of fundamental services to the whole population under reasonable and non-discriminatory conditions (universal service). European provisions also determined how the system could be financed, that is, what costs could be taken into account and who could be asked to pay for them. 1.28

**(4) The new regulatory framework**

**Convergence.** A new regulatory framework was adopted in 2002, with a view to achieving several objectives. One was to adapt existing regulation to the changing environment. Technologies and industrial structures were changing quickly. The European legislator wanted to assess whether the existing rules were still appropriate. In this regard, the European institutions paid special attention to convergence. As stated earlier, technologies and industries are growing towards each other in the broadcasting, telecommunications, and information sectors. They wanted to draw regulatory consequences from this phenomenon. 1.29

**Better coordination.** The European legislator also wanted to improve the coordination between the harmonisation and liberalisation directives. These rules were adopted by different authorities: the Council, then the Council and the Parliament, for harmonisation; the Commission, for liberalisation directives. They were based on diverging legal foundations: Article 114 TFEU for harmonisation; Articles 101, 102, and 106 TFEU and the Merger Regulation for competition rules. They pursued different, although not necessarily contradictory, objectives: achieving the internal market in one case; enhancing efficiency in the other. 1.30

|                      | Harmonisation          | Competition  |
|----------------------|------------------------|--|
| Authorities involved | Parliament and Council | Commission   |
| Legal basis          | Article 114 TFEU       | Articles 101, 102, and 106 TFEU; Merger Regulation |
| Objectives           | Mainly internal market | Mainly enhanced efficiency                         |

**(5) Subsequent amendments, including 2009 Revision**

**Current framework.** The new regulatory framework is still in force today. In this book, it is referred to simply as the Regulatory Framework (RF). It has been amended at various times. 1.31

<sup>19</sup> In particular European Parliament and Council Directive (EC) 98/10 on the application of ONP to voice telephony and on universal service for telecommunications in a competitive environment [1998] OJ L 101/24.

The main revision took place in 2009, with the adoption of directives amending all instruments comprising sector-specific regulation.<sup>20</sup> Earlier amendments were also adopted, particularly regarding roaming charges.<sup>21</sup> Through these changes, the following objectives were pursued.

- 1.32 Development of infrastructure.** One objective was to ensure general availability of state-of-the-art infrastructure throughout the Union. From surveys, it appears that, currently, access to a broadband network connection is limited to 70 per cent of the population in rural areas. With the reform, an objective is to overcome this 'digital divide' by better managing radio spectrum and making it effectively available for wireless broadband services in regions where building a new fibre infrastructure is too costly. This objective is also pursued through universal service provisions, by allowing Member States to expand the scope of that service beyond narrowband internet access.<sup>22</sup>
- 1.33 Next generation networks.** Another objective was to support the development of 'next generation networks' (NGNs). Such networks are based on new optical fibre technology, as well as on wireless network technology. They replace traditional copper-wire circuits and allow high-speed internet connections. The development of such networks requires significant capital, which operators are not inclined to make unless they are likely to receive a reasonable return on investment. For the European institutions, it was important to provide these operators with a form of guarantee that they could indeed receive such a return. This was considered the price to pay to ensure the availability of the latest technologies on the European territory. To that effect, some flexibility was introduced in the application of access-related obligations.<sup>23</sup>
- 1.34 Business-to-business relations.** Surveys have demonstrated that problems continue to exist regarding access to infrastructure controlled by operators with significant market power. To resolve these problems, steps were taken in the direction of more separation

<sup>20</sup> In this book, the amending instruments are referred to, respectively, as the First and Second Amending Directives. *First Amending Directive*: European Parliament and Council Directive (EC) 2009/136 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L 337/11. *Second Amending Directive*: European Parliament and Council Directive (EC) 2009/140 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 [2009] OJ L 337/37.

<sup>21</sup> European Parliament and Council Regulation (EC) 717/2007 on roaming on public mobile communications networks within the Community [2007] OJ L 171/32, as amended by European Parliament and Council Regulation (EC) 544/2009 [2009] OJ L 167/12.

