CONVERGENCE IN EUROPEAN TELECOMMUNICATIONS

A CASE STUDY ON THE RELATIONSHIP BETWEEN REGULATION AND COMPETITION (LAW)

by

Paul Nihoul *

A. Convergence, regulation and competition (law)

Convergence is being realised progressively between economic sectors which were previously separated - broadcasting, information and telecommunications.[1] A *rapprochement* may be observed among the technologies and indutries involved, but we are still wondering about how convergence could be shaped by the law. Questions have been raised about the respective roles which could be attributed to Regulation and Competition (law). Often, these interventions are clearly distinguished in the litterature.[2] Regulation is seen as sector-specific whereas Competition (law) would be more general. That feature - it is said - implies that Competition (law) would probably offer the best tool to govern the markets, as a general intervention is apparently better designed to cope with a converging world where specificities should be removed.

---

* Head of the Telecom Unit Centre for Philosophy of Law Université Catholique de Louvain, Belgium. The article has been drafted at the Centre for Philosophy of Law, Université Catholique de Louvain, Belgium, in a research framework financed by the Belgian telecom operator Belgacom and the Belgian Government under the program called "Poles d'Attractions Universitaires' (PAI). It draws on a more substantial work to be published shortly: NIHOUL P. (1999), *Les télécommunications en Europe: concurrence ou organisation de marché?*, Louvain-la-Neuve, Larcier.

1 As a general introduction, readers may consult the contributions presented at an international symposium on convergence in Louvain-la-Neuve, Belgium, in October 1997, as well as the references made by these contributions to other papers or books on the subject matter. The symposium was organised by the Telecom Unit at the Centre for Philsophy of Law, Université Catholique de Louvain. The contributions were published in BLACKMAN C. & P. NIHOUL (1998) (editors), *Convergence between Telecommunications and Other Media: How Should Regulation Adapt?*, Telecommunications Policy, Special issue, vol. 22, n° 3.

2 On that subject matter, see European Commission, *Towards an Information Society Approach*, Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implication for regulation, COM (97) 623 final, Brussels, 3 December 1997, 21 s. In scientific litterature, see a. o. CLEMENTS B. (1998), The Impact of Convergence on Regulatory Policy in Europe, *Telecommunications Policy*, 203 s.; COCKBORNE J.-E. DE (1997), La libéralisation du marché des télécommunications en Europe, *Journal des tribunaux-droit européen*, a. o. 219; KPMG (1996), *Public Policy Issues Arising from Telecommunications and Audiovisual Convergence*, Brussels, Report to the European Commission, 167 s.; SAUTER W. (1996),The System of Open Network Provision Legislation and the Future of European Telecommunications Regulation, *in* SCOTT C. & O. AUDÉOUD (éditeurs),*The Future of EC Telecommunications Law*, Köln, Bundesanzeiger, 105 s.; SCOTT C. (1998), The proceduralisation of telecommunications law, *Telecommunications Policy*, 243 s.

Competition (law) is furthermore associated with an efficient allocation of resources. That objective - it is alleged - may only be obtained in an environment where economic freedom is guaranteed. Freedom should thus be protected from private behaviour, in particular undesirable use of market power by undertakings. Public interventions should also be restrained to the lowest possible levels. Intervention should only be tolerated where it is demonstrated that market interaction would not realise spontaneously the objectives which are sought by public authorities. These objectives should be defined in a rather restrictive manner, not to overburden markets with goals incompatible with an efficient allocation of resources.

B. The perspective in this article

That conception will be analysed in the present article. The perspective is not to analyse in an abstract manner the relationships which may exist between Regulation and Competition (law). It is rather to attempt a clarification on some aspects of the relationship between these concepts. The analysis will be carried out in the light of the telecom rules adopted by EC authorities during the last decade - which is why reference is made to a case study in the title.

In fact, the European telecom reform is traditionally presented as a shift from Regulation to Competition (law). Markets would henceforth be governed by Competition and the rules attached to it, rather than by Regulation as it used to be. This presentation is certainly correct in so far as the exclusive rights which had been granted by national authorities to certain operators have indeed been set aside, together with some other privileges which had been attributed to these undertakings. As a result, there are now - at least potentially - several undertakings on markets which were previously reserved to a single operator. However, we have seen that competition is generally associated with a second feature - a certain restraint in public interventions. The scope of the transformation which has allegedly occurred in that respect remains to be examined: has public intervention been transformed - and if so to what extent?

These questions are essential to understand the changes which are currently taking place. The markets may not be analysed separately from the rules which are applied to them. Economic interactions are indeed framed in a regulatory environment. In that perspective, economic facts must be envisaged in connection with the norms which are applied to them - including the rules of competition.[3]

---

[3] In this regard, the article draws on contributions made by the so called "institutionalist" and the "neo-institutionalist" economic theories. Authors attached to these theories consider that economic behaviours are determined by collective habits or conventions ("institutions"), which may take the form of binding rules. For them, such behaviours may not be analysed independently of these rules. See a. o. ALLAN SCHMID A. (1994), Institutional Law and Economics, *European Journal of Law and Economics*, 33 s.; MERCURO N. (1989), Towards a Comparative Institutional Approach to the Study of Law and Economics, *in Law and Economics*, edited by Nicholas Mercuro, Boston, Kluwer, 1 s.; MERCURO N. (1997), *Economics and the Law: From Posner to Post-Modernism*, Princeton (NJ), Princeton University Press, 101 s.; SAMUELS W. & A. ALLAN SCHMID (1981), *Law and Economics: An Institutional Perspective*, Boston, Kluwer-Nijhoff.

Embarking on a regulatory study carries consequences, which are related to the nature of the Law. Unlike other realities, the Law is by nature variable. It constantly changes, in space and time. To take this characteristics into account, legal studies are often anchored in a specific regulatory environment - a sound perspective to maintain a certain empirical foundation.

Based on these methodological choices, the analysis which is carried out in this article mainly consists of a comparison between the presentation which is usually given of the reform, and the rules which have actually been adopted by the EC authorities. This comparison does not support the view that the reform should be interpreted as a shift from regulation to competition (law). That traditional presentation presupposes a clear-cut distinction between the two terms - regulation and competition (law) - submitted to the comparison. Yet, that distinction must apparently be questioned, as it appears difficult to discover substantial differences between them.

C. Regulation

The concept "Regulation" provides a typical case for an interdisciplinary approach. It is analysed in law, political sciences and economics. In their approach, authors adopt various perspectives. Some insist on the context where regulation is adopted.[4] Others focus on the nature of the intervention carried out by the authorities.[5] A third category considers the status of regulation among the public interventions in the economy.[6]

These studies will not be analysed here, in spite of their interest for a general theory on Regulation. For our purpose, it is relevant to show that various definitions have been given of the word "Regulation", and to select that which is at stake in the traditional presentation of the reform. In some instances, "regulation" is defined broadly as encompassing all kinds of rules that could be adopted by public authorities. The concept is then used - with variations - as a

---

4 These authors analyse in an institutional perspective, the agencies which are called to intervene, the modalities for an appropriate representation of the interested parties, etc. In that sense, see a. o. MEIER K. (1985), *Regulation: Politics, Bureaucracy, and Economics*, New York, St Martins Press, 8: "[R]egulation is a political process involving political actors seeking political ends".

5 For these scholars, regulation designates a direct prescription, by a public authority, of the objectives which are to be attained by the undertakings. See KAHN A. (1970), *The Economics of Regulation: Principles and Institutions*, New York, Wiley, a. o. 2 s. "[T]he essence of regulation is the explicit replacement of competition with governmental orders as the principal institutional device for assuring good performance"; "direct governmental prescription of major aspects of their structure and economic performance ... control of entry, price fixing, prescription of quality and conditions of service and the imposition of an obligation to serve all applicants under reasonable conditions".

6 E.g. HAYEK F. (1960), *The Constitution of Liberty*, Chicago, University of Chicago Press, a. o. 224 s. That author establishes a distinction between general market rules and actions which are directed at specific purposes. For him, "a free system does not exclude on principle all those general regulations of economic activity which can be laid down in the form of general rules specifying conditions which everybody who engages in a certain activity must satisfy".

synonym for the generic word "Law".[7] Other authors prefer a narrower approach. For them, "Regulation" refers to the rules which are applied to specific industries - the public utilities: energy, communications, transport and urban services. In that more precise meaning, regulation offers a medium for the authority to intervene with certain economic parameters - mainly the control on price and entry.[8]

D. Competition (law)

Of all words used in this article, Competition is probably the hardest to define. An abundant literature is devoted to it across human sciences. To give an example, scholars point out

---

7 Among other examples, see MEIER K. (1985), *Regulation: Politics, Bureaucracy and Economics*, St. Martins Press, New York: the word "Regulation" refers to "any attempt by the government to control the behavior of citizens, corporations, or subgovernments". STIGLER G. (1971), The Theory of Economic Regulation, *Bell Journal of Economics*, 3 s.: Regulation designates the material manifestation - in the economic sphere - of the use made by an authority of a power to coerce. HAYEK F. A. (1960), *The Constitution of Liberty*, Chicago, University of Chicago Press: Regulation encompasses all sorts of actions by the governments in the form of rules - as much the "general law" as the "exercise of the coercive power of government ... which was designed to achieve some specific purpose" (220-221). HEFFRON F. (1983), *The Administrative Regulatory Process*, New York, Longman: Regulation includes all kinds of government interventions. These interventions may be divided in three categories: the economic regulation, which regards the industry behavior (rates, quality, quantity, competition); the social regulation, concerning the protection of health and safety; as well as the subsidiary regulation, associated with the implementation of social and benefit programs such as social security, etc.

8 In that field, the major work is often considered to be KAHN A. (1970), *The Economics of Regulation: Principles and Institutions*, New York, Wiley, which has been commented upon in a previous footnote. For this author, the public interventions in the economy may be divided in two categories. The first one consists of regulation and the public sector. That category woas not envisaged in classical economic studies. The public interventions belonging to that category would be made of the prescriptions established by the governement regarding performance parameters to be met by undertakings. The second category would be made of the markets, considered as a mixture of facts and law. In that framework, the law would play a "peripheral" role. Thus, the public interventions would include "regulating the supply and availability of money, enforcing contracts, protecting property, proving subsidies or tariff protection, prohibiting unfair competition, providing market information, imposing standards for packaging and product content, and insisting on the righ of employees to join unions and bargain collectively" (2).

