Regulation of Telecommunications in the European Union: a challenge for the Countries acceding to the European Community

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The multi-sector negotiations with the prospective Member States and the European Commission on the conditions of accession present an occasion for re-assessing the *acquis communautaire*. For the Accession Candidates, the implementation of the EC telecommunications regime will also be a chance to regulate communications innovatively. An innovative regulatory framework taking up the challenge of the 'competition of jurisdictions' particularly discernible in the sector of telecommunications could place the new Member States in an advantageous position in the European Community and might even set the pace for a future European Community framework.

I. Telecommunications - the backbone of the Information Society

Globally, telecommunications have been liberalised on an unprecedented scale. The rationale behind these liberalising efforts is that an improvement in the field of the rapidly advancing telecommunications technology increases general welfare by aggrandising economic prosperity. Modern communication structures are the backbone not only of the telecommunications industry as such but of every sector of society, from business activities to private life. Therefore, a sophisticated communication infrastructure is the modern toolkit of European integration. Vice versa, an outdated telephone system can act as a brake on society as a whole. The European buzzword referring to present and future developments in communications is not simply the 'Information Superhighway' focusing on the transfer of information, but the 'Information Society' encompassing all sectors of society. The long-promised future of digital interactive everything has been initiated by increasing digitalisation and the consequent possibility of a whole new range of services, from Internet Service Providers to e-commerce. Thus, it is important for the prospective Member States to adjust to the liberalised and harmonised telecommunications regime of the European Community. However, it would be even more advantageous for them if they were not only to implement the present status quo, but to anticipate present and future developments - mainly the trend of converging markets and networks - and to elaborate a new communications regime encompassing the Community rules and simultaneously accommodating the demands of the dawning Information Society. Sketching the main features of the present Community telecommunications regime, the authors point to specific problems the prospective Member States will face and to the scope left for innovative regulation.

II. Telecommunications in the EC and in the prospective Member States

1. The telecommunications markets in the European Community and the CEEC

The set-up of telecommunication service providers in the EC and the prospective Member States is the result of an evolutionary process stimulated by the change of the legal background. In the beginning of the liberalisation process, there had usually been only one National Telecommunication Organisation in a monopolistic position. These monopolies were held to be natural monopolies because monopolies were deemed to be essential in making the costly telecommunication network workable from an economic as well as from a technical point of view. Nowadays, there is a multitude of telecommunication providers, even if the actual situation differs from Member State to Member State. In Germany, for example, there are at the moment more than sixteen hundred telecommunication service providers. More than 120 companies from all over the world have obtained voice telephony licenses here. Obviously, even with this increase in the number of providers, telecommunication networks have not collapsed, proving that the theory of a natural monopoly has failed at least in the telecommunication sector. All over the European Community, we have witnessed an unprecedented decrease of prices for telephony services. Contemporary digitalisation of the telephony networks is on the rise and technological innovations, e.g. the internet, have initiated changes in the markets of telecommunications and induced the convergence of previously separated markets and networks. The Commission has taken up the discussion on the effects of this trend and initiated several legislative.

As the prospective Member States strive for the implementation of the *acquis communautaire* and for fulfilling their obligations under GATS, a similar trend has started. However, a lot remains to be done. E.g. in the market for long distance and international calls, the sole provider is still quite often the national telecommunications carrier. Competitive markets can usually be found in the local fixed networks and mobile communication services. Yet even with competition in these sectors, the incumbents can be seen to be favoured over the new entrants by additional obligations for the new entrants.
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According to the EC Commission, coverage in the fixed network in the prospective Member States has presently reached in between 19 percent of the population in Poland and 33 percent of the population in Slovenia. In comparison, in the Member States with the lowest coverage, Ireland, Portugal, and Greece, the average coverage is about 44 percent. All the prospective Member States prognosticate increases in coverage, albeit with differences in extent. A relatively modest 25 to 30 percent coverage can be expected in the year 2000 according to the Polish Ministry of Communications, and an about 45 percent are the target for the Czech Republic. Concurrently, investments in the internet are on the rise and some of the prospective Member States can be expected to reach and maintain European Community level quite soon.