<sup>22</sup> As regards spectrum, a focus is placed on technology and service flexibility, making it easier for operators to introduce innovation. More services should also be made available as a result of some radio spectrum being freed with the transition from analogue to digital TV ('digital dividend').

<sup>23</sup> The Commission has also accepted that the installation of next generation networks may be supported by financial measures. The conditions to obtain an authorisation have been set out in the Commission Communication, Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks [2009] OJ C 235/7. Previously, financial measures taken to that end by the French authorities regarding the establishment of such a network in one territorial department were found compatible with TFEU provisions on State aids. Commission Decision C(2009) 7426 final of 30 September 2009 on a plan to grant compensation for public service costs of €59 million for the establishment and operation of a very-high-speed broadband electronic communications network in the department of Hauts-de-Seine (France), <[http://ec.europa.eu/community\\_law/state\\_aids/comp-2008/n331-08.pdf](http://ec.europa.eu/community_law/state_aids/comp-2008/n331-08.pdf)>. Order of the President of the General Court Case T-79/10 R *COLT Telecommunications v Commission* [2010] not yet reported.

between network and service activities in vertically integrated undertakings. As regards competition on service markets, it was decided to facilitate further the ability of users to change from one provider to another, whatever the technology used, through enhanced mechanisms of number portability.

**Business-to-customer relations.** Far-reaching measures were adopted to improve the position of customers, particularly consumers. **1.35**

- Roaming tariffs for mobile communications were lowered.
- Provisions were inserted to ensure better information for customers.
- The protection of users in contracts was improved, together with the protection of personal data.
- Better access was granted to emergency services and more protection was granted to disabled users.

**Institutional provisions.** A last aspect of the reform was to improve the institutional architecture for the better application of the framework. To that effect, the independence of national regulatory authorities (NRAs) was reinforced. A body of European Regulators was also created. The procedures for the adoption of decisions by NRAs were reviewed, particularly those regarding the definition of relevant markets, the identification of firms with significant market power, and the imposition of sector-specific obligations. **1.36**

## (6) Convergence in electronic communications

### *Convergence between fixed and mobile communications*

**Convergence.** To many people, convergence means the relationship between mobile and fixed communications. Telecommunications first developed over fixed lines. Mobile technology was used to provide transmissions in situations where resorting to wires would be impossible, difficult, or costly. The development of these technologies gave rise to a new industry. **1.37**

**Fixed and mobile technology.** Both (mobile and fixed) technologies are increasingly combined to provide services wherever the client is located. Real convergence is unfolding between the two segments, which are growing towards each other to a point where it will be difficult to distinguish them. (a) Thus mobile communications are rarely conveyed from the transmitter to the addressee using only mobile technology. Signals are transmitted by the mobile terminal. They are intercepted by a receiver (antenna) placed in the area. From that point, they are sent to an antenna located in the area where the addressee is located. The transmission between antennas takes place on fixed lines. From the second antenna, the communication is sent to the addressee's terminal via mobile technology. (b) Mobile technology is also employed to facilitate the use of technologies traditionally associated with fixed communications. For instance, people sometimes have at home a hands-free terminal. That device is connected to a fixed base which is connected to a fixed network. (c) Services are now being provided by some undertakings using the model of a combination of fixed and mobile telephony. One number is assigned to the subscriber. The latter may use a fixed or mobile terminal to make and receive communications. Through a simple operation the user indicates to the network whether he wants to be reached via fixed or mobile technology. **1.38**

**Further development of mobile technology.** Convergence can also refer to another development which mobile communications are currently undergoing. Originally mobile **1.39**

technologies were used to provide voice telephony. Other functions were hardly possible, although they were well developed using fixed technology. For instance, e-mails could be sent via a fixed connection but not using mobile technology. Similarly, accessing the world-wide web did not seem possible with available mobile techniques although it was easily done through broadband fixed networks. That situation is likely to change. The development of third generation mobile terminals and networks will make it possible to perform all functions now provided through fixed connections, and the appropriate radio frequencies have been allocated in all Member States. It is, however, difficult to predict when the new generation of mobile services will develop fully, as technologies are complex and the financial situation of the operators has been damaged by the stock market crisis.

