

## THE LEGISLATIVE AND INSTITUTIONAL STRUCTURE OF EU ELECTRONIC COMMUNICATIONS REGULATION

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### 1. Introduction

The development of the Internal Market has been one of the European Union's (hereinafter the 'EU') greatest projects. The goal of the Internal Market is to increase economic prosperity among the EU's Member States by reducing the barriers to trade and investment. The cornerstones of the Internal Market are the Four Freedoms.<sup>1</sup> These freedoms establish the free movement of people, services, goods and capital and are enshrined in the Treaty on the Functioning of the European Union (hereinafter the 'TFEU').<sup>2</sup>

With greater economic integration, Member States have begun to reap the benefits of increased trade and investment.<sup>3</sup> With regards to the Internal Market, an important initiative for the Commission is the liberalisation and harmonisation of the electronic communications sector. This initiative promotes the free movement of communications services across the Member States. The communications sector has become a priority because an advanced communications infrastructure is necessary in order to develop a digital knowledge-based economy. The Commission has identified the transition to such an economy as integral to the future economic and social prosperity of the EU.<sup>4</sup>

In order to further liberalise and harmonise the communications sector, the Commission released in 2002 its regulatory package for electronic communications. This package consists of five Directives: the Framework Directive,<sup>5</sup> the Access Directive,<sup>6</sup> the

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<sup>1</sup> Commission (EC), 'General policy framework' <[http://ec.europa.eu/internal\\_market/top\\_layer/index\\_1\\_en.htm](http://ec.europa.eu/internal_market/top_layer/index_1_en.htm)> accessed December 2011.

<sup>2</sup> EC Treaty (Treaty of Rome, as amended) arts 28-37, 45-48 (TFEU).

<sup>3</sup> Commission (EC), 'The Macroeconomic Effects of the Single Market Programme after 10 Years' <[http://ec.europa.eu/internal\\_market/10years/background\\_en.htm](http://ec.europa.eu/internal_market/10years/background_en.htm)> accessed December 2011.

<sup>4</sup> Commission (EC), 'eEurope – an information society for all' (Communication) COM (1999) 687 final, 8 December 1999.

<sup>5</sup> Council Directive (EC) 2002/21 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33.

Authorisation Directive,<sup>7</sup> the Universal Service Directive<sup>8</sup> and the ePrivacy Directive.<sup>9</sup> These Directives have completely overhauled communications regulation in the EU in order to better reflect market and technological changes.

In addition, the current regulatory framework has instituted a network-based governance model. The EU has traditionally employed either a centralised or a decentralised governance model.<sup>10</sup> In a centralised model, the Commission is given the primary role of enforcement of EU law, whereas in a decentralised model, the Member States are given the primary role of enforcement. Both models have their drawbacks: in a centralised model the Commission may become a cumbersome and sluggish bureaucracy, while a decentralised model may lead to inconsistencies among Member States in their application of EU law. With the EU's communications regulatory framework, the EU has decided to reject both these traditional models and has instead employed a network-based governance model. In a network-based governance model each Member State has a single designated National Regulatory Authority (hereinafter the 'NRA'). Although the primary role of the NRAs is the enforcement of EU communications law, with a network-based governance model there is constant collaboration, consultation and information sharing among NRAs and the Commission. These mechanisms ensure that there is a level of consistency in the application of EU communications law. The network-based governance model thus provides a degree of autonomy to the Member States, while also ensuring that there is not too much inconsistency in the application of EU law.

The purpose of this paper is to outline the legislative and institutional structure of the EU communications regulatory framework. The first part of this paper will provide a sketch of the Directives that constitute the legislative structure, while the second part will examine how the various agencies interact in the institutional structure. The examination of the communications regulatory framework will provide an opportunity to discuss how the EU approaches regulation generally and how it attempts to balance the need for greater legal coherence with the desire for Member States to maintain their autonomy. The EU's ability to balance these competing factors will become important as initiatives are continually suggested to deepen the Internal Market. Throughout this paper, the UK's regulatory

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<sup>6</sup> Council Directive (EC) 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ L108/7.

<sup>7</sup> Council Directive (EC) 2002/20 on the authorisation of electronic communications networks and services [2002] OJ L108/21.