A similar meaning is granted to the word by SHEPHERD W. & WILCOX C. (1979), *Public Policies towards Business*, Homewood (Ill.), Irwin. For that author, the public policies towards businesses may be divided into three categories: antitrust, regulation and public enterprise. See also GELLHORN E & J. PIERCE (1982), *Regulated Industries*, St. Paul, West Publishing Co., which considers that economic regulation "explicitly substitutes the judgment of regulators for that of either the business or the market place" (7-8). A similar appreciation may be found *in* BREYER S. (1982), *Regulation and its reform*, Cambridge, Harvard University Press. In that book, the public interventions are divided into categories based on their object: pricing (calculated on the basis of costs or in order to allow the undertakings to realise a faire return - respectively called cost of service rate making and historically based price regulation); market entry (licences, right to serve based on a set of market entry criteria, historically based allocation, allocation of scarce resources based upon previous usage, individualised screening); as well as standard setting (promulgation and enforcement of requirements governing environmental pollution, product quality or work place safety).

the contradiction which exists between the insufficient character of available resources compared with the unlimited nature of human needs. In these conditions - they say - firms and individuals strive in order to gain access to the available resources, which will allow them to realise their projects.[9] To that analysis, the law may bring a contribution. Many studies on Competition seek to characterise the state of the markets. Yet, for legal scholars, competition may not be envisaged alone. As mentioned in the previous section, the markets are to be considered in connection with their legal structure. As a result, Competition may not be examined without the rules attached to it - hence the expression "Competition (law)" used in this article.[10]

E. Two sets of rules

At first sight, the EC rules which have been adopted in the reform appear to offer scope for a division into (two) categories, on the basis of the legal provision on which they were founded as well as the authors who adopted them.

I. Commission

Some rules were adopted by the European Commission (hereinafter "Commission"). Part of them were based on Art. 90 EC. As is well known, this article provides that competition rules apply to public undertakings as well as to firms which have been granted special or exclusive rights by the Member States (par. 1). A derogation is possible in so far as the application of these rules may obstruct the performance of the particular tasks assigned to these undertakings

---

9 That perspective has been developed almost unanimously by scholars with an interest in competition law and policy. It is impossible to give a comprehensive review about the literature which has been written around that topic. For some examples, see SCHERER F. M. & D. ROSS (1980), *Industrial Market Structure and Economic Performance*, Boston, Houghton Mifflin Company, 9 s.; STIGLER G. J. (1957), Perfect Competition, Historically Contemplated, *Journal of Political Economy*, n° 65, 1 s. The relation between competition and liberty have been emphasised by the School of Chicago. See a. o. FOX E. (1981), The New American Competition Policy : From Anti-Trust to Pro-Efficiency, *European Competition Law Review*, 439 s.; LANDE R. H. (1994), Beyond Chicago : Will Activist Antitrust Arise Again ?, *The Antitrust Bulletin*, 1 s.; MARTIN S. (1993), *Industrial Economics : Economic Policy and Public Policy*, Englewood Cliffs, Prentice Hall, 8 s.; POSNER R. (1978-1979), The Chicago School of Antitrust Analysis, *University of Pennsylvania Law Review*, n° 127, 925 s. En français, v. LEPAGE H. (1978), *Demain le capitalisme*, Paris, Librairie générale française and ID. (1980), *Demain le libéralisme*, Paris, Librairie générale française.

10 In that expression, Competition describes the relationship between undertakings on a given market. In effect, Competition gives a certain structure to the markets. It is carried out through certain rules, which have an economic nature (relationship between price and quantity, etc.). The relationship with the law is related to the function which is attributed to Competition. Competition is expected to achieve an efficient allocation of resources. Where it disappears, that result can not be attained spontaneously. An intervention is then warranted on the part of Competition authorities, which restore markets in their prime order. In that conception, Competition law is understood to prolong natural rules in force on the markets. In fact, they are interpreted as a legal expression of rules existing on the markets - which implies that they are considered as a sort of *jus naturalis* for businesses. On that subject matter, see NIHOUL P. (1998), Competition or Regulation for Multimedia?, *Telecommunications Policy*, 207 s.

in the general interest (par. 2). The Commission is entrusted with the power to ensure the application of these principles in the Community (par. 3).[11]

In the telecommunications sector, Art. 90 EC was in substance used as a legal basis for enacting instruments introducing competition. Several markets were affected, including those concerning the telecom services[12] as well as the terminal equipment.[13] The other rules were founded by the Commission on Art. 85/86 EC, as well as on the EC Merger Regulation. These rules apply in specific circumstances the principles of which are broadly formulated in these general provisions.[14]

---

11 On that subject matter - which has been extensively analysed - , see a. o. DEFALQUE L. (1993), Le traité de C.E.E. interdit-il la création, le maintien ou l'extension des monopoles nationaux?", *Journal des tribunaux - Droit européen (J.T.D.E.)*, 42 s.; EDWARD D. & M. HOSKINS (1995), Article 90: Deregulation and EC Law, *Common Market Law Review*, 157 s.; PAPPALARDO A. (1991), State Measures and Public Undertakings: Article 90 of the EEC Treaty Revisited, *European Competition Law Review*, 29 s.; GYSELEN L. (1989), State Action and the Effectiveness of the EEC Treaty's Competition Provisions, *Common Market Law Review*, 33 s.; PIJNACKER HORDIJCK E. (1995), EC Law versus Legal Monopolies: A Tense Relationship, *Revue du droit des affaires internationales*, 593 s. On telecom monopolies, see specifically AMORY B. (1986), Les monopoles de télécommunications face au droit européen (Telecommunications Monopolies vs. European Community Law), *Revue de droit des affaires internationales*, 117 s.; EHLERMANN C. (1993), Telekommunikation in der EG und Europäisches Wettbewerbsrecht, *EuR.*, 134 s.; ESTEVA MOSSO C. (1993), La compatibilité des monopoles de droit du secteur des télécommunications avec les normes de concurrence du traité CEE, *Cahiers de droit européen*, 445 s.; NAFTEL J. (1993), The Natural Death of a Natural Monopoly: Competition in the Telecommunications *ter*minals Jugment, *European Competition Law Review*, 1993; PAYLOR S. (1994), Article 90 and Telecommunications Monopolies, *European Competition Law Review*, 322 s.

12 Commission Directive 90/388/EEC, of 28 June 1990, on competition in the markets for telecommunications services, OJ L 192, 10 (hereinafter "Service Competition Directive"), amended by Commission directive 94/46/EEC, of 13 October 1994, amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L 268, 15; by Commission Directive 95/51/EC, of 18 October 1995, amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services, OJ L 256, 49; by Commission Directive 96/2/EC, of 16 January 1996, amending Directive 90/388/EEC with regard to mobile and personal communications, OJ L 20, 59; as well as by Commission Directive 96/19/EC, of 13 March 1996, amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 74, 13.

13 Commission Directive 88/301/EC, of 16 May 1988, on competition in the markets in telecommunications *ter*minal equipment, OJ L 131, 73 (hereinafter "Terminal Competition Directive"). That instrument was also amended by Commission Directive 94/46/EEC, which is mentioned in the previous note.

14 Art. 85 EC: prohibition of anticompetitive agreements; Art. 86 EC: abuses committed by dominant firms; Merger Regulation: prohibition of mergers creating or reinforcing a dominant position. The cases are sometimes brought by plaintiffs to the attention of the Commission. They may also be investigated by that authority on its own initiative. In some instances, the Commission acts on the basis of a notification provided by the parties - for instance in the framework of the Merger Regulation. On these procedural issues, see a. o. BELLAMY C. & G. CHILD (1993), *Common Market Law of Competition*, London, Sweet & Maxwell (edited by V. Rose), 11-001 s.; KORAH V. (1994), *An Introductory Guide to EEC Competition Law and Practice*, London, Sweet & Maxwell, 109 s. and 239 s.; WAELBROECK M. & A. FRIGNANI (1997), Concurrence, *in Commentaire Mégret: le droit de la CE*, Bruxelles, Editions de l Université de Bruxelles, vol. 4, 403 s.; WHISH R.

On the basis of Art. 85 and 86 EC, the Commission also issued several opinions concerning the application of competition rules to specific practices. One of these documents regards general problems which may occur as a result of the introduction of competition within the telecom markets.[15] Another one is related to practices which may disrupt access to existing public infrastructure[16]. In principle, these documents have no binding force. In practice, however, they issue warnings to be taken into account by the undertakings if the latter want to avoid the sanctions which may be imposed if they adopt the described practices.[17]

II. Council and Parliament

A second set of rules were enacted by the Council and the European Parliament.[18] These measures pursue various objectives, which are connected to the framework to which they belong. One of them is the provision of an open network on the Community territory - a goal

---

& B. SUFRIN (1993), *Competition Law*, London-Edinburgh, Butterworths, 285 s.

15 Guidelines on the application of EEC competition rules in the telecommunications sector, OJ C 233, 2. On that subject matter, see a. o. LONG C. (1990), Competition in the Markets for Telecommunication Services: Services Directive and its Draft Competition Guidelines, *International Business Lawyer*, 511 s.; RAMSEY T. (1996), The EU Commission's use of the Competition Rules in the Field of Telecommunications: A Delicate Balancing Act, *Fordham Corporate Law Institute*, 561 s.; RAVAIOLI P. (1990), La Communauté européenne et les télécommunications: développements récents en matière de concurrence, *Revue internationale de droit économique*, 103 s.; UNGERER H. (1996), EC Competition Law in the Telecommunications, Media and Information Technology Sectors, *Fordham International Law Journal*, 465 s.;

16 The instrument was partly based on COUDERT BROTHERS (1995), *Competition Aspects of Interconnection Agreements in the Telecommunications Sector*, Report to the European Commission (DG IV), Luxembourg, Office for Official Publications of the European Communities and WILMER, CUTLER & PICKERING (1995), *Competition Aspects of Service Providers to the Resources of Telecommunications Network Operators*, Report to the European Commission, (DG IV).

17 The specific effects of these documents are related to the legal basis on which a sanction can be imposed. Binding rules formally express obligations. Sanctions may thus be founded directly on them. By contrast, no obligation of such a nature is formulated in opinions. The latter are presented as interpretations given to broader provisions. In these cases, the sanction will thus be based on these provisions rather than on the opinions. On this subject matter, see a. o. WAELBROECK M. & A. FRIGNANI (1997), Concurrence, *in Commentaire Mégret: le droit de la CE*, Bruxelles, Editions de l Université de Bruxelles, vol. 4, 461 s.