*Convergence between broadcasting, telecommunications, and the information technology industry*

**1.40 Digitalisation.** A convergence is also taking place between broadcasting, telecommunications, and information or computer-related activities. These sectors were formerly considered as separate fields. They are now increasingly being brought together. The factor behind that process is mainly of a technological nature. Scientists have made it possible to express as computer data the signals that are transmitted in broadcasting and telecommunications. Broadcasting and telecommunications originally involved 'analogue signals'. In that technique, sounds and images are represented in the form of a wave. By contrast, data stored and processed on computers are represented in 'digital form'. They are divided into units that are represented by a particular sequence of electronic current.

**1.41 Technology, industry, and the law.** Scientific progress has made it possible to use digital techniques to express sounds and images. As a result, it is now possible to transmit these categories of data together. It is also possible to combine them and provide multimedia products/services. This technological development has been followed by moves within the industry. Businesses have realised they can offer new products and services to their customers. They have thus embraced convergence, in the hope of creating new markets. As technology and businesses have changed, regulators have realised they have to react.

**1.42 All transmissions treated alike.** In the RF, all transmissions are treated alike, whatever the segment they belong to. In this approach, the transmission of broadcast services is no longer distinguished from the transmission of telecommunications services. Distinct legal or regulatory regimes are no longer applied to them. The concepts of 'telecommunications' and 'broadcasting' may disappear, as far as the transmission of the related services is concerned. Both categories are designated using a single concept, 'electronic communications'.

*Framework Directive, Preamble, recital 5.* 'The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework.'

**1.43 Absence of convergence regarding content.** In the RF, the Parliament and Council have separated transmission from content. For content, they have not used the approach adopted for transmission. Pursuant to the Framework Directive, content is not subject to the RF. As a result, no rule dealing with the content of transmissions can be found, in principle, in the RF.

*Framework Directive, Preamble, recital 5.* 'It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the

content of services delivered over electronic communications networks using electronic communications services.<sup>24</sup>

**Influence of content on transmission.** A difficulty with this approach is that a distinction is not always easily made between content and transmission. Decisions on one aspect often have consequences for the other. Where, for example, an authority wants to ensure cultural pluralism in content production, it must allocate resources in a way impeding one production from taking precedence over others. In the absence of such a policy, alternatives would be eliminated. Network capacity constitutes one of these resources. If that capacity is limited,<sup>25</sup> the authority must allocate it to allow producers of alternative programmes to reach customers. An objective relating to content (pluralism) thus has consequences on how capacity (transmission) is regulated. **1.44**

**Influence of transmission on content.** Conversely, transmission may affect content. A distinction is generally made between various forms of transmission. (a) In some instances, one message is sent from a central point to a multitude of addressees. That mechanism is generally used in broadcasting, where films or programmes are transmitted to viewers from one channel or producer. (b) In other instances, data—including video—are transmitted from one point to another. That system is used for individual communications. Users normally exchange information on a one-to-one basis. (c) With the development of the internet, the latter technique is increasingly used. It remains the standard for communication among individuals. At the same time, it becomes a useful technique for communications between broadcasters and users. Networks make it possible to adapt supply to individual demand. In that context, broadcasting tends to become a point-to-point communication as well. It sets in train a process whereby a producer provides a viewer with individualised or quasi-individualised<sup>26</sup> content. **1.45**

**One sort of content.** These point-to-point, or point-to-multipoint techniques, and their development, may be influenced by regulation. Suppose that authorities set standards for digital broadcasting via satellite. The establishment of standards allows manufacturers to use the same technology everywhere. Resorting to that technique becomes cheaper. The attention of content-producing undertakings is attracted, as they try to minimise their costs. Given the low price of the technology, these undertakings resort to satellite transmissions. Broadcasting satellites are, however, placed at high altitudes. They do not permit point-to-point communication. By contrast, they make it easy to broadcast data (images, etc) from one point to a multitude of viewers in a given region. These data must, however, be standard in nature. They cannot be transmitted via satellites with a substantial quantity of individual content. **1.46**