2. The development of the law of telecommunications in the European Community

The present market situation in the EC is the result of a legal process initiated in 1987 with the Green Paper on the development of the common market for telecommunications services and equipment. This has in turn led to a gradual process, leading to full liberalisation of telecommunications in the EC since 1 January 1998, with extensions for some Member States. This result has been approached gradually. First, the terminal equipment market was opened for competition introducing the principle of full mutual recognition of type approval for terminal equipment. After liberalising the market for terminal equipment, step by step the Commission abolished monopoly rights, starting with non-voice services and voice services for closed user groups. The legal basis in the EC Treaty proved fortuitous for the Commission: The EC-Treaty provides for the reduction of special and exclusive rights of public undertakings, especially state monopolies. The Commission is entitled to address on its own Directives and Decisions to Member States in order to reduce these special and exclusive rights. It is in the field of the abolishment of special and exclusive rights of public undertakings and monopolies that liberalisation as such is taking place.

Concurrently to the legislative activities of the Commission, Council Directives were adopted. First, alternative network infrastructures, e.g. cable television networks, were opened for the provision of telecommunications services. The Council of Ministers issued the Open Network Provision Directive establishing the basic principles for transparent and non-discriminating network access. The legal basis entails the adoption of the Directive in question by the Council of the European Community and the European Parliament. This leads to harmonisation of the Member States' laws - not necessarily to liberalisation. Finally, at the beginning of the last year, voice telephony was fully liberalised within the EC. The difference between the power of the Commission to act on its own and the harmonisation procedure according calling for legislative activity of the Council of Ministers and the European Parliament led to the basic dualism at the heart of EC telecommunication laws: On the one hand, the liberalising abolition of public monopolies, on the other hand, the shaping of a harmonised general framework for a liberalised market. Nowadays, when envisaging a regime for the Information Society, the emphasis is more on harmonisation than on liberalisation due to the fact that most services are not offered by former monopolies.

III. Implementation of the telecommunications law in the prospective Member States

1. A general framework

A fundamental duty of the accession candidates is the adoption of the acquis communautaire. As the general framework of EC telecommunications rules is laid down in Directives, there is a margin of discretion as to how the EC rules should be implemented in the law of the new Member States. According to the Art. 189 EC-Treaty, Directives are binding for the Member States addressed only as to the result to be achieved. There is some leeway - depending on the wording of the Directive - as to how precisely this final result is to be brought about through domestic implementation in the Member States. It is the Member States' duty to make the Directives applicable through acts of the national authorities ensuring that the Directives' objectives are efficiently accomplished. In the telecommunications sector, it is crucial to create a general national framework flexible enough to allow for rapid technological changes, for instance due to the digital convergence of information technologies. Consequently, the technical rules - being especially prone to change should be dealt with in administrative ordinances.

2. Open Network Provision

One of the core concepts in the new legal framework is the so-called concept of Open Network Provision (ONP). The aim of ONP is twofold. First, the optimisation of the technology involved and the facilitating of the Europe-wide offer of services is aimed for. This is to be achieved by harmonisation of technical interfaces, usage conditions, and tariff principles on the basis of European standards adopted by ETSI. Second, the ONP rules state that networks have to be opened to other providers of services. In order to bring this about, basic principles and essential requirements for these conditions are laid down. If Member States frame conditions for ONP, these have to contain objective criteria, transparent conditions, and they have to provide for equality of access in a nondiscriminatory way. Only essential requirements can constitute exceptions to the ONP-rules, which are enumerated, e.g.
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security of network operations and the network integrity.

Seeing that so far the ONP-rules are only partially implemented in the prospective Member States, changes are still necessary in this area. Implementing the ONP-rules will imply a more competitive treatment of the dominant players in most of the prospective Member States. It should be kept in mind, that these laws have to be made workable.

3. Interconnection

Interconnection means the linking, physical as well as logical, of telecommunications networks in order to allow the users of one organisation to communicate with users of another organisation, or to access services provided by another organisation. Interconnection rules are a prerequisite for establishing competition in markets with a network structure. The EC Interconnection rules state that network providers with a market share above a certain threshold have to offer interconnections, i.e. to let competitors use their networks charging only the expenses incurred plus an adequate return on investment. Thus, competitors are enabled to offer services competitively without having to build their own network. This is crucial as the former national carriers control a bottleneck between the services market and the customer.

The relative position in the market is taken into account in order to compensate for an imbalance in negotiating power. The player has to have 'significant market power', in order to face specific obligations. This is the case for public telecommunication network operators and public telecommunication services providers having more than 25 percent market share. These obligations relate to the granting of network access, non-discriminatory treatment of competitors demanding access to the network, the publication of IC terms and prices, the cost orientation of IC prices, and cost accounting requirements. The rule that telecommunication companies with significant market power face more duties than those companies with a smaller market share is known as the principle of asymmetric regulation. All players, even those without significant market share, have the obligation to negotiate interconnection agreements.