18 The Council and the Parliament have prime responsibility to adopt legislative acts in the Community. By comparison, the normative function entrusted to the Commission in Art. 90 EC is strictly limited. The role performed by the Parliament has incurred several modifications in the course of the reform. The modifications were due to amendments introduced by the Member States in the Treaties concerning the European Communities. To simplify the presentation, we will attribute telecom legislation to the Council *and* the Parliament when both institutions have participated in the decisions. On that subject matter, see a. o. WYATT D. & A. DASHWOOD (1993), *European Community Law*, London, Sweet & Maxwell, 31 s. and 37 s.; KAPTEYN P. J. G. & P. VERLOREN VAN THEMAAT (1998), *Introduction to the Law of the European Communities*, third edition edited and further revised by L. GORMLEY, London - The Hague - Boston, Kluwer International, 209 s. as well as - more specifically - LENAERTS K. (1998), Federalism: Essential Concepts in evolution - The Case of the European Union, *Fordham International Law Journal*, 746 s.

which is referred to as "Open Network Provision".[19] The measures related to that objective organise the existing Community networks, in order to ensure that they can be fully used. The idea is to allow service providers to access existing networks at reasonable conditions - financially and technically. These providers will thus be able to enter into contact with potential customers, who will be better served in a position where they can chose their supplier(s).[20] The framework also aims at providing operators with an opportunity to interconnect their networks, to encourage the development of infrastructures covering the entire Community territory.[21] Finally, ONP rules organise economic relationships in the markets. Thus, obligations are imposed on operators as to services they will have to make available to potential clients in a given period of time.[22] In a similar way, rights are granted to users to ensure they are adequately treated by operators.[23]

Another purpose pursued by the Council and the European Parliament is to apply to the telecom sector - as well as to other public utilities - the European rules regarding public procurements.[24] Rules of that nature were already in force in the Community,[25] but their application

---

19 Several instruments were adopted in that perspective. The first of them establishes a framework and a program for action: Council Directive 90/387/EEC, of 28 June 1990, on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L 192, 1, as amended by Directive 97/51/EC of the European Parliament and 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 (hereinafter "ONP Framework Directive"). Other instruments subsequently applied in specific areas the principles laid down in the framework. See Council Directive 92/44/EEC, of 5 June 1992, on the application of open network provision to leased lines, OJ L 165, 27, as amended by above mentioned Directive 97/51 (hereinafter ONP Leased Lines Directive"); Council Directive 95/62/EC of the European Parliament and the Council, du 13 December 1995, on the application of open network provision (ONP) to voice telephony, OJ 1995 L 321, 6 (hereinafter "ONP Voice telephony Directive"); and Directive 97/33/EC of the European Parliament and of the Council, of 30 June 1997, on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP), OJ L 199, 32, as amended by Directive 98/61/EC of the European Parliament and of the Council, of 24 September 1998, amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection, OJ L 268, 37 (hereinafter "ONP Interconnection Directive").

20 See e. g. ONP Interconnection Directive, Art. 4, par. 2: organisations authorised to provide public networks and/or publicly available services have an obligation to meet all reasonable requests of access to the network, when they hold a significant market power.

21 See e. g. the preamble to ONP Interconnection Directive, par. 2: "[A] general framework for interconnection to public telecommunications networks ... is needed in order to provide end-to-end interoperability services for Community users".

22 See e. g. ONP Leased Lines Directive, Art. 7, "Provision of a minimum set of leased lines in accordance with harmonised technical characteristics".

23 Rights of that nature may be found, e. g., in ONP Voice Telephony Directive. Under Art. 7 of that instrument, the service to be provided by a telecom organisation must be specified in a contract concluded with the user. Compensation and/or refund arrangements have to be provided by that telecom organisation if quality levels are not met. Exceptions are only accepted if they are fully justified and if they are made clear in the contract, under supervision by the national regulatory authority.

24 Chronologically, Council Directive 92/13/EEC, of 25 February 1992, co-ordinating the laws, regulations

had been excluded from the above mentioned sectors.[26] They basically constrain the choices which are made by the relevant undertakings,[27] by setting the criteria on which their economic decisions must be based when they enter a contractual relationship. The hope is that the choices will then be based on "sound" economic criteria, and that the potential contractors will all be treated equally.[28]

A last objective contemplated by the Council and the European Parliament was to realise the internal market in the telecom sector. Several instruments were adopted to that effect in the markets for terminal equipment.[29] The purpose was to ensure that terminals manufactured in one Member State would be granted access to the other European countries.[30]

---

and administrative provisions relating to the application of community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 76, 14 (remedies) and Council Directive 93/38/EEC, of 14 June 1993, co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 199, 84 (material rules).

25 See a. o. O'LOAN N. (1992), An Analysis of the Works and Supplies Directives of the European Communities, *Public Procurement Law Review*, 40 s.; WINTER J. (1991), Public Procurement in the EC, *Common Market Law Review*, 741 s.

26 On the extension of these rules to the public utility sectors, see a. o. ARROWSMITH S. (1995), The Application of the EC Treaty Rules to Public and Utilities Procurement, *Public Procurement Law Review*, 255 s.; BROWN A. (1993), The Extension of the Community Public Procurement Rules to Utilities, *Common Market Law Review*, 721 s.; O'LOAN N. (1992), An Analysis of the Utilities Directive of the European Communities, *Public Procurement Law Review*, 175 s.

27 Under Art. 2 of above mentioned Directive 93/38, the rules on public procurements normally apply in the relevant sectors to public authorities, public firms and undertakings with special or exclusive right(s) granted by a national authority.

28 On that subject matter, see a. o. TREPTE P.-A. (1993), Public Procurement and the Community Competition Rules, *Public Procurement Law Review*, 1993, 93 s. and TRIANTAFYLLOU D. (1996), Les règles de concurrence et l'activité étatique y compris les marchés publics, *Revue trimestrielle de droit européen*, 57 s. The application of the rules for public procurement to the telecom sector was decided at a time when the former national operators still enjoyed a monopolistic situation. In that context, these undertakings were not constrained by competition to choose the best contractors. Most of these operators had furthermore a public status. They were organised as an administrative department, or as a separate entity under the direction of a public authority. It was feared that in such a context, the decisions would not always be based on economic matters, but would rather be influenced by political considerations.

29 See Directive 98/13/EC of the European Parliament and of the Council, of 17 February 1998, relating to the telecommunication terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity, OJ L 74, 1 (hereinafter "Terminal Harmonisation Directive"). That instrument supersedes Council Directive 93/97/EEC, of 29 October 1993, supplementing Directive 91/263/EEC in respect of satellite earth station equipment, OJ L 290, 1; Council Directive 91/263/EEC, of 29 April 1991, on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, OJ L 128, 1; and Council Directive 86/361/EEC, on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment, OJ L 217, 21.

30 See a. o. MIE A. (1988), L'Europe des télécommunications : la relance de la libre circulation par la reconnaissance mutuelle et complète de l'agrément des équipements terminaux (première étape), *Revue du marché*

A similar intervention took place in the markets for telecom services.[31] Before the reform, the provision of these services was submitted to conditions determined by the Member States. That situation - it was feared - would create an excessive discrepancy among the regimes applied throughout the Community. There was thus a risk that the internal market would be jeopardised.

To avoid that possibility, a decision was made to harmonise the conditions under which the services would be provided in the Member States.[32] The harmonisation which has taken place, ensures that operators receiving an authorisation in one Member State are subject to similar standards in other European countries. As a result, operators are placed on equal-footing. Furthermore, the obtention of authorisations is facilitated in the Community. It is indeed easier for an undertaking which has obtained an authorisation in one Member State, to demonstrate in another national proceeding that the conditions are satisfied. To further facilitate the process, a one-stop-shopping procedure was established. With that mechanism, the undertakings who wish to perfom services in several Member States may address their application to a designated body, which dispatches the documents to the concerned national authorities. These authorities have to reply through said body within specified time limits.[33]

F. Qualification of Community rules

In the previous section, the rules adopted by the EC institutions have thus been divided in categories based on their authors and their legal foundations. That classification may now be examined in connection with the concepts which have been introduced in the beginning of this article - regulation and competition (law).

I. Competition (law)

From the outset, we may observe that the norms enacted by the Commission in the telecom sector appear to be connected with the concept of "competition (law)". They are indeed

---

commun, 215 s.; NAFTEL J. (1993), The Natural Death of a Natural Monopoly : Competition in EC Telecommunications after the Telecommunications Terminals Judgment, *European Competition Law Review*, 105 s.; PERALDI-LENEUF F. (1996), La libéralisation du marché des terminaux de télécommunications et la jurisprudence communautaire : une connexion en cours, *Europe*, n° 2, 1 s.

31 Directive 97/13/CE of the European Parliament and of the Council, of 10 April 1997, on a common framework for general authorisations and individual licences in the field of telecommunications services, OJ L 117, 15 (hereinafter "Service Harmonisation Directive").

32 The reasons justifying the decision to harmonise are explained in the Preamble to Service Harmonisation Directive. On the harmonisation process, see in general KAPTEYN P. J. G. & P. VERLOREN VAN THEMAAT (1998), *Introduction to the Law of the European Communities*, third edition edited and further revised by L. GORMLEY, London - The Hague - Boston, Kluwer International, 774 s.; SLOT P. J. (1996), Harmonisation, *European Law Review*, 378 s.; VIGNES D. (1993), The Harmonisation of National Legislation and the EEC, *European Law Review*, 358 s.

33 For a description of that mechanism, see Service Harmonisation Directive, Art. 13.

based on provisions located in the EC Treaty, in a section dealing with the rules of competition.[34] The Commission, which is their author, is furthermore responsible in practice for the definition and the implementation of the policy which is carried out in the name of competition on the European territory.[35]

The links with competition are not limited to formal criteria such as the identity of the author and the legal basis used for the enactement of the provisions. They may also be derived from a functional approach, focusing on the object(s) assigned to the rules. According to the Commission, the instruments it has adopted in the telecom sector aim at introducing and fostering competition. A first line of action was directed against the restrictions which had been established by the Member States with respect to entry into the markets. These restrictions have in principle been eliminated.[36] These measures were not sufficient, however, to ensure the full realisation of the goals which are attached to competition law. A satisfactory degree of economic freedom must be maintained in the markets, as it is a prerequisite for firms to realise their potential and compete for access to resources. Measures were thus enacted by the Commission in an attempt to preserve economic freedom, where that degree had been impaired or threatened by the behaviour adopted by economic agents. They were mainly based on Art. 85 EC, Art. 86 EC as well as on the Merger Regulation.[37]

---

34 Art. 85, 86 and 90 EC. The Merger Regulation - and the subsequent amendments - were mainly enacted on the basis of Art. 235 EC. That provision allows the European institutions to take the measures which are appropriate to attain an objective assigned to the common market, where the necessary powers have not been provided by the Treaty. Art. 87 EC allows the Council to give effect through directives and regulations, to the principles set out in Art. 85 and 86. One would thus expect the instruments enacted on that basis, to refer to the principles contained in these latter provisions. That is not the case with the Merger Regulation. In fact, that instrument does not really apply Art. 85 and 86, but rather complements them. As it is said in the Preamble to the Regulation, "Articles 85 and 86 ... are not ... sufficient to control all operations which may prove to be incompatible with the system of undistorted competition" (par. 6). For a similar comment, see KAPTEYN P. J. G. & P. VERLOREN VAN THEMAAT (1998), *Introduction to the Law of the European Communities*, third edition edited and further revised by L. Gormley, London - The Hague - Boston, Kluwer International, 902, note 726.