**Scenario influenced by regulation.** In this scenario, one sort of data (standard data) and thus of content is encouraged by the adoption of a specific regulation concerning transmission (standards). The imposition of a specific standard, regarding one form of transmission, has an influence on the type of content likely to be produced. **1.47**

<sup>24</sup> For an example of content provided via electronic communications services, see Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] I-1141. In that case, undertakings offered financial services by telephone to potential recipients established in other Member States.

<sup>25</sup> If there is no limitation on capacity, there will be no difficulty; all producers will be able to reach their customers.

<sup>26</sup> eg transmission of video at the time requested by the viewer, change of sequences in a film according to the wishes expressed by the viewer, etc.

*Rules applicable to content*

- 1.48 No common rules for content.** Another difficulty generated by the RF is that, despite convergence, content remains subject to different rules depending on the sector in which the service takes place. Thus, content is not treated in the same fashion in the broadcasting industry and in the telecoms field. On that point, convergence has not taken place.
- 1.49 What rules apply to content?.** If content is not subject to the RF, what rules should then be applied to it? Indications are provided in the Framework Directive. According to the Preamble, the RF does not bring any change to the rules governing content. Content issues must thus be solved outside the RF in already existing, or future, rules. Examples are provided in the Preamble. (a) Information Society services are covered by European Parliament and Council Directive (EC) 2000/31 on certain legal aspects of Information Society services, in particular electronic commerce, in the internal market ('e-Commerce Directive').<sup>27</sup> (b) The content of TV programmes is covered by the Audiovisual Media Services Directive.<sup>28</sup> (c) In the discussion on content, the Preamble to the Framework Directive finally refers to financial services. No specific instrument is, however, mentioned in connection with these services. The rules applicable to electronic communications with financial content may be found in other instruments.<sup>29</sup>
- 1.50 European and national rules.** The examples presented in the previous paragraph refer to European instruments. The Framework Directive makes it clear, however, that national measures may also be applied. The rules applicable to content may thus have a European or a national origin.

*Framework Directive, Preamble, recital 7.* The 'framework is . . . without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law.'

- 1.51 Constraints on Member States.** In that respect, it should be recalled that limits are imposed on legislative activity by the Member States as a result of their membership of the European Union. (a) *Prohibition on hindering European goals.* Wherever they regulate, Member States must refrain from adopting measures which may adversely affect objectives pursued by the European Union (Article 4 EU). They are not allowed to take measures running counter to what is being sought in the RF (eg the development of competition). (b) *Obligation to contribute to European goals.* Pursuant to the same provision (Article 4 EU), Member States must adopt measures that will facilitate the achievement of the Community's tasks. That obligation imposes a positive duty on the Member States. The latter must actively use, in the areas placed under their jurisdiction, the tools allowing them to contribute to the

<sup>27</sup> [2000] OJ L 178/1.

<sup>28</sup> European Parliament and Council Directive (EEC) 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services [1989] OJ L 298/23, as amended by European Parliament and Council Directive (EC) 97/36/EC amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L 202/60 and by European Parliament and Council Directive (EC) 2007/65 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L 392/27.

<sup>29</sup> For a general analysis of the subject, see Report on E-commerce and Financial Services to the Financial Services Policy Group at <[http://europa.eu.int/comm/internal\\_market/en/finances/general/fspg-report.htm](http://europa.eu.int/comm/internal_market/en/finances/general/fspg-report.htm)>.

## C. General Presentation of Applicable Instruments

fulfilment of European objectives.<sup>30</sup> (c) *Harmonisation*. Wherever the European legislator intervenes by way of harmonisation, the freedom of the Member States is limited. Such States may adopt regulation in the area only if, and to the extent, the harmonisation undertaken by the European legislator is not complete. When an area is harmonised, the Member States lose their power to adopt their own objectives and measures.