<sup>8</sup> Council Directive (EC) 2002/22 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L108/51.

<sup>9</sup> Council Directive (EC) 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201/37.

<sup>10</sup> Maartje de Visser, *Network-Based Governance in EC Law: The Example of EC Competition and EC Communications Law* (Hart Publishing, 2009) 7-11.

framework will serve as the prime example of how the EU framework affects Member States.

## 2. Legislative Framework

### 2.1. Historical Development

The current regulatory framework can be traced back to a consultation process that began in 1987. In that year, the Commission published a Green Paper setting out various proposals for reform to further liberalisation and harmonisation in the telecommunications sector at the EU level.<sup>11</sup> The consultations following from the publication of the Green Paper were highly successful.<sup>12</sup> These consultations would begin the legislative process for implementation of the Commission's proposals for telecommunications reform.

In 1992, the Commission published its Review of the telecommunications sector.<sup>13</sup> The Review laid the groundwork for further reform in the telecommunications sector. Following the consultations conducted as part of the Review, the Commission issued a proposed timetable for liberalisation of the telecommunications sector.<sup>14</sup> The Commission proposed that liberalisation occurs in two stages.<sup>15</sup> In the first stage (from 1993 till 1995) certain markets, such as cable and satellite, would be liberalised. In the second stage (from 1996 till 1997) preparations would be made for the full liberalisation of the telecommunications sector.

Beyond the desire for greater liberalisation, technological innovation was rendering the old approach to communications regulation obsolete. Historically, broadcasting, voice telephony and online computer services were seen as distinct services and as a result, were regulated separately.<sup>16</sup> Technological innovation now permits formally distinct networks and services to be used interchangeably. For instance, telecommunications networks can be used to offer television services and cable networks can be used to offer telephone services. In addition, devices have become multifunctional, thus allowing a person to access

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<sup>11</sup> Commission (EC), 'Towards a Dynamic Economy' (Green Paper) COM (87) 290 final, 30 June 1987.

<sup>12</sup> Antonio Bavasso, *Communications in EU Antitrust Law: Market Power and Public Interest* (Kluwer Law International 2003) 31-34.

<sup>13</sup> Commission (EC), '1992 Review of the situation in the telecommunications services sector' SEC (92) 1048 final, 21 October 1992.

<sup>14</sup> Commission (EC), 'Communication on the result of the consultation on the Review of the situation in the telecommunications services sector' COM (93) 159 final, 28 April 1993.

<sup>15</sup> *Ibid.*, 34-35.

<sup>16</sup> Bavasso (n 12) 36-37.

broadcasting, telephone and online services on a single device. This phenomenon is what is commonly referred to as 'convergence'. These converged markets are now referred to as the 'communications sector'. In 1997, the Commission published a Green Paper in order to begin a consultation process to determine how to address the issues arising from convergence.<sup>17</sup> After consultations on the Green Paper were concluded, the Commission published its 1999 Review.<sup>18</sup> This Review contains most of the important principles and proposals that would form the new electronic communications regulatory framework.

Throughout this development in the communications sector, the Commission's powers with regards to enforcing liberalisation have also been developing. For example, in *Italy v Commission*,<sup>19</sup> the Courts of Justice of the European Union (hereinafter the 'CJEU') held that EU competition law was applicable to the telecommunications sector. In many Member States, telecommunications services were previously provided by national monopolies. The CJEU's decision permitted the Commission to pursue greater liberalisation because it gave the Commission a way to break up the national monopolies. The CJEU asserted that the Commission's ability to break up national monopolies is derived from a reading of Article 101 TFEU<sup>20</sup> with Article 106 TFEU.<sup>21</sup>

Another seminal case is *French Republic v Commission*.<sup>22</sup> In that case, France challenged the Commission's Directive that sought to liberalise the telecommunications terminals market. It argued that the Commission should have used the Article 258 TFEU procedure<sup>23</sup> to hold that the Government was not compliant with the TFEU, rather than issue the Directive under Article 101(3) TFEU.<sup>24</sup> The CJEU rejected France's argument and held that the Commission had legitimately used its powers under Article 86(3) TFEU to issue the

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<sup>17</sup> Commission (EC), 'Towards an Information Society Approach' (Green Paper) COM (97) 623, 3 December 1997.

