



UNIVERSITY OF LAPLAND
LAPIN YLIOPISTO

Rovaniemi Summer School in Legal Informatics

EU Regulation of Electronic Communications,
after the approval of the last Regulatory Package

Rovaniemi, 30/08/2011

Manuel David Masseno



Instituto Jurídico Interdisciplinar
da Faculdade de Direito da Universidade do Porto

✓ **Starting point: EU Law of Electronic Communications/Telecommunications as a *Reform Law***

Its purpose is the **building of an European Market for Electronic Communications** in place of the National monopolies, the so called *PTT Model*

So, we will

- **start** with a **brief panorama** of a process that has more than 20 years in action, with a closer look to the current situation, before the ongoing Review, and
- **finish** pointing out the **latest outcomes**

The “**Constitutional Foundations/Structures**”

According to TFEU - Treaty on the Functioning of the European Union, the **EU “Economic Constitution” is based on “the principle of an open market economy with free competition”**, Art. 119(1)(2)

And

“The Union shall **establish an internal market**. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance [...]”

Essential is the “**Principle of Conferral**”

“The limits of Union competences are governed by the principle of conferral. [so] the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States .”
(Art. 5(1) of the EC Treaty, now Art. 5(1)(2) of TEU)

Therefore, the **regulation of Telecommunications would remain a competence of Member-States**, as assumed at

- Art. 1(a) of **Council Directive 71/305/EEC** of 26 July 1971 concerning the **coordination of procedures for the award of public works contracts**
- Art. 2(2) (b) of **Council Directive 77/62/EEC** of 21 December 1976 coordinating procedures for the **award of public supply contracts**
 - ✓ this changed after **Council Directive 93/38/EEC** of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

As *Telecommunications* were considered as a *Public Service* to be provided by the States

And **National monopolies** were, in principle, seen as **compatible with the Common Market**:

“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community” (Art. 86(2) of EC Treaty, now Art. 106(2) of TFEU)

However, the **European Commission** had **another vision** and put forward:

- a **Communication from the Commission to the Council COM(79) 650**, the European society faced with the challenge of new information technologies a Community response, of 23 November 1979
- a **Communication from the Commission to the Council COM(80) 422**, Recommendations on Telecommunications, of 1 de September de 1980

Proposing the **harmonization of the sector**, in order to create:

- a **range of standards for data services and terminals**
- an **European market for data terminals**
- a **joint committee between the Commission and the National Administrations**

And to

- **start the opening of public telecommunications markets**

For its part, the European Parliament

- ✓ by a Resolution of 27 April 1981,
- **supported the Recommendations of the Commission**, even if it would have preferred Directives over recommendations
- defended the full liberalization of the terminals market
- joined the objective of creating and Europe-wide open and competitive market regarding data terminals

But the Council

- **Blocked the Commission proposals**, even if they had not references to telecommunications services and didn't even touch the direct role of National Administrations...

However, real change was “pushed” by the European Court of Justice

A Commission Decision of 1982 about the possible infringement of Art. 82 (Abuse of dominant position) by *British Telecommunications*, considering that two regulations, based on its legal monopoly, aimed to limit competition regarding the retransmission of telex messages

British Telecom ruling (Case 41/83, 20 March 1985), stating that **operating a telecommunications system is an undertaking under the Treaty**

✓ Also in the Judgments **French Republic vs. the Commission, 19/03/91**, **RTT vs GB-Inno-BM, SA, 13/12/1991** and **Kingdom of Spain vs. the Commission, 17/11/1992**

Coherently with its, well known, *Jurisprudential Policy*....

From this, came out some **preliminary decisions**

- **Council Directive 83/189/EEC** of 28 March 1983, laying down a **procedure for the provision of information in the field of technical standards and regulations**
 - ✓ a *standstill* provision regarding the trade of telecommunications terminal equipment
- **Council Agreement of 17 December 1984**, laying the **basis for the coordination of national policies on telecommunications** and for the development of common projects
- **Council Directive 86/361** of 24 July 1986 **on** the initial stage of the **mutual recognition of type approval for telecommunications terminal equipment**
- **Decision of the Council of 22 December 1986**, on **standardization in the field of information technology and telecommunications**

A *New Stage*, started with the

Green Paper on the Development of the Common Market for Telecommunications Services and Equipment COM (87) 290 final, 30 June 1987

- ✓ Enumerating several **Pragmatic principles for a gradual transition towards a liberalization of the Telecommunications sector**, through the:
 - **opening to free competition of the production and commercialization of terminals**
 - **opening to free competition of telecommunication services, starting with those of added value**
 - **freedom of access to basic services and networks**
 - **implementation of market prices related to real costs**
 - **split between regulation and operation**

The First Directives:

- **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**
- **Commission Directive 90/388/EEC** of 28 June 1990, **on competition** in the markets for telecommunications services