35 The Commission has progressively taken up the charge of defining the policy of competition which is to be applied in the European Community, where the responsibility was apparently entrusted to the Council in the EC Treaty. For an analysis, see a. o. BELLAMY C. & G. CHILD (1993), *Common Market Law of Competition*, London, Sweet & Maxwell (edited by V. Rose), 1-008 s.; KORAH V. (1994), *An Introductory Guide to EEC Competition Law and Practice*, London, Sweet & Maxwell, 15 s.; PAPPALARDO A. (1994), La réglementation communautaire de la concurrence, *Revue internationale de droit économique*, 343 s.; WHISH R. & B. SUFRIN (1993), *Competition Law*, London-Edinburgh, Butterworths, 31 s.

36 See in particular Art. 2 of Service Competition Directive and of Terminal Competition Directive 90/388, as amended. These instruments eliminate the exclusive rights, the special rights as well as the other restrictions which had been imposed by the national authorities on the telecom markets.

37 For the application of these rules to the telecom sector, see the opinions issued by the Commission in that respect. References have been provided for these opinions in earlier footnotes. An example of a telecom decision based on the Merger Regulation may be found in Commission decision 97/815/EC, of 14 May 1997, declaring a concentration to be compatible with the common market and the functioning of the EEA

II. Regulation

The correspondence does not appear limited to the rules adopted by the Commission and the definition given to the concept of "Competition (law)". Parallel to that, a link may be found between the second category ("Regulation") and the rules due to the Council and the European Parliament.[38] Admittedly, these rules are complex and numerous.[39] However, the majority of them seems to be associated with criteria which have been retained for the definition given to the concept of "Regulation". These criteria - it is reminded - are related to the character of the intervention in issues such as

- the admission of undertakings into a given market as well as - in some instances - their identity;
- the conditions (prices, output, ...) at which goods and services may or must be commercialised;
- the characteristics of the investments (type, amount, duration, ...).

---

agreement (case n° IV/M.856 - British Telecom/MCI (II), OJ L 336, 1 s. For a telecom decision based on Art. 85 EC, see Commission decision 96/546/EC, of 17 July 1996, relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (Case n° IV/35.337 - Atlas), OJ L 239, 23.

38 The application of the label "Regulation" on telecom instruments adopted by the Council and the Parliament is not limited to this article. A similar qualification has been retained by several authors. To give an example, see SAUTER W. (1997), *Competition Law and Industrial Policy in the EU*, Oxford, Clarendon Press, 208-209: "[C]ompetition policy and detailed telecommunications regulation such as ONP do not form functional equivalents"; "The ONP and competition rules are complementary, not alternatives". In the same sense, see CLEMENTS B. (1998), The Impact of Convergence on Regulatory Policy in Europe, *Telecommunications Policy*, 203: "The application of competition law and regulation in telecommunications is a comparatively recent phenomenon in Europe"; "early EC measures focused on introducing competition in the presence of incumbent monopolies. The main purpose of regulation then was to provide a framework for sustainable competition through a known set of rules on open networks and through harmonisation of the diverse technical and commercial environments surrounding the sector in different Member States".

39 For a brief presentation, see section 2 above. A more systematic description may be found in ALEXIADIS P. (1995), European Union Telecommunications Policy, *in* Long C. D. (editor), *Telecommunications Law and Practice*, London, Sweet & Maxwell, 223 s.; BUTCHER C. (1996), Telecommunications in the European Union, *Administrative Law Review*, 451 s.; CARRETERO FERNANDEZ A. (1997), Directivas comunitarias sobre telecomunicaciones (I), *in* CREMADES J. (coordinator), *Derecho de las Telecomunicaciones*, Madrid, La Ley-Actualidad-Ministerio de Fomento, 245 s.; DOV LANDO S. (1994), The European Community's Road to Telecommunications Deregulation, *Fordham Law Review*, 2159 s.; ERGAS H. & E. RALPH (1994), The Interconnection Problem with a Focus on Telecommunications, *Communications et stratégies*, n° 16, 9 s.; FORAY D., RUTSAERT P. & L. SOETE (1995), Telecommunications Services, *in* BUIGUES P., JACQUEMIN A. & A. SAPIR (editors), *European Policies on Competition, Trade and Industry : Conflict and Complementarities*, Alderschot (UK)-Brookfield (US), Edwar Elgar, 268 s.; COCKBORNE J.-E. DE (1997), La libéralisation du marché des télécommunications en Europe, *Journal des tribunaux-droit européen*, 217 s.; SAUTER W. (1996),The System of Open Network Provision Legislation and the Future of European Telecommunications Regulation, *in* (SCOTT C. & O. AUDÉOUD (éditeurs),*The Future of EC Telecommunications Law*, Köln, Bundesanzeiger, 105 s.

In the telecom sector, the conditions for entry into the markets - first feature - are determined in the Directives adopted by the Council and the Parliament, in connection with the purpose associated with the realisation of the internal market. To give an example, Terminal Harmonisation Directive introduces the technical specifications which may be imposed by the Member States as a condition for admission of terminal and satellite equipment on their territory.[40] That mechanism may be considered a condition for entry, as manufacturers have no access to those territories where the terminals may not be introduced.

Similar constraints are imposed on markets for telecom services. Under European law, Member States are entitled to subject the provision of (some) services to procedures. That prerogative was specifically upheld and organised in the telecom sector by the Council and the Parliament in Service Harmonisation Directive.[41] In the framework of these procedures, conditions are imposed by the member States. If these conditions are not met, the right to perform the relevant activity may be refused.[42]

The intervention of the Council and the Parliament also complies with the second feature listed above, i. e. the determination of conditions on the markets. For instance, ONP Voice Telephony Directive contains provisions regulating the prices operators may be allowed to charge. These provisions address issues such as : on what basis should the prices be calculated?[43]

---

40 Directive 98/13/EC of the European Parliament and of the Council, of 17 February 1998, relating to the telecommunication terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity, OJ L 74, 1, Art. 5 s.

41 Directive 97/13/EC of the European Parliament and of the Council, of 10 April 1997, on a common framework for general authorisations and individual licences in the field of telecommunications services, OJ L 117, 15.

42 Two main procedures are organised in Service Harmonisation Directive - the individual licence and the general authorization. The first one is limited to specific activities, specifically those which imply an access to radio frequencies/numbers in order to perform the service or the mandatory provision of publicly available telecommunications services and/or public telecommunications networks, including obligations to provide universal service and other obligations under ONP legislation. By contrast, general authorisations do not require an explicit decision by the authority. Sets of conditions and/or obligations are imposed on the applicants. Information is to be provided, to allow a control on the respect of these conditions. The authority may react if one or several conditions are not respected. In the absence of compliance, the concerned undertakings may be barred from access to the relevant market(s). For the two procedures, see Service Harmonisation Directive, respectively Art. 7 s. and 4 s.

43 See e. g. ONP Voice Telephony Directive, Art. 12. Under that provision, national regulatory authorities are to ensure that tariffs for use of the fixed public telephone network and the voice telephony service follows the basic principles of transparency and cost orientation. The Directive also includes a list of obligations/prohibitions regarding the calculation of tariffs independent of the application implemented by the users (par. 3); the unbundling of tariffs for facilities provided in addition to voice telephony or the connection to the fixed public telephone network (par. 4); the structure for tariffs, which should be itemised to show the initial connection charge, the periodic rental charge and the usage charges (par. 5); and the possibility for national authorities to impose tariffs constraints relating to the objectives of universal telephone service accessibility, including town and country planning aspects (par. 1).

how should the costs be calculated?[44] how should they be reflected in the invoices?[45] in what circumstances may discounts be granted?[46] etc.

Finally, references to the last feature of Regulation - intervention in investments - may be found in the rules adopted by the Council and the Parliament. In some instances, undertakings are placed under an obligation to comply with technological standards.[47] In others, an obligation to perform certain services is imposed on the undertakings. The constraint which is then placed on the economic agents is not limited to a compliance with standards. A further obligation is added in so far as the firms have an obligation to undertake an activity they might not have otherwise considered.

An example of that last type of requirement may be found in ONP Leased Lines Directive. Under that instrument (Art. 7), designated operators[48] have an obligation to provide a minimum set of leased lines in accordance with specific requirements.[49] The same process is used in ONP Voice Telephony Directive (Art. 5), which obliges operators to comply with targets published by the national regulatory authorities in connection with certain supply-time and quality-of-service indicators.[50] Under that same directive (Art. 9), operators must also provide

---

44 Under Art. 13, the Member States have to ensure that telecom organisations implement a cost accounting system which conforms to the prescriptions laid down with respect to the establishment of tariffs. An emphasis is placed on itemising the costs and relating them to corresponding services. Costs common to several activities should as much as possible be allocated through an indirect link with those which may be related to specific markets.

45 Pursuant to Art. 15, national regulatory authorities are to ensure that targets are set and published for the provision of itemised billing as a facility available to users on request, taking into account the state of network development and market demand.

46 Under Art. 14 and 19, special tariffs may be provided in connection with bulk discount schemes, socially useful services (emergency services, low-usage users, specific usage groups, ...), off-peak times, disabled users and people with special needs.

47 Examples have been provided in that regard, with respect to Terminal Harmonisation Directive. Standards may also be imposed in the ONP framework. See a. o. ONP Interconnection Directive, Art. 13.

48 To be precise, the obligation is not imposed directly on the operators. To produce an effect *vis-à-vis* the latter, it has to be implemented by the Member States. In that respect, the mechanism used by the Council and the Parliament conforms with the definition given to that category of instruments. Under Art. 189 EC, directives binds the Member States to which they are addressed as to the result to be achieved, but leave to the national authorities the choice of form and methods. On that subject matter, see a. o. KAPTEYN P. J. G. & P. VERLOREN VAN THEMAAT (1998), *Introduction to the Law of the European Communities*, third edition edited and further revised by L. GORMLEY, London - The Hague - Boston, Kluwer International, 326 s.; LOUIS J.-V. (1993a), Les actes des institutions, *in Commentaire Mégret : le droit de la CEE*, Éditions de l'Université de Bruxelles, vol. 10, 500 s.; WYATT D. & A. DASHWOOD (1993), *European Community Law*, London, Sweet & Maxwell, 69 s.

49 For instance, operators are to provide ordinary quality voice bandwidth analogue, with specific interface presentation specifications (2 wires ETRS 300 448(3) as well as specific connection characteristics and performance specifications (2 wire - ETS 300 448 (3).

50 These indicators are enumerated in the Annex II to the Directive. They encompass - to name a few - supply

advanced services which are identified specifically - with a reserve where the services may not be provided for reasons related to technical feasibility and economic viability.[51]

G. Regulation and competition law in EC telecom

As it has been shown in the previous section, the concepts which have been introduced in this article may thus be used to reflect the scope and nature of the interventions carried out by Community authorities in the telecom sector. On the basis of that qualification, an attempt may be made to examine the relationship between the two categories of rules. From that comparison, it appears - contrary to what could have been expected - that the distinction which is generally made between "Regulation" and "Competition (law)" should be nuanced. These rules apparently rely on common principles - which makes it difficult to find a sort of ideological or philosophical specificity to either of them. Furthermore, they both address the same issues which they solve in proposing similar solutions. These findings are analysed in the following sections.