In the prospective Member States, the former monopolists have a much lower share of a possible future total of phone lines due to the present low coverage. Thus, one of the reasons for asymmetric regulation in the EC regime - putting more obligations on carriers with significant market power specifically in order to expose the market position of the ex-monopolist - is not as compelling in the prospective Member States as it has been in the present Member States. When implementing the interconnection rules into domestic laws, the thrust of the competition rules should rely less on asymmetric regulation and more on the general rules on competition.

4. Universal Services

Correlating to the extended freedom of the telecommunications companies, the EC established a universal services regime to guarantee a minimum of telecommunications services which must be available for everyone within the EC. To be precise, universal services designate a defined minimum set of services of specified quality which has to be made available to all users independent of their geographical location and at an affordable price. The idea behind the universal services concept is to prevent the market participants from picking out the raisins in the telecommunications market: all regions of a Member State, be they densely or loosely populated, should be provided with basic telecommunication services, even though the expenses per line of providing the less populated areas with this basic level of telecommunication services will be higher than the expenses per line in the densely populated areas.

The provision of universal services can be financed in two ways: On the one hand, a mechanism could be established for sharing the net cost of the universal service obligations. Also here, the principles of transparency, non-discrimination and proportionality in setting the contributions to be made have to be considered. The setting up of such a mechanism is allowed for if the provision of universal services is not commercially viable and represents an unfair burden for the universal services provider. On the other hand, universal services can be financed by supplementary charges paid by undertakings interconnecting with the universal service provider.

Unfortunately, the Universal Services concept has not been framed in a systematic way, let alone set out in a single Directive. The rules defining the Universal Services are spread over several Directives. There is no final enumeration of services which are part of the universal services concept. The definition of such a list depends on the technical change in the telecommunications sector and its influence on society. Whether a telecommunication service is important enough so that every citizen of the European Union should have access to it; is subject to social change. By now, the universal services within the EC are defined as the traditional (plain-old) telephony service with the additional capability for fax and data transmissions, directory services, and public pay phone services. As the Internet has become part of today's life, it is not surprising that some Member States are interested in adding Internet-access to the list of universal services.

Universal Services put a major burden on the players having to finance them. Considering that universal services imply the possibility of voice, fax and data transfer for the general population, major investments into the network structure will be needed. The costs for all players will increase significantly - the benefits accrued by liberalisation could be lost through the high
costs for extending the network structure. Thus, it might
be in the interest of the Member States to negotiate
an exception to the universal services regime. Several
options should be envisaged: first, a different definition
of universal services could be used for a certain time,
cutting the services which have to be offered to a
minimum. However, this might entice investments into
old networks, which are not adequate in the digital age,
and therefore hinder network innovation. Therefore,
a second option appears more appealing: the universal
services rules could be suspended for a period of transi-
tion. Finally, it could be negotiated that for a period of
transition the network infrastructure can partially be
financed by the new Member States, thus leading to an
exemption from the EC rules on state aid44. This
financing scheme could possibly be supported by the EC
via the funds for Trans European Networks45 or regional
aid. As the exact delineation of universal services is
subject to change, it would once again be better to lay
down details in ordinances44.

6. The National Regulatory Authority
Corresponding to the regulatory framework, the
Commission provided for an institutional framework.
The Member States are obliged to separate the regula-
tory and entrepreneurial players in the telecommunications
markets46. The structural separation between the
National Regulatory Authority and activities associated
with ownership or control of organisations providing
telecommunications networks, equipment or services
has to be effective46. This demand leaves a wide margin
of discretion. In the present Member States, the separa-
tion of functions has been achieved by the creation of
government departments or independent agencies to
handle regulatory matters47. The powers of these bodies
comprise the granting of licenses, dispute settlement
between market players, the distribution of frequencies,
and the power to regulate prices on all distributive
levels. While the National Regulatory Authorities in the
Member States have to be independent from market
participants, their duties could be carried out by a
ministry. This would however necessitate that the state is
not a major shareholder of the companies providing
telecommunication services. One of the crucial powers
the National Regulatory Authorities can be granted is a
sectoral special competition power. This leads to the
peculiar situation in which the EC Commission deals
with infringements of the rules on competition with
EC-wide consequences, while in the Member States a
national general competition authority and a sectoral
competition authority cover general competition rules
and sector specific competition rules respectively.

There are a couple of ways the powers of the National
Regulatory Authority can be delineated. For example,
competition could be dealt with by the general competi-
tion authority, leaving the National Regulatory Authority
with licenses, determination of charges, distribution of
frequencies etc. Furthermore, the National Regulatory
Authority could be equipped with further powers than
merely those concerning telecommunications. A model
which could bear fruit in the long run would be the inte-
gration of the telecommunications powers, plus the
powers on broadcasting, plus the power on distributing
frequencies. With regard to convergence of telecommu-
nications and digital broadcasting, this model could
prove to be suitable also in the long-run48.