<sup>18</sup> Commission (EC), 'Towards a new framework for Electronic Communications infrastructure and associated services' COM (1999) 539, 10 November 1999.

<sup>19</sup> Case 41/83 *Italy v Commission* [1984] ECR 873.

<sup>20</sup> All EU treaty references throughout the paper will be made to their modern equivalents.

<sup>21</sup> TFEU (n 2) arts 101, 106. Art 101 prohibits undertakings from distorting competition in the Internal Market, while art 106 allows the Commission to enforce art 101 against public undertakings.

<sup>22</sup> Case C-202/88 *French Republic v Commission* [1991] ECR I-1223.

<sup>23</sup> The art 258 TFEU procedure requires the Commission to give a Member State a reasoned opinion when it considers the Member State to have failed to fulfil its treaty obligations. If the Member State is still non-compliant then the Commission can bring the matter before the CJEU for adjudication.

<sup>24</sup> TFEU (n 2) arts 101(3), 258.

Directive.<sup>25</sup> The CJEU relied on the fact that the Commission was setting down general obligations rather than making a specific finding of non-compliance by France.<sup>26</sup> The case is important because it affirmed the Commission's power to issue Directives relating to the liberalisation of the communications sector.

More recently, an important case in communications and competition jurisprudence is *Deutsche Telekom v Commission*.<sup>27</sup> In that case, Deutsche Telekom AG (hereinafter 'DTAG') appealed the Commission's decision to fine DTAG for anticompetitive behaviour in violation of Article 101 TFEU.<sup>28</sup> Specifically, the Commission had found DTAG to be guilty of 'margin squeezing' and imposed a fine of €12.6 million.<sup>29</sup> Margin squeezing occurs when the wholesale tariffs charged by an incumbent communications provider to its competitors for access to its network are so high that competitors are forced to charge higher retail prices than the incumbent provider. In its defence, DTAG argued that its wholesale tariffs had been approved by the *Bundesnetzagentur*, the German NRA, and, as a result, EU competition law did not apply. This argument was rejected by the Court of First Instance (hereinafter the 'CFI'),<sup>30</sup> whose decision was later affirmed by the CJEU. The *Deutsche Telekom* decision, therefore, stands for the proposition that sector-specific communications regulation does not displace EU competition law. The holding in *Deutsche Telekom* gives the Commission the power to intervene when it finds that NRAs have not adequately fostered competition in their domestic markets.

## 2.2. The Framework Directive

The Framework Directive establishes a harmonised framework for the regulation of electronic communications services and networks.<sup>31</sup> Most importantly, Article 2 of the Framework Directive provides key definitions that are integral to understanding the current regulatory framework:

'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other

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<sup>25</sup> Ibid., art 86(3).

<sup>26</sup> Bavasso (n 12) 44.

<sup>27</sup> Case C-280/08 *Deutsche Telekom v Commission* [2010] 14/10/2010.

<sup>28</sup> TFEU (n 2) art 101.

<sup>29</sup> Commission Decision (EC) 2003/707 relating to a proceeding under Article 82 of the EC treaty [2003] OJ L263/9.

<sup>30</sup> Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477.

<sup>31</sup> Framework Directive 2002/21 (n 5) art 1(1).

electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

[...]

‘electronic communications service’ means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.<sup>32</sup>

These definitions cover both traditional telecommunications and broadcasting networks and services in order to deal with the reality of convergence. In addition, the definitions were drafted broadly to ensure that they capture future changes in technology.

In the United Kingdom (hereinafter ‘UK’), Section 32 of the Communications Act incorporates the definitions found in the Framework Directive.<sup>33</sup> For instance, Section 32(1) defines an ‘electronic communications network’ as:

- (a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and
- (b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—
  - (i) apparatus comprised in the system;
  - (ii) apparatus used for the switching or routing of the signals; and
  - (iii) software and stored data.<sup>34</sup>

The Framework Directive also establishes the following criteria for how NRAs are to carry out their tasks:

- NRAs must be independent;
- NRAs must be impartial and transparent;

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<sup>32</sup> Ibid.

<sup>33</sup> Communications Act 2003, s 32.

<sup>34</sup> Ibid., s 32(1).