**Harmonisation.** These remarks concerning harmonisation merit some explanation. Complete harmonisation implies that Member States are prevented from relying on justifications embodied in the Treaty. However, harmonisation is not always complete. An illustration can be taken from the Authorisations Directive. (a) That directive harmonises fully the formal and material conditions that may be attached to entry on the market. On these points, harmonisation can be deemed complete. From the Preamble to that directive, as well as from the provisions contained in that instrument, it appears that the European legislator sought to regulate completely the conditions imposed in connection with market entry. (b) One aspect is not covered, however. The European legislator has not decided that authorisations granted in one Member States are to be recognised in the other European countries. On that point, harmonisation cannot be deemed to be complete. Member States thus keep the power to apply their national legislation in this respect. **1.52**

**Limitations on national power.** The possibility of applying national legislation does not imply that Member States are entirely free to act. For instance, they may not adopt any measure which contradicts the provisions contained in the directives or the objectives that are sought in those instruments (see Article 4 EU.) Furthermore, they are not allowed to adopt measures that may be regarded as barriers to the free provision of services within the Union. These measures may sometimes be justified on the basis of an exception or an essential requirement accepted under European law (these exceptions and requirements are embodied in Articles 51 and 52 EC via Article 62 TFEU, as regards the free provision of services within the Union). That justification is assessed by the Commission, and by the ECJ in cases where judicial proceedings are initiated. Once complete harmonisation takes place, Member States lose their right to invoke a requirement or an exception. They may not add any additional measure to those adopted at European level. **1.53**

## C. General Presentation of Applicable Instruments

### (1) Sector-specific regulation

#### *Organisation of markets*

**Framework directives.** This section introduces briefly the main instruments adopted by the European legislator in the field of electronic communications. The RF consists mainly of directives adopted by the Parliament and Council, each dealing with a specific subject. These directives are presented briefly in the following paragraphs. **1.54**

---

<sup>30</sup> An area where no power has been transferred to the European legislator remains, as far as powers are concerned, with the Member States. The European legislator does not intervene, even on the basis of implicit powers entrusted to it by European primary law. In such an area, Member States will not, however, be able to regulate as they would like. They have to refrain from any behaviour that would jeopardise the attainment of European goals. They will also be obliged to adopt measures likely to contribute to the realisation of such goals.

- 1.55 Principles and institutional organisation.** European Parliament and Council Directive (EC) 2002/21 on a common regulatory framework for electronic communications networks and services ('Framework Directive'),<sup>31</sup> as amended, lays down the principles underlying the RF. It also establishes the institutional organisation making it possible, for European and national authorities, to control markets and ensure the proper functioning of economic activity in this field. Beyond general provisions, the Framework Directive addresses certain specific issues, including the management of radio frequencies; numbering, naming, and addressing; rights of way; and co-location and facility sharing.
- 1.56 Market entry.** European Parliament and Council Directive (EC) 2002/20 on the authorisation of electronic communications networks and services ('Authorisations Directive'),<sup>32</sup> as amended, deals with conditions relating to market entry. Prior to starting their activities, undertakings may be required to carry out certain formalities, in some cases involving the imposition of conditions. In most cases these correspond to obligations imposed by other directives making up the RF.
- 1.57 Access to networks and facilities.** European Parliament and Council Directive (EC) 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities ('Access Directive'),<sup>33</sup> as amended, deals with a major issue faced by undertakings on electronic communications markets. On these markets investments are often considerable in scope. Building and maintaining a network, for instance, requires quantities of capital which may not be available to all undertakings. As a result of these costs, facilities and other resources may need to be shared in the interests of competition and economic efficiency. Service providers, for instance, may need to negotiate access to existing networks, instead of systematically building their own installations. Another example is the situation of operators seeking interconnection to other facilities instead of trying to build out to all locations where end users are located.