In short, **was achieved**:

- ✓ **a, partial, liberalization**, keeping the principle of public monopolies of voice services and of the infrastructure

and

- ✓ **a regulatory segmentation**: fundamental services vs. added value services

A Second Stage:

Previous steps:

- **Council resolution 93/C 213/01** of 22 July 1993 on the **review of the situation in the telecommunications sector and the need for further development of the market**
- **Council resolution 94/C 379/03** of 22 December 1994 on the **principles and timetable for the liberalization of telecommunications infrastructure**
 - ✓ **1 February 1998** was set as the **reference date for the full liberalization of all telecommunications services and infrastructures**

- **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 liberalized telecommunications services**
 - ✓ a **liberalization of all alternative networks**
- **Commission Directive 96/2/EC** of 16 January 1996, amending Directive 90/388/EEC with regard to **mobile and personal communications**
 - ✓ **all restrictions pending on operator regarding the creation of their own infrastructure, the use of infrastructures belonging to third parties and the sharing of infrastructures were abolished**
 - ✓ **States would be able to limit the number of licences based on “essential requirements”** related to the lack of availability of frequency spectrum and justified under the principle of proportionality

Full Liberalization, arrived with

- **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

“Member States shall withdraw all those measures which grant:

(a) exclusive rights for the supply of telecommunications services otherwise than voice telephony and

(b) special rights which limit to two or more the number of undertakings authorized to supply such telecommunication services, otherwise than according to objective, proportional and non-discriminatory criteria, or

(c) special rights which designate, otherwise than according to such criteria, several competing undertakings to provide such telecommunication services.

They shall take the measures necessary to ensure that any operator is entitled to supply any such telecommunications services, otherwise than voice telephony”, Art. 2(1)

Followed by

- **Directive 97/13/EC** of the European Parliament and of the Council of 10 April 1997, on **a common framework for general authorizations and individual licenses** in the field of telecommunications services
- **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)
- **Directive 97/66/EC** of the European Parliament and of the Council, of 15 December 1997, concerning the **processing of personal data and the protection of privacy in the telecommunications sector**

The Previous Regulatory Framework

- **Directive 2002/21/EC** of the European Parliament and of the Council of 7 March 2002 on **a common regulatory framework for electronic communications networks and services** ('**Framework Directive**')
- **Directive 2002/19/EC** of the European Parliament and of the Council of 7 March 2002 **on access to, and interconnection of, electronic communications networks** and associated facilities ('**Access Directive**')
- **Directive 2002/20/EC** of the European Parliament and of the Council of 7 March 2002 on **the authorization of electronic communications networks and services** ('**Authorization Directive**')

- **Directive 2002/22/EC** of the European Parliament and of the Council of 7 March 2002 on **universal service and users' rights relating to electronic communications** networks and services (**'Universal Service Directive'**)
- **Directive 2002/58/EC** of the European Parliament and of the Council of 12 July 2002 concerning the **processing of personal data and the protection of privacy** in the electronic communications sector (**'Directive on privacy and electronic communications'**)
- **Commission Directive 2002/77/EC** of 16 September 2002 on **competition** in the markets for electronic communications networks and services
- **Regulation (EC) No 2887/2000** of the European Parliament and of the Council of 18 December 2000 on **unbundled access to the local loop**

The European Regulators Group (ERG)

- ✓ The European Regulators Group for electronic communications networks and services was set up by **Commission Decision 2002/627/EC**, as amended by the Commission Decision of 14 September 2004

Objectives:

- to **provide a suitable mechanism for encouraging cooperation and coordination between national regulatory authorities and the Commission**
 - to **promote the development of the internal market for electronic communications** networks and services, and
 - to seek to **achieve consistent application**, in all Member States, **of the provisions set out in the Directives** of the new regulatory framework
- ✓ **At work since January 2003**

The “**Telecoms Reform Package**”, as proposed by the European Commission, at 13 November 2007, **main features:**

- **new consumer rights** such as
 - the right to switch telecoms operators within one day
 - the right to transparent and comparable price information
 - the possibility to call free phone numbers from abroad, and
 - a more effective single European emergency number 112
- **more consumer choice through more competition**
 - ✓ especially by giving National telecoms regulators the new remedy of functional separation for dominant telecom operators
- **more security in using communication networks**
 - ✓ especially through new instruments to fight against spam, viruses and other cyber attacks

- **a “New Deal” for radio spectrum**
 - ✓ to spur investment into new infrastructures and to ensure “broadband access for everyone”
- **a better regulation in telecoms by deregulating those markets where EU-driven market-opening has already led to competition**
 - ✓ this would allow the Commission and National regulators to focus on the main bottlenecks, such as the broadband market
- **a more independent watchdogs to guarantee fair regulation in the interest of consumers**
 - ✓ too often, telecoms regulators are still close to the dominant operator that continues to be partly owned by the national government in many countries, so the Reform wants to strengthen the independence of national telecoms watchdogs from operators and governments alike
- **the creation of a European Telecom Market Authority**
 - ✓ this European Telecom Market Authority would more effectively combine the functions of the current **European Regulators Group (ERG)** and of the current **European Network and Information Security Agency (ENISA)**