H. Underlying common principles

Both sets of interventions rely on principles which appear to have a general scope and nature. Given the place which is assigned to this article, it is not possible to present here a list of all of them. A few examples will be given as illustrations. They regard values which may be considered essential in the reform.

I. Transparency

Firstly, there appears to exist in the two sets of rules, a strong emphasis on the need for more transparency in the markets and in the public interventions. Numerous provisions were inserted to that effect in the acts adopted by the Commission ("Competition (law)",[52] as well as in the Directives enacted by the Council and the Parliament ("Regulation").[53]

---

time for initial network connection, fault rate per connection, dial tone delay, transmission quality statistics, ...

51 These services - which are also called facilities in the Directive - are also mentioned in an Annex to the Directive, in specie Annex III (1). Among them are the Dual-tone multi-frequency operation, the Direct dialling-in (or facilities offering equivalent functionality), the Call forwarding as well as the Calling-line identification.

52 Examples may be found in Terminal Competition Directive, Art. 5, as well as in Service Competition Directive, Art. 3, al. 3 (as amended by Directive 96/19) (conditions imposed by the member States on the provision of voice telephony and public telecommunications networks), Art. 3 *bis*, al. 2 (as amended by Directive 96/2) (like conditions introduced with respect to mobile and personal communications systems) and Art. 4, al. 1 (as amended by Directive 96/19) (conditions governing access to the networks).

53 See for instance ONP Framework Directive, Art. 3, par. 1. Pursuant to that instrument, ONP conditions must comply with a number of basic principles, including transparency and an adequate publication. That requirement is repeated in Directives implementing the program announced in that instrument. See e. g.

In both sets of interventions, the provisions resort to similar modalities to achieve the level of transparency which is desired. An obligation is imposed on authorities to express clearly the rules they enact.[54] As regards the medium chosen to channel information, several possibilities may be utilised. In some cases, the acts are to be notified to the addressee(s); in others, they are to be communicated;[55] in a third category, they must be published.[56][57]

In both sets of telecom provisions, different purposes are assigned to transparency. One is to provide economic actors with information about the rules that may apply to them, particularly when an incentive or a sanction may affect them. That information will allow economic agents to adapt their behaviour accordingly.[58] We may analyse in that perspective a provision

---

ONP Leased Lines Directive, Art. 3 ("Availability of information") and Voice Telephony Directive, Art. 4 ("Publications of and access to information").

54 That emphasis reflects a concern which has been expressed in several documents issued by the Community authorities, as well as in some declarations made by the Member States during the Maastricht and Amsterdam intergovernmental conference. On that subject matter, see LENAERTS K. & DE SMIJTER E. (1998), Le traité d'Amsterdam, *Journal des tribunaux - droit European*, 32 s.; VAN RAEPENBUSCH S. (1998), Les résultats du Conseil européen d'Amsterdam (les 16 et 17 juin 1997), *Actualités du droit*, 18 s. KAPTEYN P. J. G. & P. VERLOREN VAN THEMAAT (1998), *Introduction to the Law of the European Communities*, third edition edited and further revised by L. GORMLEY, London - The Hague - Boston, Kluwer International, 335 s. (in the context of motivation).

55 The communication of information is also made compulsory in some circumstances. That modality is mainly used to ensure respect of EC rules by the Member States. Typically, Directives require national authorities to communicate to the Commission the rules they intend to adopt in implementation of EC law. In some instances, the rules will have to be communicated in advance, to allow the Commission to verify their compatibility before enactement. Other information is to be communicated upon request by the Commission. Reports may be required in certain circumstances.

56 In some instances, detailed requirements must be complied to as regards publication. These requirements may concern the type of information to be published. For instance, ONP Leased Lines Directive imposes an obligation to provide information in accordance with requirements sketched out in Annex I to that instrument. (For another example, see ONP Voice Telephony Directive, Art. 4). In other cases, the requirements may be related to the kind of medium which must be chosen to publish the materials. Thus, ONP Voice Telephony Directive provides that information "shall be published in such a way as to provide easy access for users to that information" (Art. 4, par. 2). Reference must be made to that publication in the official journal of the Member State concerned (*ibidem*).

57 In that regard, the instruments adopted by the EC institutions conform with the distinction made in Art. 173 EC. In that provision, the modalities used to address Community binding acts are examined in connection with an action for annulment which may be introduced against them. On that subject matter, see generally KAPTEYN P. J. G. & P. VERLOREN VAN THEMAAT (1998), *Introduction to the Law of the European Communities*, third edition edited and further revised by L. GORMLEY, London - The Hague - Boston, Kluwer International, 460 s.; WYATT D. & A. DASHWOOD (1993), *European Community Law*, London, Sweet & Maxwell, 120 s.

58 In the economic analysis of the law, the rules are presented as variables modifying the cost and benefit function of the individuals and the undertakings. On that subject matter, see FIELD A. (1979), On the explanation of Rules using Rational Choice Models, *Journal of Economic Issues*, 49 s.; KATZ A. (1966), Positivism and the separation of Law and Economics, *Michigan Law Review*, 2229 s.; KITCH E. (1983), The Intellectual foundations of Law and Economics, *Journal of Legal Education*, 184 s.; MERCURO N. (1997), *Economics and the*

which is contained in ONP Voice Telephony Directive. Pursuant to that provision (Art. 23), clients are to be warned about possible adverse consequences if they do not settle their bill in time. It is hoped that the behaviour of these clients may change as a result of that transparent warning.

More generally, one can say that telecom provisions related to transparency promote objectives which are related to the behaviour of economic agents. Sanctions or incentives are important in that regard. For instance, the authorities may encourage compliance with technical standards by publicising them.[59] They may promote competition by imposing a publication of the conditions proposed by undertakings, in an attempt to facilitate a comparison between offers by the users.[60] Publication may help authorities and parties to identify infringements to Community law when that identification implies a comparison with published information - for instance where an offer does not conform with general terms announced by an undertaking (discrimination).[61]

II. Independence of authorities

Independence was introduced early as a requirement for telecom authorities in the framework of "Competition (law)". That requirement appears in basic instruments adopted by the Commission, i. e. Terminal Competition Directive as well as Service Competition Directive. Pursuant to the first of them, the Member States are to ensure that responsibility for drawing up technical specifications, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.[62] A similar constraint may be found in the second Directive, under

---

Law: From Posner to Post-Modernism, Princeton (NJ), Princeton University Press; POSNER R. (1975), The Economic approach to Law, *Texas Law Review*, 757 s.

59 Standards are always made obligatory. A mere publication is made compulsory in some circumstances. In that case, the indication provides undertakings with an indication as to the technological orientation which is supported by the authorities. Such an indication is important in several respects. For instance, compliance with these standards are generally requested in the public procurements. The undertakings which might participate in these procurements, have an incentive to prepare for compliance. Furthermore, undertakings may feel that the standards will be adopted by the markets. In these circumstances, they may want to align their choices on those made on the markets, in particular for compatibility purposes.

60 Such publications are made obligatory, for instance, under ONP Leased Lines Directive (Art. 3 and 4), under ONP Voice Telephony Directive (Art. 4) as well as under ONP In*ter*connection Directive (Art. 14).

61 Specific provisions are inserted to that effet in the ONP Leased Lines Directive as well as in the ONP Voice Telephony Directive. Under the first instrument (Art. 5), Member States are to ensure that existing offers continue for a reasonable period of time, and that termination can be effected only after consultation with users affected. A procedure must be established so that a solution may be found in case no agreement may be readily found. Under the second instrument (Art. 8), a telecom organisation must seek the agreement with the national regulatory authority to vary the conditions, where it considers it unreasonable to provide connection to the fixed public telephone network under its published tariffs and supply conditions.

62 Terminal Competition Directive, Art. 6.

which the Member States have to make sure that the granting of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and the surveillance of usage conditions are carried out by a body independent of the telecommunications organisations.[63]

Independence also forms the core of several provisions adopted by the Council and the Parliament in the framework of "Regulation". Thus, Terminal Harmonisation Directive stipulates characteristics which must be complied with by the authorities in order to qualify as an independent body in the context of mutual recognition.[64] Similar constraints are imposed by ONP Framework Directive (as amended), under which national regulatory authorities must be legally distinct from, and functionally independent of, all organisations providing telecommunications networks, equipment or services.[65]

Apart from confirming that general obligation, this latter instrument addresses the particular situation of countries where the capital of the former national operator is still held by a public authority.[66] Under the instrument, Member States that retain ownership or a significant degree of control on organisations providing telecom networks and/or services, have to ensure an effective structural separation of the regulatory function from activities associated with ownership or control.[67] It is hoped that the structural separation will help set aside risks of indirect collusion which may exist where the operator and the authority are placed under the same direction.

The scope of independence is not limited to the rules adopted by the Commission and/or the Council/Parliament. The requirement may be found in other instruments, some of which also belong to the "Competition(law)" framework. In *RTT*,[68] a telecom operator had an exclusive right for network management on the national territory. Under national law, a regulatory

---

63 Service Competition Directive, Art. 7.

64 These characteristics are mentioned in Annex 5 to said Directive, "Minimum criteria to be taken into account by member States when designating notified bodies". Under the Annex, the notified body may not be a designer, manufacturer, supplier or installer of a telecom undertakings, nor may it become involved in such activities (par. 1). The body must carry out its tasks free from all pressures and inducements which might influence their judgment or the result of their inspection (par. 2). To ensure impartiality, the staff may not be remunerated on the basis of the number or the results of the tests/inspections which are carried out (par. 5).

65 Council Directive 90/387/EEC, of 28 June 1990, on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L 192, 1, as amended by Directive 97/51, Art. 5 bis, par. 2.

66 ONP Framework Directive 90/387, Art. 5 bis, par. 2, as amended by Directive 97/51.

67 *Ibidem.*

68 European Court of Justice (ECJ), 13 December 1991, *RTT*, I-5941. On that judgment, see the following specific comments: GYSELEN L. (1992), *Common Market Law Review*, 1229 s.; SLOT P. J. (1993), *Sociaal-economische wetgeving*, 530 s.; TAYLOR S. (1994), *European Competition Law Review*, 322 s.; VAN GERVEN Y. (1992), *Nederlandse staatscourant*, n° 5, 4.

authority was vested on that undertaking, which had responsibility for setting criteria to be respected for terminal connection and ensuring compliance with these criteria.

That situation was found incompatible with the EC Treaty. For the Court of justice, the combination of economic activities and regulatory powers is contrary to the EC rules of competition. *In specie*, equality was impaired among the economic agents, as the national operator could favour its own terminals to the detriment of competitors'.[69]

> "A system of undistorted competition ... can be guaranteed only if equality of opportunity is secured between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors".[70]

III. Fundamental Principles

A last illustration is provided about the general requirements underlying the approach adopted by the Commission and /or the Council/Parliament. This illustration is related to fundamental principles which are imposed on the public authorities.[71] These principles may be associated with the philosophy which has apparently inspired the reform. In that philosophy, economic agents must be allowed to carry out their activities as freely as possible. Public interferences should therefore be limited to a strict measure, and the rules enacted by the authorities should be designed with great care.[72]

A framework is thus established, to ensure that public interventions will not disrupt the optimal allocation of resources which may be expected from the spontaneous interaction of the market forces. It is hoped that such disruptions will be avoided if the public actions conform with that framework, which is made of these fundamental principles.