*Other policy objectives*

- 1.58 Public service, universal service.** Most issues concerning undertakings are covered by the provisions included in the Framework, Authorisations, and Access Directives mentioned above. Policy objectives are, however, pursued beyond the correct and efficient functioning of the markets. These policy objectives have led the European legislator to introduce, and construct, the concept of 'universal service'. In the RF this concept is organised in European Parliament and Council Directive (EC) 2002/22 on universal service and users' rights relating to electronic communications networks and services ('Universal Service Directive'),<sup>34</sup> as amended.
- 1.59 User protection.** In addition to issues relating to universal service, the Universal Service Directive addresses, and regulates, the relations between users and undertakings. Regulation of these relations was made necessary by the fundamental changes which have occurred in the sector. Electronic communications were in most of the Member States previously provided by an administration acting autonomously. In that context users had few individual rights, as services were provided in the interest of society. That system has been transformed

<sup>31</sup> [2002] OJ L 108/33.

<sup>32</sup> [2002] OJ L 108/21.

<sup>33</sup> [2002] OJ L 108/7.

<sup>34</sup> [2002] OJ L 108/51.

into a model where users are now regarded as customers. In this new context, the relations between undertakings and their customers must be organised by the law.

**Data protection.** The directives mentioned above (Framework, Authorisations, Access, Universal Service) provide a structure for relations between actors on markets. An important aspect of that structure is the protection of users. That protection is contained, in general, in the Universal Service Directive. Special attention has been increasingly granted to the protection of privacy, particularly the protection of personal data. As it is important for user protection, that aspect has been addressed in this book. That protection can be found in European Parliament and Council Directive (EC) 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended.<sup>35</sup> **1.60**

**Internet freedom.** Over the years, the European Parliament and Council have become wary of the use which could be made of electronic communications to cause damage to people or society. For instance, one source of damage is the exercise of illegal activities on the internet, for instance the transmission of illicit content. Another example, regarding public action, would be the technical possibility, opened by electronic communications, for authorities to control users and curb freedoms. Various provisions were included in the regulatory framework, particularly in 2009, to address these issues. **1.61**

**Radio spectrum.** The use of radio spectrum is a significant issue in the context of electronic communications services. At the present time, radio spectrum in all its aspects cannot really be considered as being part of the RF. In this field, the European legislator has only begun to develop a policy and time and effort are needed to achieve results. Currently, the radio spectrum-related instruments adopted at European level have the function of providing a basis for coordination. The European legislator has attempted to organise coordination mechanisms between the Member States, so as to define common approaches to common problems. Action has also been taken to increase awareness of the importance of European approaches in this field. **1.62**

#### *Execution, implementation*

**Recommendation on relevant markets.** Several instruments have been adopted in execution of these four directives. Among them, some provide important explanatory material concerning essential concepts. The first such concept is that of 'market'. This concept is used in general competition law. On the basis of case law, the markets where specific regulatory obligations may be imposed were identified by the Commission in Recommendation 2007/879 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.<sup>36</sup> **1.63**

**Guidelines on market power.** A second concept is market power. As will be submitted, there is a need for clarification as to how this concept is to be interpreted in the context of electronic communications. To that effect, the European Commission has adopted Guidelines **1.64**

<sup>35</sup> [2002] OJ L 201/37.

<sup>36</sup> [2007] OJ L 344/65.

2002/C165/03 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.<sup>37</sup>

- 1.65 List of standards and specifications.** Among the instruments giving effect to the framework, mention must also be made of the List of standards and/or specifications for electronic communications networks, services and associated facilities and services in accordance with Article 17 of the Framework Directive.
- 1.66 Communications, recommendations, notices.** Finally, a set of documents was issued by the Commission to outline its vision of certain issues arising on electronic communications markets. For instance, a recommendation was published to explain what type of information must be supplied by operators and service providers on callers attempting to reach emergency services.<sup>38</sup> Other examples include several recommendations issued on specific aspects relating to access, particularly leased lines. These documents are analysed in the sections addressing the problems they are meant to resolve.<sup>39</sup>
- 1.67 Status of recommendations.** Pursuant to case law, recommendations are not binding. However, they are not deprived of legal effect. According to the Court, they must be taken into account by national courts and authorities. One particular situation is when national legislation is adopted to implement recommendations. National courts and authorities must then verify whether the relevant recommendations have been interpreted correctly in the relevant piece(s) of national law. Another situation is where recommendations are adopted by the Commission with a view to providing guidance on another, binding, European instrument (for instance, a directive or a regulation). In that situation also, national courts and authorities must take recommendations into consideration.<sup>40</sup>
- 1.68 Implementation reports.** Each year, the Commission issues a communication providing information on the implementation, in the Member States, of the measures which have been taken at European level in the electronic communications (formerly telecommunications) sector. These reports contain important information about the situation of electronic communications markets within the European Union, together with an analysis of faults in the transposition or application of EU principles in national law.