IV. The future of Telecommunications in
Europe – a Case for the Competition of
Jurisdictions
1. Competition of Jurisdictions

After stressing the need for full harmonisation in the
early years, the integration of the European Community
has then been advanced as well by minimum harmonisa-
tion and mutual recognition. This has been due to the
fact that there has been a lot of political noise in the
context of further harmonisation. An open discussion of
further integrationist projects has to keep in mind that
there is also an economic argument for letting different
jurisdictions compete and therefore come up with the
best regulatory solution. Like companies in the private
markets, jurisdictions compete for the influx of resources49.
Though this line of thought is comparatively new, there are suitable legal bases in EC law. A case-in
point is the principle of subsidiarity, introduced by the
Treaty of Maastricht50. The principle of subsidiarity
seems to de-integrate Europe at first glance, introducing
conditions on when the Commission may act. However, a
correct reading of the text shows that it does not intro-
duce new powers for the Commission, but outlines the
correct use of the given powers51. Yet, regardless of the
precise way the principle of subsidiarity is to be inter-
preted, it indicates a trend: Solutions should be found as
close to the problem as possible – i.e. wherever possible,
the Member States or parts thereof should legislate. This
in turn leads to competition of these jurisdictions. The
notion indicated by the explicit inclusion of the principle
of subsidiarity in the EC Treaty has been strengthened by
the introduction of new rules on closer co-operation52 in
the European Community in the EC and EU Treaties by
the Amsterdam revision53. These encourage the competi-
tion of jurisdictions in an unprecedented way by inviting
the Member States to rethink their approach to Euro-
pean integration and to come up with innovative ideas
on how to integrate further. Now the choice is not only
for solutions on the level of the Member States (or parts
thereof) or on the level of the Community, but also on the
level of several Member States.

2. Telecommunications – harmonisation for competition

The telecommunications policy appears not to be a case
in point for the competition of jurisdictions. After all,
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the main drive next to liberalisation of the markets has been the harmonisation of rules, so neither the principle of subsidiarity nor the closer co-operation of some Member States appear pertinent. However, in the context of telecommunications services, harmonisation has paved the way for the competition of jurisdiction. Economic players are only endowed with the necessary mobility, where common technical and commercial standards are in place. Moreover, as has been pointed out above, the main rules have been laid down in Directives. Even though not all of the Directives leave the same margin for implementation, there is still room for Member State initiatives, as the legal European Community framework leaves scope for different interpretations. The prospective Member States should make use of the margins pointed out above. Especially the institutional framework should be framed in a way which anticipates future developments.

3. The Green Paper on Convergence

Finally, the sector of telecommunications is one of the fastest changing sectors in the European Community. Not only the evolution initiated by liberalisation, but also the technological revolution induced by digitalisation can be felt here. Acknowledging the digital revolution, driving all communications sectors towards the convergence of information technologies, the EC-Commission is nowadays debating new ways of regulating all areas of communications, deliberating the integration of telecommunications and other forms of electronic communications, like interactive digital broadcasting, in a single regulatory framework. The Commission published a Green Paper on the Convergence of the telecommunications, media and information technology sectors. For the time being, the regulatory situation is open to the competition of jurisdictions. The EC-Commission has not proposed a convergent regulatory option so far. Rather, it is up to the Member States to discuss, and maybe devise and implement their own solution. This in turn means that the Member State with the best solution might expect that it is this solution which will form the basis of a future European regulatory framework. Thus the players in the Member State with the best framework will be able to enjoy the benefits of their Member State's first-mover-advantage.

V. Summary

To put it in a nutshell, the regulation of telecommunication services in the EC strives for the liberalisation of all telecommunications markets in the Community and the harmonisation of the general framework for telecommunications. A modern communication structure is the backbone not only of the telecommunications industry as such, but of every sector of society, from business activities to private life and thus of the Information Society. A sophisticated communication infrastructure is a step to real integration into the Community. Even though exceptions to the rules may be necessary for the immediate time after accession, it is also in the interest of the prospective Member States to get things on a working level as soon as possible.

1. Adopting the acquis communautaire, i.e. the implementation of the EC-rules on telecommunication, should not present a major problem for the Accession Candidates.