- NRAs must cooperate with competition and consumer authorities when dealing with matters of common interest;
- NRAs must contribute to the Internal Market by cooperating with each other and the Commission; and
- NRA decisions must be subject to a right of appeal.<sup>35</sup>

In the UK, the Office of Communications (hereinafter '**Ofcom**') was established as the NRA. Prior to the establishment of Ofcom, communications was regulated by multiple agencies, including the Office of Telecommunications, the Independent Television Commission, the Broadcasting Standards Commission, the Radio Authority and the Radio Communications Agency.<sup>36</sup>

The Framework Directive provides NRAs with various policy objectives and regulatory principles to follow when carrying out their tasks. For instance, NRAs may take into account the desirability of regulating in a technologically neutral manner.<sup>37</sup> NRAs are also permitted to promote cultural and linguistic diversity as well as media pluralism. In addition to these suggestions, Article 8 of the Framework Directive establishes the development of the Internal Market; the promotion of competition and the promotion of consumer interests as three objectives to guide NRAs in their application of the Directives.<sup>38</sup> These objectives are accompanied by a list of non-exhaustive regulatory principles to assist NRAs. In the UK, Section 4 of the Communications Act implements the policy objectives and regulatory principles outlined in the Framework Directive.<sup>39</sup> What is implemented in the Act goes even further than what is found in the Framework Directive.<sup>40</sup> For instance, in addition to the principles outlined in the Framework Directive, the Act also establishes as principles the promotion of network access, interoperability and common standards.<sup>41</sup>

### 2.3. The Access Directive

The purpose of the Access Directive is to harmonise the way NRAs regulate access and interconnection between the networks of competitors.<sup>42</sup> Access and interconnection

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<sup>35</sup> Framework Directive 2002/21 (n 5) arts 3(2)-3(4), 4, 7(2).

<sup>36</sup> Ian Walden & John Angel (eds), *Telecommunications Law and Regulation* (2nd ed, OUP 2005) 102.

<sup>37</sup> Framework Directive 2002/21 (n 5) art 8(1).

<sup>38</sup> *Ibid.*

<sup>39</sup> Communications Act (n 33) s 4.

<sup>40</sup> Sebastian Farr & Vanessa Oakley, *EU Communications Law* (2nd ed, Sweet & Maxwell 2006) 68.

<sup>41</sup> Communications Act (n 33) s 4(7)-4(10).

policies are integral to facilitating competition in the communications sector.<sup>43</sup> Historically, telecommunications providers were regulated as natural monopolies. This meant that a single provider would operate in a single area free from any competition. When the telecommunications sector became liberalised, competitors were given access to the incumbent monopoly provider's network in order to provide services. Unless there is the danger of regulatory intervention, incumbents are unlikely to provide competitors with access to their networks on fair and equitable terms. Similarly, the regulation of interconnection ensures a fair and equitable connection between an incumbent's networks with that of its competitors operating in the same geographical area. Incumbents have no incentive to interconnect with their competitors' networks unless there is regulatory intervention.

Under the Access Directive, NRAs must encourage access and interconnection 'in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users'.<sup>44</sup> In addition, Articles 9 to 13 of the Access Directive give NRAs the power to impose obligations on dominant communications providers in order to enforce access and interconnection, thus facilitating competition. In the UK, Sections 73 to 76 of the Communications Act permit Ofcom to impose conditions on communications providers that are important for promoting competition, such as requiring network access and the interconnection of networks.<sup>45</sup>

#### **2.4. The Authorisation Directive**

The Authorisation Directive dramatically changes the way in which the provision of electronic communications networks and services are regulated.<sup>46</sup> Rather than require communications providers to apply for individual licences in order to provide networks and services, the general authorisation scheme only requires such providers to give notice to the relevant NRA and abide by various conditions.<sup>47</sup> The general authorisation scheme, therefore, significantly decreases the administrative barriers to market entry, which in turn facilitates competition.

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<sup>42</sup> Access Directive 2002/19 (n 6) art 1(1).

<sup>43</sup> Walden and Angel (n 36) 215-217.

<sup>44</sup> Access Directive 2002/19 (n 6) art 5(1).

<sup>45</sup> Communications Act (n 33) ss 73-76.