The Milestones

- **24 September 2008**: the European Parliament approved the *Package* at first reading after amending it significantly
- **29 April 2009**: the European Parliament and Council sealed a landmark deal on the main issues of the telecoms package
- **7 May 2009**: in a surprise move, the MEPs reject the agreement previously reached with the Council and propose a more rigorous text in defence of Internet users' rights
 - ✓ the rejection came in response to a draft French anti-piracy bill, the so-called *HADOPI Law*; the draft French law had foreseen a 'three-strike' approach whereby consumers who illegally download music or films could see their Internet access cut off after two warnings
- **12 June 2009**: Telecoms ministers reject the Parliament's amendments and agreed to start a conciliation procedure later in the year
- **24 November 2009**: the European Parliament approved a compromise proposal with the Council and the Commission

The Reformed Regulatory Framework

Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (**'Citizens Rights Directive'**):

- **a new protection of citizens' rights relating to Internet access by a Internet freedom provision**
 - ✓ citizens in the EU are now entitled to a prior fair and impartial procedure, including the right to be heard, and they have a right to an effective and timely judicial review

- **a better consumer information**
 - ✓ consumer contracts must specify, among other things, information on the minimum service quality levels, as well as on compensation and refunds if these levels are not met, subscriber's options to be listed in telephone directories and clear information on the qualifying criteria for promotional offers
- **a right of European consumers to change**, in one working day, fixed or **mobile operator while keeping their old phone number**
- **Consumer protection against personal data breaches and SPAM**
 - ✓ communications providers will be obliged to inform the authorities and their customers about security breaches affecting their personal data
 - ✓ Internet users will be better informed about cookies and about what happens to their personal data
 - ✓ Internet service providers will also gain the right to protect their business and their customers through legal action against spammers
- **Better access to emergency services, 112**
 - ✓ also strengthening operators' obligation to pass information about caller location to emergency authorities

- **Directive 2009/140/EC** of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services (**'Better Regulation Directive'**):
 - **New guarantees for an open and more "neutral" Internet**
 - ✓ from now on, National telecoms authorities will have the powers to set minimum quality levels for network transmission services so as to promote "net neutrality" and "net freedoms" for European citizens
 - **National telecoms regulators will gain greater independence**
 - ✓ this will be achieved by an eliminating of political interference in their day-to-day duties and by adding protection against arbitrary dismissal for the heads of national regulators

- **a new Commission say on the competition remedies for the telecoms markets**
 - ✓ **the European Commission** will have the **power to oversee regulatory remedies proposed by national regulators**, as well as enable the Commission to adopt further harmonisation measures in the form of recommendations or (binding) decisions if divergences in the regulatory approaches of national regulators
- **functional separation as a means to overcome competition problems:**
 - ✓ **National telecoms regulators will gain the additional tool of being able to oblige telecoms operators to separate communication networks from their service branches**, as a last-resort remedy
- **an accelerated broadband access for all Europeans**
 - ✓ The reform will help in **overcoming this "digital divide" by better managing radio spectrum** and by making it effectively available for wireless broadband services in regions where building a new fibre infrastructure is too costly and by allowing Member States to expand universal service provisions beyond narrow-band Internet access

- **encouraging competition and investment in next generation access networks**
 - ✓ the new rules **bring legal certainty for investment** in next generation access (NGA) networks, since they preserve the incentives to invest by taking into account the risks involved in allowing access to NGA networks and allowing for various cooperative arrangements between investors and access-seeking operators

And

- Regulation (EC) N. 1211/2009** of the European Parliament and of the Council of 25 November 2009 **establishing the Body of European Regulators for Electronic Communications (BEREC)** and the Office
- replaced the loose cooperation behind closed doors that exists today in the "European Regulators Group"
 - **in place from 28 January 2010**

Present situation

- **The deadline for the transposition of the Directives was 25 May 2011**
- However, **only** Denmark, Estonia, **Finland**, Ireland, Malta, Sweden and the UK **complied**
 - the other 20 Member States didn't (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, **Portugal**, Romania, Slovakia, Slovenia and Spain)
- So, by 19 July, **the European Commission has sent requests for information to these States**, under the form of letters of formal notice under EU infringement procedures
- If they fail to reply or if it is not satisfied with the answer, the Commission can send the Member States concerned **a formal request to implement the legislation** (in the form of a 'reasoned opinion' under EU infringement procedures), **and** ultimately **refer them to the Court of Justice of the EU**

Kiitos paljon!