2. However, the need for huge network infrastructure investments will be a challenge for the implementation of the EC-universal services regime in the new Member States. In order to avoid disturbances regarding investments in modern network infrastructure, some of the universal services obligations invoking high costs, especially for network providers, should be suspended for a short period of transition. Afterwards, the universal services network infrastructure could partially be financed by the new Member States, thus necessitating an exemption to the EC rules on state aid. This financing scheme could be supported by the EC via the funds for Trans-European Networks or regional aid.

3. Accession Member States should anticipate the digital revolution instead of merely implementing the European status quo. Given the time horizon of the Accession and the very fast change of technology, the communication sectors will converge the current information technologies. Accommodating the competition of jurisdictions, Community law leaves enough room to the Accession Candidates for ways of regulating all areas of communications, integrating the technical platform of telecommunications and all contents of electronic communications, like interactive digital broadcasting, in a single regulatory framework. This leapfrog model, which will bear fruit in the long run, calls for an integration of the regulatory authorities over telecommunications with those over (interactive) broadcasting and other forms of electronic communication. The Accession Candidates can strengthen their attractiveness to foreign investments through an innovative regulatory approach building upon a high speed ramp to digital superhighways and thus take their place in the European Information Society.

1 Professor Dr. Christian Koenig is Director and Ernst Riedel Associate at the Centre of European Integration Studies in Bonn (http://www.ecis.de). The authors would like to thank Associate Sascha Loetta and Research Assistant Barbara Dresdner for valuable contributions.
2 Cf. eg. The agreement in the WTO as part of the GATS, http://www.wto.org/en/e/wto96/wto96_52.htm
4 The Economist, "Beware the Gatekeeper", May 1st 1999, p. 16.
5 The prospective Member States in the first round are the Czech Republic, Estonia, Hungary, Poland, Slovenia, and Cyprus, which
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has a somewhat special position due to the unresolved territorial disputes with Turkey.


8 Cf. the data of the German National Regulatory Authority at http://www.regp.de/Fachinf/Anzeige/teil2.PDF (as of 18.1.1999, updated every 6 months)


11 Currently, only Estonia is merely an observer state, all the other prospective Member States are Members of the WTO.

12 Cf. for Commission’s analysis of the situation in the prospective member states
EC Commission, Communication of the Commission, DOC 97/6 Strasbourg, 15 July 1997

15 In Poland eg still the TSSA. TSSA also is the sole provider of a fixed network for voice telephony services. In Hungary MATIV etc.

14 In Poland, eg the mobile telephony providers are obliged to relay their local calls through the fixed network of the TSSA.

15 For EC-projects with the CEEC in the field of e-commerce cf. http://www.ispo.ccc.eu/e-commerce/ceec.htm

16 COM (87) 290 final, 30.07.1987


20 Previously Art. 90 (5) EC, now Art. 85 (5) EC.


22 Based on Art. 100 a of now Art. 95 EC

23 Before the entry into force of the Maastricht Treaty on 1 November 1995, the Council of the European Community adopted Directives based on Art. 100a EC on its own.

24 Cf. Commission Directives at footnote


26 An exception are broadband services offered by the former National Telecommunications Operators in some Member States.

27 Countries desiring to become members of the Union have to be able to assume the obligations of membership by satisfying the economic and political conditions. One of the obligations is the implementation of the acquis communautaire.

28 Cf. Art. 249 EC.

29 Konig/Hartwich, Europarecht (1988), No. 215 f.


31 More information about the ETSI at http://www.etsi.org/

32 Art 5 (1) of the ONP Directive 90/387/EC, fn.

33 Art. 5 (2) of the ONP Directive 90/387/EC, fn.


35 It should be noted that the general rules on competition in the EC, particularly art. 85 EC Treaty, do not refer to "significant market power", but to the well-established conceptualisation of "dominant market position".


39 Cf. e.g. fn.

40 In the Czech Republic, e.g. the Postal Act of 1946 defines written communications and (temporarily) parcels and money orders as universal-service obligations, cf. Commission opinion at http://europa.eu.int/comm/dgs1/enlarge/agenda2000_czech/cz3.htm


42 Art. 87 ff. EC.

43 Art. 154 EC.

44 In Poland, this has unfortunately been neglected.
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46 Cf. Fn.


50 As Art. 3b, new Art. 5 EC.


52 Also known as multi-speed Europe, on terminology and background, cf. Röder, Integration at Multiple Speeds in the European Union, [http://www.uni-bonn.de/l-uas0067/integration.doc].

53 Art. 40, 43, 44 EU, Art. 11 EC.


55 Cf. examples at Fn.

56 Green Paper on the Convergence, fn.