- *Equality*. Pursuant to a first principle, the authorities may not discriminate in favour of certain undertakings. All economic agents are thus to be treated equally. In these conditions, decisions will be based on economic merits, not on political considerations.

---

69 Par. 25.

70 "In those circumstances, the Court continues, the maintenance of effective competition and the guaranteeing of transparency require that the drawing up of technical specifications, the monitoring of their application, and the granting of type-approval must be carried out by a body which is independent of public or private undertakings offering competing goods or services in the telecommunications sector" (par. 26).

71 These principles are also mentioned in some instruments in connection with the behaviour adopted by the former national operators. See e. g. ONP Interconnection Directive, art. 6 ("Non-discrimination and transparency") and Art. 7 ("Principles for interconnection charges and cost accounting systems").

72 On that subject matter, see CLEMENTS B. (1998), The impact of convergence on regulatory policy in Europe, *Telecommunications Policy*, 203 s.; KPMG (1996), *Public Policy Issues Arising from Telecommunications and Audiovisual Convergence*, Report to the European Commission, 171 s.; and NIHOUL P. (1998), Competition or Regulation for Multimedia?, *Telecommunications Policy*, 210 s.

- *Objectivity*. Under a second principle, the actions undertaken by public authorities must pursue aims which are accepted and recognised in the European Union. In telecoms, these values are principally embodied in the essential requirements which can be found in Directives adopted by the Commission and/or the Council/Parliament.[73]

- *Proportionality*. The third requirement is related to the means which may be used by the authorities to achieve objectives based on values introduced in the previous paragraph. Firstly, the means implemented by the authority must be capable of attaining the objective which is pursued - there must exist a causality between these means and the ends. Secondly, there must not exist a possibility to replace the measure by another one, which would allow the realisation of the same objective but affect less the protected value. Thirdly, the measure should not produce excessive effects on the markets.[74]

The fundamental principles appear in the two categories of instruments which are analysed here. To give an example concerning the "Competition (law)" framework, these principles were introduced by the Commission in Terminal Competition Directive. Pursuant to that instrument (Art. 3), Member States may impose technical qualifications to individuals and undertakings who wish to connect, bring into service and maintain terminal equipment. That possibility is however submitted to a condition. The requirements may only be imposed "on the basis of objective, non-discriminatory and publicly available criteria".[75]

The principles also appear in several instruments adopted by the Council and the Parliament ("Regulation" framework). According to ONP Framework Directive, they must be respected by authorities when the latter establish conditions in connection with the Open Network Provision. These conditions must be based on objective criteria,[76] they must guarantee

---

73 For example, see Service Competition Directive (Commission), Art. 1, par. 14 as well as ONP Interconnection Directive (Council and Parliament), Art. 2, point 6.

74 On the principle of proportionality, see in general HERDEGEN M. (1985), The Relation between the Principles of Equality and Proportionality, *Common Market Law Review*, 683 s.; KAPTEYN P. J. G. & P. VERLOREN VAN THEMAAT (1998), *Introduction to the Law of the European Communities*, third edition edited and further revised by L. GORMLEY, London - The Hague - Boston, Kluwer International, 144 s.; LENAERTS K. & P. VAN YPERSELE (1994), Le principe de subsidiarité et son contexte: étude de l'àrt. 3 B du traité CE, *Cahiers de droit européen*, 52 s.; SCHWARZE J. (1994), *Droit administratif européen*, Bruxelles, Bruylant-Office des publications officielles des Communautés européennes, vol. 2, 898 s.; VAN GERVEN W. (1992), Principe de proportionnalité, abus de droit et droits fondamentaux, *Journal des tribunaux*, 305 s.; ID. (1993), Les principes de subsidiarité, proportionnalité et coopération en droit communautaire européen, *in Hacia un nuevo orden internacional y europeo, estudios en homenaje al Profesor Don Manuel Diez de Velasco*, 1281 s.; WYATT D. & A. DASHWOOD (1993), *European Community Law*, London, Sweet & Maxwell, 89 s.

75 "Member States may ... require economic operators to possess the technical qualifications needed to connect, bring into service and maintain terminal equipment on the basis of objective, non-discriminatory and publicly available criteria". Art. 3.

76 Council Directive 90/387, of 28 June 1990, on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L 192, 1, Art. 3, par. 1.

equality of access (non-discrimination)[77] and they must be proportional to the objectives which are sought.[78]

It does not come as a surprise that said principles were introduced by the Commission. Their importance is underlined throughout the Directives enacted by that authority in connection with the introduction of competition on the telecom markets. The emphasis placed on these principles in these instruments is almost obsessive. Thus, they appear in provisions regarding

- the definition[79] and the abolition[80] of special rights,
- the procedures that can be imposed on undertakings,[81]
- the conditions which are related to voice telephony and the provision of public networks,[82]
- the conditions related to mobile and personal communications,[83]
- the radio-spectrum[84] and number attribution,[85]
- the interconnection agreements,[86]
- the conditions related to the access to fixed public networks,[87]
- as well as the financial charges imposed upon undertakings.[88]

---

77 *Ibidem.*

78 See e. g. Art. 3, par. 3. "Open network provision conditions may not allow for any additional restrictions on the use of the public telecommunications networks and/or publicly available telecommunications services, except those which are compatible with Community law".

79 Service Competition Directive 90/388, Art. 1, par. 3.

80 Same Directive, Art. 2.

81 Same Directive, Art. 2, par. 3.

82 Same Directive, Art. 3, par. 3.

83 Same Directive, Art. 3 *bis*, par. 2.

84 Same Directive, Art. 3 *ter*, par. 1.

85 Same Directive, Art. 3 *ter*, par. 4.

86 Same Directive, Art. 3 *quinquies*, par. 3 and Art. 4 *bis*, par. 1.

87 Same Directive, Art. 4, par. 1.

88 Same Directive, Art. 6, par. 3.

I. A real homogeneity

I. Principle

Common principles may thus be found underlying the categories which are examined, i. e. the rules related to "Competition (law)" (Commission) and those regarding "Regulation" (Council/Parliament). These principles, however, do not constitute the main connection between the two categories. As a matter of fact, that connection goes far beyond the existence of a common inspiration. In effect, one may find in some respects a real homogeneity between the two sets of instruments. In either categories, they address the same issues, which they solve by implementing similar solutions. In these circumstances, it becomes hardly possible to establish a clear cut distinction between "Regulation" and "Competition (law)" - and to continue presenting the reform as a shift from one paradigm to the other.

The homogeneity which thus seems to exist between both categories is illustrated hereinafter by the treatment granted in the telecom instruments to three issues, which have quintessential importance in the reform.

The first issue is related to the procedures undertakings are to go through if they want to receive an authorisation which will allow them to carry out given activities, in cases where such procedures are organised or allowed by EC law.

The rules dealing with these procedures provide a essential mechanism for authorities to impose conditions on undertakings who wish to perform an activity on a telecom market. The performance of activities is made contingent on the respect of constraints established in the name of general interest. The procedures also provide an opportunity for an encounter between the undertakings and the authorities, in which the latter may verify to what extent the former intends to behave in a way which is compatible with the law and the public conception of general interest.[89]

The second issue regards interconnection among existing networks, as well as access by service providers to such networks in order to perform activities through these infrastructures.

Again, the rules concerning interconnection have an essential role in the reform. They provide a point of contact between the objective which is pursued by the EC authorities - introduce more freedom to the markets - and the views which dominated the period prior to their intervention. During that period, there was an idea that telecom infrastructure was to be consid-

---

89 On these procedures, see - in the telecom sector - , see a. o. BLANDIN-OBERNESSER A. (1996), *Le régime juridique communautaire des services de télécommunications*, Paris, Armand Colin, 130 s.; COCKBORNE J.-E. DE (1997), La libéralisation du marché des télécommunications en Europe, *Journal des tribunaux-droit européen*, 220 s.; IDATE (1995), *L'impact de l'autorisation de la fourniture de services de télécommunications libéralisés par les câblo-opérateurs*, Bruxelles, Rapport présenté à la Commission européenne (DG XIII); KIESSLING T. & Y. BLONDEEL (1998), The EU regulatory Framework in Telecommunications: A Critical Analysis, *Telecommunications Policy*, 571 s.

ered a natural monopoly.[90] Heavy investments were committed by operators in order to build, maintain and upgrade networks. These expenses - it was feared - would only be amortised if the totality of the demand was concentrated on their object (infrastructure).

The idea progressively disappears, although networks continue to require heavy investments. In that context, how may competition be introduced? Competing networks with a high capacity and an extensive coverage may not be established in a short period of time. The only possibility is to organise interconnection among existing assets, while waiting for them to be completed over the years.[91]

Issues of a similar nature were raised in connection with the introduction of competition in the market for telecom services. A natural monopoly was supposed to exist on the markets for telecom infrastructure, as it has been mentioned before. Authorities did not want the relative absence of competition to be extended onto the markets for services, where no such investment related constraints seemed to exist. They thus decided to intervene, in an attempt to organise access for service providers to the existing infrastructure. The hope was, through that organisation, to make it possible for providers to enter into contact with potential clients through the existing networks.[92]

The last issue to be addressed in this article concerns the rules for universal service. As is well known, that concept refers to the main exception which has been accepted as a concession to the introduction of competition on the telecom markets. Through that mechanism, basic

---

90 On that subject matter, see in general POSNER R. (1969), Natural monopoly and Its Regulation, *Stanford Law Review*, 548 s.; SHARKEY W. (1982), *The Theory of Natural Monopoly*, Cambridge University Press; SCHMALENSEE R. (1979), *The Control of Natural Monopolies*, Lexington, Lexington Books. For a specific analysis with a legal perspective in the telecom sector, see NAFTEL J. M. (1993), The Natural Death of a Natural Monopoly : Competition in EC Telecommunications after the Telecommunications Terminals Judgment, *European Competition Law Review*, 105 s.

91 Alternative infrastructure is thus established progressively with network pieces installed by undertakings for specific segments (business areas, etc.) or for their own use, as well as with non telecom conduits which may be converted to telecom purposes (e. g. audiovisual network or for some usage the grids used for distribution of electricity). Interconnection may be sought with public infrastructure to reach areas which are not covered by alternative infrastructure. On that subject matter, NIHOUL P. (1999), *Les télécommunications en Europe: concurrence ou organisation de marché?*, to be published shortly, Louvain-la-Neuve, Larcier, Part I, Title III.