*Issues not covered*

- 1.69 Equipment, public procurement.** A key objective pursued by the RF is to favour the development of markets for services. The rules concerning terminals or, more generally, equipment,<sup>41</sup> are therefore not examined here.<sup>42</sup> Another issue not covered in this book is

<sup>37</sup> [2002] OJ C 165/3.

<sup>38</sup> Commission Recommendation (EC) 2003/558 on the processing of caller location information in electronic communications networks for the purpose of location-enhanced emergency call services [2003] OJ L 189/49.

<sup>39</sup> eg Commission Recommendation (EC) 2009/396 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU [2009] OJ L 124/67.

<sup>40</sup> ECJ, Case C-322/88 *Grimaldi* [1989] ECR I-4407. ECJ, Case C-207/01 *Altair Chimica* [2003] ECR I-8875. In the field of electronic communications: ECJ, Cases C-317, 318, 319, and 320/08 *Rosalba Alassini ea* [2010] not yet reported. In the case law, the Court insists that, even in these situations, recommendations have no binding effect. In practice, however, the special consideration to be given to them, particularly where they accompany binding legislation, is such that, in practice, there is an obligation to implement them, even if different terminology is used by the Court.

<sup>41</sup> Terminal equipment provides the interface between the user and the network and the services provided over it, and usually takes the form of handsets, mobile handsets, fax machines, computer terminals, and so on.

<sup>42</sup> Instruments applicable to equipment, particularly terminals, are cited in the Annex on applicable instruments.

public procurement, as it ceased to be relevant in the sector as a result of the elimination of special and exclusive rights, which are generally the condition for these rules to apply.

(2) Liberalisation directives

**Competition Directive.** In the field of electronic communications services, the European Commission has adopted Directive (EC) 2002/77 on competition in the markets for electronic communications networks and services ('Competition Directive').<sup>43</sup> This directive follows a series of instruments of the same nature, whereby the Commission had introduced competition on the markets for telecommunications networks and services. As is submitted in another section, the move started in 1988 and liberalisation directives were adopted until 1996. These directives have been the source for most Member States of the opening of markets to competition and the possibility for new actors to enter the market. **1.70**

(3) General competition law

**Other rules.** Others rules apply to electronic communications, among them competition rules. The latter form a body of law which applies to all sectors of the economy. Exceptions are allowed but they must comply with restrictive conditions. These rules include Article 101 TFEU, which prohibits anti-competitive agreements; Article 102 TFEU, which provides sanctions against abuses committed by dominant undertakings; Article 107 TFEU, regarding State aids; and provisions dealing with merger control. **1.71**

**Notices on application of competition rules.** In addition to liberalisation directives, the Commission has adopted notices to explain how general competition law must be applied to the electronic communications services sector. A first interesting instrument is the Commission Guidelines (EC) on the application of EEC competition rules in the telecommunications sector.<sup>44</sup> These guidelines were adopted early in the liberalisation process, and concern all behaviour likely to be adopted on electronic communications markets and falling under Article 101 and/or Article 102 TFEU. **1.72**