92 On interconnection, see COUDERT BROTHERS (1995), *Competition Aspects of Interconnection Agreements in the Telecommunications Sector*, Report to the European Commission (DG IV), Luxembourg, Office for Official Publications of the European Communities; ERGAS H. & E. RALPH (1994), The Interconnection Problem with a Focus on Telecommunications, *Communications et stratégies*, n° 16, 9 s.; VAN LIEDEKERKE D. (1997), Access to Infrastructure, Networks and Services Under EC Competition Law : Interconnection in Telecommunications and Precedents in Other Sectors, *in* UNION EUROPÉENNE DES AVOCATS (1997), *The Law of the Information Super-Highways and Multimedia : A New Challenge*, Bruxelles, Bruylant, 131 s.; WISSENSCHAFTLICHES INSTITUT FÜR KOMMUNIKATIONSDIENSTE & EUROPEAN-AMERICAN CENTER FOR POLICY ANALYSIS (1994), *Network Interconnection in the Domain of ONP*, Brussels, Report to the European Commission (DG XIII)

services are provided at reasonable conditions, in circumstances where they would not have been supplied spontaneously by the markets.[93]

As appears from this presentation, the issues raised by universal service are located at the intersection between market interaction and public intervention. The covered areas are those where a competitive environment would not ensure the provision of services which are deemed essential in modern society - that situation being remedied by public action. Universal service thus stands at a place where public intervention starts while market interaction as directed by competition (law) comes to an end.

II. Procedures

In telecoms as in other areas, the EC authorities are motivated by a desire to realize a common market for equipment and services.[94] In order to realise that objective, they seek to establish an environment where undertakings may carry out inter-state activities without excessive obstacles. In that environment, the Member States retain the right to impose procedures prior to the provision of services. In these procedures, an authorisation is granted in so far as the candidate(s) comply with specific requirements, which have been - to a certain extent - approximated. It is hoped that through that mechanism, similar constraints will be imposed on undertakings in different Member States, thereby placing operators on equal-footing and facilitating the obtention of authorisations throughout the Community.

At first sight, the determination of requirements was made at Community level by the Council and the Parliament. A specific instrument - Service Harmonisation Directive - was adopted to that effect by these institutions. That first impression must however be corrected, if one takes a more comprehensive view of the instruments which have been adopted in the telecom sector. In fact, the decision to harmonise as well as the options as to the scope of harmonisation were not decided by the Council and the Parliament acting alone. To a certain extent, they correspond to some made earlier by the Commission. Not only were these choices and options expressed by that latter authority in proposals handed over to the Council and Parlia-

---

93 On the universal service, see in general CURIEN N. & E. DOGNIN (1995), Le service universel: quelle valeur? quel coût? quel financement?, *Annales des télécommunications*, 337 s.; HAAG M. & L. GOLSING (1997), Universal Service in the European Union Telecommunications Sector, *in* KUBICEK H., DUTTON W. H. & R. WILLIAMS (editors), *The Social Shaping of Information Superhighways, European and American Roads to the Information Society*, Frankfurt/New York-Campus Verlag, New York-St. Martin's Press, 233 s.; HILLS J. (1993), Universal Service: A social and Technological Construct, *Communications et stratégies*, n° 10, 61 s.; MURRONI C. (1997), Universal Service in Liberalised Telecommunications Markets, *in* DUMORT A. & J. DRYDEN (editors), *The Economics of the Information Society*, Brussels, European Commission, 76 s.; POULLET Y & F. VAN DER MENSBRUGGHE (1995), Service universel ou public dans la politique européenne des télécommunications, *Communications et stratégies*, n° 17, 11 s.; UNGERER H. & P. LIPPENS DE CERF (1994), Le service universel, le service public et le réseau, *Communications et stratégies*, n° 13, 23 s.

94 In this section, the analysis is limited to the rules concerning the provision of services. For terminals, see Service Harmonisation Directive as well as Terminal Competition Directive, as amended, on the basis of which a similar study could be carried out.

ment for adoption under Art. 100 A.[95] But they also appear in Directives enacted by the Commission on its own initiative in the "Competition (law)" framework.[96] In the end, the rules formulated in "Regulation" (Council and Parliament) seem to repeat - and somehow develop - those which were already given a binding force in "Competition (law)" (Commission).

These rules, which thus appear in both sets of instruments, may be presented as four items. They are presented hereafter in an explicit form as well as under the form of a scheme (table) summing up in a graphical manner the interventions made by the respective authorities.

- *Rule 1*. Several situations may be envisaged with respect to the procedures that may be imposed to undertakings : absence of formality, obligation to declare an intention to start an activity ("declaration"), obligation to obtain an authorization in order to perform certain services ("authorisation") as well as the obligation to obtain an individual licence in connection with specific activities ("licence").

- *Rule 2*. There must exist a relationship between the procedures imposed by the Member States and the activities which are envisaged by the undertakings. In fact, the procedural requirements set forth by the national authorities must be proportional to the objectives which are sought. Thus, procedures must in principle be limited to a declaration or an authorization. For instance, an individual licence - which is a more demanding formal requirement - may only be requested to carry out an activity in exceptional circumstances - for instance on markets related to vocal telephony, public networks or mobile networks.

- *Rule 3*. Obligations may or must be imposed on certain activities. In substance, essential requirements[97] have to be respected in all cases. Trade regulations may be introduced on given markets - those for which an individual licence may be requested. Operators supplying public networks may have to comply with financial obligations related to the provision of the universal service.

---

95 That Article provides the institutional framework for the adoption of harmonisation Directives. On that subject matter, see a. o. KAPTEYN P. J. G. & P. VERLOREN VAN THEMAAT (1998), *Introduction to the Law of the European Communities*, third edition edited and further revised by L. GORMLEY, London - The Hague - Boston, Kluwer International, 774 s.; SLOT P. J. (1996), Harmonisation, *European Law Review*, 378 s.; VIGNES D. (1993), The Harmonisation of National Legislation and the EEC, *European Law Review*, 358 s.

96 See in particular Mobile and Personal Communications Directive 96/2 and Full Competition Directive 96/19. Provisions dealing with procedures were inserted by these instrument in Service Competition Directive, mainly at Art. 2, 3 and 3 *bis*.

97 For some examples, see Council Directive 90/387/EEC, of 28 June, on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L 192, 1, art. 3, par. 2, as amended. For definitions given by the Commission, see a. o. Commission Directive 94/46/EC, of 13 October 1994, amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L 268, 15, art. art. 2, par. 1, point (v) Commission Directive 96/2/EC, of 16 January 1996, amending Directive 90/388/EEC with regard to mobile and personal communications, OJ L 20, 59, art. 1.

- *Rule 4.* The number of licences may be limited in specific circumstances (lack of availability spectrum), whereas the licensees must respect the essential requirements and the fundamental principles.[98]

	Liberalisation*	Harmonisation
Authorisation	Competition	*Idem*
	Essential requirements	*Idem*
	Contribution to the universal service	*Idem*
	Trade Regulation: permanence, availability and quality of the service	Respect of ONP rules
Licence	Competition	*Idem*
	Essential requirements	*Idem*
	Contribution to the universal service	*Idem*
	Trade Regulation: permanence, availability and quality of the service	ONP rules, trade regulation and other rules

Procedures

Some differences may be found between the two sets of instruments - but they appear limited to considerations which may be deemed accessory. One of them is related to the conditions under which individual licences may be required for an undertaking to be allowed to perform certain activities. In Competition Directives 96/2 and 96/19, the Commission determined the activities which could be affected by that requirement. In that framework, it stipulated that licences could be required in connection with the provision of vocal telephony or public telecommunications networks[99], as well as with the establishment or provision of mobile and personal communications systems.[100]

---

98 Service Competition Directive, Art. 3, al. 5 for voice telephony and the provision of public telecommunications network, as well as Art. 3 *bis*, al. 3 for personal and mobile communications.

99 "Member States may limit the number of licences to be issued only where related to the lack of availability spectrum and justified under the principle of proportionality". That provision has been introduced in Service Competition Directive under Art. 3, par. 4.

100 "Member States may limit the number of licences for mobile and personal communications systems to be issued only on the basis of essential requirements and only where related to the lack of availability of frequency spectrum and justified under the principle of proportionality". That provision was introduced in

A different approach was adopted by the Council and the Parliament in Service Harmonisation Directive 97/13.[101] Admittedly, the activities specified by the Commission were mentioned in that instrument. However, the Council and the Parliament envisaged in addition to these activities, several purposes[102] which may be put forward by the Member States to justify the imposition of a licence requirement in other activities.

In fact, the difference between both approaches should not be overestimated. The purposes envisaged by the Council and the Parliament refer to situations related to activities mentioned by the Commission in "Competition (law)".

- Thus, the Council and the Parliament allow Member States to impose licences in circumstances where the licensee is to have access to radio frequencies or numbers. These situations are not really different from those envisaged by the Commission, in particular the establishment and the provision of public telecommunications networks (numbers) and mobile/personal communications (frequencies).[103]

- The Council and the Parliament envisage licence requirements in cases where obligations and constraints are to be imposed in connection with the mandatory provision of publicly available telecommunications services and/or public telecommunications network, including obligations to provide universal service and other constraints under ONP legislation.

- Again, these requirements should not be separated from activities identified by the Commission. Among these activities were indeed those which are related to infrastructure (above). The obligation to provide a universal service - another circumstance taken into account by the Council and the Parliament - mainly concerns, at Community level, basic services, which are related to networks, or fundamental performances such as voice telephony, which is also associated by the Commission with

---

Service Competition Directive under Art. 3 *bis*, par. 3.

101 Service Harmonisation Directive, Art. 7, par. 2: "[T]he provision of publicly available voice telephony services, the establishment and provision of public telecommunications networks as well as other networks involving the use of radio frequencies may be subject to individual licences".

102 Service Harmonisation Directive, Art. 7, par. 1. Among these purposes are the desire to allow the licensee access to radio frequencies or numbers; to impose obligations and requirements relating to the mandatory provision of publicly available telecommunications services and/or public telecommunications network, including obligations which require the licensee to provide universal service and other obligations under ONP legislation; and to impose specific obligations in accordance with Community competition rules where the licensee has significant market power.

103 One should also mention the reference which is made explicitly in Competition Directive 96/19, to the possibility of establishing a licence requirement in connection with number allocation. "Member States shall ensure ... that adequate numbers are available for all telecommunications services. They shall ensure that numbers are allocated in an objective, non-discriminatory, proportionate and transparent manner, in particular on the basis of individual application procedures". That provision was introduced in Service Competition Directive under Art. 3 *ter*, par. 4.

a licence requirement. As for the other ONP obligations, they are mainly related to leased lines (ONP Leased Lines Directive 95/62), voice telephony (ONP Voice Telephony Directive) and interconnection with public network (ONP Interconnection Directive 97/33) - three fields similarly mentioned by the Commission in connection with a licence requirement.[104]

- A last difference may be mentioned, which concerns the degree to which certain obligations are specified. An illustration may be taken in that regard from a requirement introduced by Service Harmonisation Directive (Council and Parliament). Under that instrument, undertakings may have to supply information to allow public control on the markets.[105] No such obligation may be found with a similar degree of explicitation in "Competition (law)" instruments (Commission).