A second instrument is Commission Notice 98/C265/02 on the application of competition rules to access agreements in the telecommunications sector.<sup>45</sup> This notice deals with specific issues relating to access. It has already been submitted in an earlier paragraph that access constitutes a key aspect for the development of activities on electronic communications markets. It is for that reason that a specific directive has now been devoted to the subject by the Parliament and Council (the Access Directive). The Commission in the meantime also sought to clarify some of the problems that undertakings may encounter when they seek access to facilities controlled by others, and the notice examined these problems from the perspective developed in general competition law. **1.73**

**Services of general interest.** Several important instruments adopted by the European Commission deal with services of general interest. Among these are Commission Communication (EC) 96/C281/03<sup>46</sup> and Commission Communication (EC) 2001/C17/04 on Services of general interest in Europe.<sup>47</sup> They are based on Article 106 TFEU, which provides that **1.74**

<sup>43</sup> [2002] OJ L 249/21.

<sup>44</sup> [1991] OJ C 233/2.

<sup>45</sup> [1998] OJ C 265/2.

<sup>46</sup> [1996] OJ C 281/3.

<sup>47</sup> [2001] OJ C 17/4.

public undertakings or undertakings with special or exclusive rights are subject to competition rules. A derogation from that principle is provided in respect of undertakings carrying out a mission of general interest. The derogation is limited to circumstances where the mission entrusted to the undertaking in question is legitimate and the means used are compatible with the principle of proportionality.

- 1.75 Instruments of a more general character.** Other instruments of a more general character concerning all economic activities and not limited to the electronic communications sector or to other sectors presenting similar characteristics may apply. Among these is Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty.<sup>48</sup> Another is the Commission Notice on the definition of relevant markets for the purposes of Community competition law.<sup>49</sup> Unlike the above-mentioned regulation, the notice is not binding; its object is rather to explain how the Commission, when applying competition rules, defines markets in such a way as to allow an assessment of the position acquired on those markets by the various parties in question.

**(4) Concurrent application of rules<sup>50</sup>**

- 1.76 Issue.** Various sets of rules are thus applicable to electronic communications and, in that context, an issue arises about the possible concurrent application of them. If several of these rules apply at the same time, to the same issues, it cannot be guaranteed that no contradiction will emerge. The existence of contradictions, and even the risk of possible contradictions, threatens the legal certainty which is necessary for firms to develop their activities.

*Areas where concurrent application may occur*

- 1.77 Mergers, acquisitions, anti-competitive agreements.** A possible application of the sets of rules involved would not seem to raise difficulties as regards issues covered by Article 101 TFEU or the European Merger Regulation. The sort of issues raised under these provisions or groups of provisions are not addressed, specifically, in sector-specific regulation. As a result, one could not state that a real overlap would exist regarding these issues. The consequence is that concurrent application should not be an issue in that context.<sup>51</sup>
- 1.78 Public measures with financial consequences.** The situation is less clear-cut as regards public measures with financial consequences for undertakings. In some instances, the situation provides an opportunity for an investigation under provisions relating to State aids without, however, presenting issues that would be covered by sector-specific regulation. For instance, subsidies were granted in Italy to purchasers of digital decoders.<sup>52</sup> The subsidy was analysed under general competition law but not in the light of sector-specific regulation. A further example was where the French authorities backed France Telecom, when that firm

<sup>48</sup> [2003] OJ L 1/1.

<sup>49</sup> [1997] OJ C 372/5.

<sup>50</sup> On this, see also paras 5.290 to 5.311 in Chapter 5 dealing with user protection, data protection, and dispute resolution.

<sup>51</sup> As an example, the ECJ ruled that German mobile operators colluded on prices in 2001. The issue was analysed under the rules of competition (Art 101 TFEU). A violation was found. But the issue was not analysed under sector-specific regulation. Case C-8/08 *T-Mobile Netherlands, KPN Mobile, Orange Nederland, Vodafone Libertel v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529.

<sup>52</sup> Commission Decision (EC) 2007/374 on State aid C 52/2005 implemented by the Italian Republic for the subsidised purchase of digital decoders [2007] OJ L 147/1. Case T-177/07 *Mediaset SpA v European Commission* [2010] not yet reported.