That relative silence should not be construed, however, as implying that the provision of information is not required in that latter framework. In fact, it may be considered that supplying information for monitoring purposes is inherent to the idea of a public control on the markets. Controls are to be organised under telecom "Regulation" instruments, in particular those related to the internal market. But these documents have no exclusivity in dealing with verifications by authorities. Public controls are also to be implemented under telecom "Competition (law) instruments. To give an example, indications may be found to that effet in Service Competition Directive (Art. 2, par. 3), which refers to procedures to be established in order to ensure a proper exercise of economic activities. The same instrument (Art. 7) provides that operating licences are to be granted by independent bodies, which will be entrusted with additional tasks related to the "surveillance of usage conditions".

The provisions - which only provide illustrations - do so in a clear fashion. Possible requirements related to the provision of information for verifications by authorities are not limited to "Regulation" instruments. They may also be introduced under "Competition (law)" legal documents.[106]

---

104 In fact, the authorities have privileged different approaches. A ma*ter*ial perspective was adopted by the Commission. That institution apparently wanted to enumerate the activities which could be concerned by a licence requirement, probably in an attempt to limit the discretion of the Member States in that regard. A functional approach was adopted by the Council and the Parliament, who did not want to limit the requirement to precisely circumscribed activities but preferred to leave the question open so as to allow the Member States to introduce a licence requirement in cases where that requirement was appropriate even though it had not been envisaged by the Commission.

105 See Service Harmonisation Directive, Annex , point 2.2.: "Conditions which may be attached to all authorisations, where justified and subject to the principle of proportionality: conditions linked to the provision of information reasonably required for the verification of compliance with applicable conditions".

106 A similar comment may be made with respect to the obligation to respect EC competition law. An obligation to comply with the rules of competition is explicitly formulated in Service Harmonisation Directive ("Regulation") (Annex, point 2.3.). No such reference may be found - at least in an explicit manner - in "Competition (law)" instruments. Does that imply that the rules of competition are not obligatory in that framework? In fact, the application of competition rules is mandated by general provisions such as Art. 85

III. Interconnection

It is believed that competition will emerge on the markets for telecom services, to the extent providers are allowed to distribute their services via the existing networks.[107] The existing infrastructure is dominated by the former operators, which are also engaged in the provision of services. Under these circumstances, there is danger that such operators will attempt to restrict access to the network, in a hope to maintain and/or consolidate their position.[108]

The issue is addressed by several instruments adopted by the EC authorities in the "Regulation" and "Competition (law)" frameworks. Four rules are established in both sets of instruments in connection with that issue. They are presented in the following paragraphs, as well as in a table summarising their content and identifying the instrument where they appear.

- Dominant operators must provide an interconnection to their network when the demand formulated to that effect by a service provider or another network operator may be deemed reasonable.
- The conditions under which the interconnection is provided, must comply with the fundamental principles (equality, objectivity, proportionality).
- Such conditions are to be negociated by the parties, with a possibility for the national regulatory authority to intervene in cases no agreement may be found between the parties.
- The operator must hold a cost based accountancy system, which allows for the determination of the expenses related to the provision of interconnection.

The four rules thus summarised may be found in Competition Directives adopted by the Commission, as well as in Regulation Directives emanating from the Council/Parliament. In fact, the adoption of the relevant instruments seem to mirror the pattern presented above in connection with the procedures. A specific legal document was enacted by the Council and the Parliament with respect to interconnection - ONP Interconnection Directive. That intervention suggests that the EC rules regarding interconnection are to be considered part of the "Regula-

---

and 86 EC, without a need for the Commission to repeat these rules in the specific telecom "Competition (law)" instruments.

107 See e. g. COOPERS & LYBRAND (1994), *Alternative Telecommunications Infrastructure for Corporate Networks*, Brussels, Report to the European Commission (DG XIII), 6 s.; COUDERT BROTHERS (1994), *An Overview and Analysis of the Legal and Regulatory Barriers of the Take-Off of Multimedia Applications in Preparation for the Infrastructure Green Paper*, Report to the European Commission, Brussels, 9 s.; WILMER, CUTLER & PICKERING (1995), *Competition Aspects of Service Providers to the Resources of Telecommunications Network Operators*, Report to the European Commission, (DG IV), 20 s.; STANBROOK & HOOPER (1994), *Legal and Institutional Issues Raised in Preparing for the Full Liberalisation of the Telecommunications Sector*, Brussels, Report to the European Commission, 73 s.

108 On that subject matter, see a. o. **Projet de Communication de la Commission relative à l'application des règles de concurrence aux accords d'accès dans le secteur des télécommunications - Cadre général, marchés en cause et principes, JO C 76, 9.**

tion" framework.[109] The Directive indeed appears to satisfy the criteria discussed earlier in connection with the definition of a regulatory approach (determination of conditions related to entry, of the obligations associated with the provision of goods/services as well constraints on the investments projected by the undertakings).

That appearance is however put to the test when one realises that the four rules correspond to choices which had been made earlier by the Commission in application of the powers vested upon that authority in the framework of competition. Again, the provisions were adopted by the Council and the Parliament on the basis of decisions made beforehand by the Commission. In one word, they appear to implement a program designed by the Commission. As a result, it is difficult to envisage a classification the rules they contain, in a category limited to Regulation or to Competition (law).

	'Competition (Law)'*	**'Regulation'**
The principle	"Member States shall ensure that the telecommunications organisations provide interconnection";	"Member States shall take all-necessary measures to remove any restrictions which prevent organisations authorized ... from negociating interconnection agreements"; "organisations ... shall meet all reasonable requests for access to the network";
Fundamental principle	"the telecommunications organisations provide interconnection ... on non-discriminatory, proportional and transparent terms, which are based on objective criteria";	"the telecommunications organisations provide interconnection ... on non-discriminatory, proportional and transparent terms, which are based on objective criteria";
Accountancy	"the cost accounting system implemented by telecommunications organisations ... identifies the cost elements relevant for pricing interconnection offerings";	"The Commission shall ... draw up recommendations on cost accounting systems and accounting separation"; "the cost accounting systems ... are suitable for implementation of the requirements";
Reglatory Authorities	"If commercial negociations do not lead to an agreement ...,	"national regulatory authorities may intervene on their own

109 An example of that conception may be found a. o. in SAUTER W. (1997), *Competition Law and Industrial Policy in the EU*, Oxford, Clarendon Press, 207 s.

	Member States shall ... adopt a reasoned decision which establishes the necessary operational and financial conditions and requirements for such interconnection";	initiative at any time, and shall do so if requested by either party, in order to specify issues which must covered in an interconnection agreement, or to lay down specific conditions to be observed by one or more parties to such an agreement".

Interconnection

IV. Universal service

The third illustration is related to the universal service, which appears to be the main derogation conceded to the introduction of competition on the markets. EC authorities did not wish the undertakings to carry out their activities in total freedom. They wanted to ensure that the economic and technological development attained in telecommunications as a result of competition, would produce advantages for the entire society. To that effect, the provision of minimal services has been organised at reasonable conditions for all members of the society (universal service).[110]

The issue was extensively addressed by the Council and the Parliament in ONP Interconnection Directive. Again, the intervention of these authorities may be summarised in four rules, which are presented below (see also table 3).[111]

R1. The cost of the universal service must in principle be supported by the operator providing the services, but the burden may be financed in another manner if and when that burden is excessively inequitable.

R2. The deficit incurred while providing the universal service may not be financed through a derogation to the rules of competition. Subsidies may however be paid by the public authorities, or contributions by the undertakings carrying out their activities in specific markets. In that latter case, the payment should be made directly to the undertakings providing the universal service in the form of a supplementary charge added to the interconnection charge. The sum may also be paid through a specific fund established and organised by the public authorities.

R3. The obligation to contribute to the cost of the universal service must be limited to specific undertakings, *in specie* those which provide public networks or voice telephony.

---

110 Basic references concerning universal service have been provided earlier in the footnotes.

111 The references of the provisions where these rules may be found, both in Regulation and Competition (law), may be found in table 3.

R4. The subsidies and the contributions are to be limited to the net cost incurred in providing the services which are imposed by the legislation and would not have be provided absent such a financing mechanism.

These rules are set out in ONP Interconnection Directive, which was enacted by the Council and the Parliament. It may not be said, however, that they correspond to choices made by the authorities acting in their own capacity. In fact, these rules are based on options which were previously chosen by the Commission and which were given a binding force in the instruments adopted by that authority in the "Competition (law)" framework.

Competition	**Regulation**
"[A]ny national scheme **R1** which is necessary to share **R4** the net cost of the provisions of universal service obligations entrusted to the telecommunications organisations, with other organisations **R2** whether it consists of a system of supplementary charges or a universal service fund : **R3** *a)* apply only to undertakings providing public telecommunications networks; *b)* allocate the respective bruden to each undertaking according to objective and non-discriminatory criteria and in accordance with the principle of proportionality. **R4** Member States shall communicate any such scheme to the Commission so that it can verify the scheme's compatibility with the Treaty."	"**R1** Where a Member State determines ... that universal service obligations represent an unfair burden on an organisationn, it shall establish a mechanism for sharing **R4** the net cost of the universal service **R3** with other organizations operating public telecommunications networks and/or publicly available voice telephony services". **R2** "Contributions ... may be based on a mechanism specifically established for the purpose ... and/or may take the form of a supplementary charge added to the interconnection charge". **R4** "[O]rganisations with universal service obligations shall ... calculate the net cost of such obligations".

Universal service (Rules numbers are mentioned in front of the passage related to them)

J. Conclusion

To conclude, there is much to say in institutional terms about the particular situation of the Commission which, on the one hand, has the capability to orientate the choices to be made by the Council and the Parliament through the drafts which are submits to their adoption and

which, on the other hand, may adopt on its own binding rules of a general nature (Art. 90 EC) allowing it to organise entire economic sectors. However, observations should remain focused on the central theme of this article - the lessons to be drawn in the perspective of convergence, from the transformations which have allegedly occurred in public intervention during the telecom reform.

In that respect, the main contribution of this article is to show through a legal analysis, that there are serious reasons to challenge the traditional presentation given of the reform as a shift from regulation to Competition (law). To what extent can we consider that a real shift has occurred as Regulation and Competition (law) rely on common principles and address identical problems with similar solutions? In these conditions, is it still appropriate to argue that Competition law should be preferred in the name of an alleged public restraint and/or by virtue of a supposed general character?[112] These questions show how unclear Competition (law) still is in many respects. Let us hope that the debate on convergence will draw attention on obscurities to clarify ...

[112] For an example of specific approaches to sectors under competition law, see LAROUCHE P. (1998), EC competition law and the convergence of the telecommunications and broadcasting sectors, *Telecommunications Policy*, 219 s., which establishes that different treatments were granted under competition law to telecom and broadcasting merger cases.