<sup>46</sup> Farr and Oakley (n 40) 185.

<sup>47</sup> Walden and Angel (n 36) 153-154.



Article 2(3) of the Authorisation Directive specifies the limitations on what an NRA can require in a notification.<sup>48</sup> The exhaustive list of permissible conditions that can be attached to general authorisations is found in the annex of the Authorisation Directive.<sup>49</sup> Once a communications provider has complied with these requirements it is granted a minimum set of rights.<sup>50</sup> The general authorisation gives communications providers protection from the discretion of NRAs since providers no longer need to obtain a licence to operate in the EU market. This scheme thus creates a more welcoming business environment for new providers entering the market.

In the UK, Section 45 of the Communications Act sets out Ofcom's power to put in place conditions for general authorisations.<sup>51</sup> The Act distinguishes between five types of conditions: (1) general conditions; (2) a universal service condition; (3) an access-related condition; (4) a privileged supplier condition; and (5) a significant market power condition.<sup>52</sup> Section 47(2) of the Act sets out the following test to determine when Ofcom will set or modify a condition:

- (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
- (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
- (c) proportionate to what the condition or modification is intended to achieve; and
- (d) in relation to what it is intended to achieve, transparent.<sup>53</sup>

## 2.5. The Universal Service Directive

In contrast to the Access Directive which regulates wholesale relationships, the Universal Service Directive regulates the relationship between electronic communications network and service providers and their customers.<sup>54</sup> As a communications concept, 'universal service' aims to ensure a minimum level of affordable service to every customer that requests it. This goal is vital in a society where communications services have become essential to interact socially and benefit economically. As a result, Article 1 of the Universal

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<sup>48</sup> Authorisation Directive 2002/20 (n 7) art 2(3).

<sup>49</sup> *Ibid.*, Annex.

<sup>50</sup> *Ibid.*, art 4.

<sup>51</sup> Communications Act (n 33) s 45.

<sup>52</sup> *Ibid.*, s 45(2).

<sup>53</sup> *Ibid.*, s 47(2).

<sup>54</sup> Farr and Oakley (n 40) 291.

Service Directive states that the purpose of the Directive is to ensure universal service throughout the EU by granting consumers various rights and imposing on communications providers various obligations.<sup>55</sup> In the UK, Sections 65 to 72 of the Communications Act establish the provision of universal service.<sup>56</sup> The following are things which are covered under the UK's universal service regime:

- (a) electronic communications networks and electronic communications services;
- (b) facilities capable of being made available as part of or in connection with an electronic communications service;
- (c) particular methods of billing for electronic communications services or of accepting payment for them;
- (d) directories capable of being used in connection with the use of an electronic communications network or electronic communications service; and
- (e) directory enquiry facilities capable of being used for purposes connected with the use of such a network or service.<sup>57</sup>

Article 4(2) of the Universal Service Directives provides a description of the provision of universal access at a fixed location:

The connection provided shall be capable of supporting voice, facsimile communications and data communications, at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.<sup>58</sup>

Notably, this description extends universal service to include Internet access. Traditionally, universal service usually extended only to fixed telephone service.<sup>59</sup>

Article 8 of the Universal Service Directive enables Member States to designate certain communications providers as having universal service obligations.<sup>60</sup> In the UK, BT (formerly British Telecom) and KC (formerly Kingston Communications) have been designated as universal service providers.<sup>61</sup> If the universal service obligations become an

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<sup>55</sup> Universal Service Directive 2002/22 (n 8) art 1.

<sup>56</sup> Communications Act (n 33) s 65-72.

<sup>57</sup> *Ibid.*, s 65(2).

<sup>58</sup> Universal Service Directive 2002/22 (n 8) art 4(2).

<sup>59</sup> Walden and Angel (n 36) 139-140.

<sup>60</sup> Universal Service Directive 2002/22 (n 8) art 8.

unfair financial burden, then the Universal Service Directive permits the establishment of a financing scheme. Articles 12 and 13 address the costing and financing, respectively, of universal service obligations.<sup>62</sup> In the UK, Sections 70 to 72 of the Communications Act require Ofcom to review the compliance costs of those service providers who have a universal service obligation and to establish a sharing mechanism to distribute the financial burden of universal service obligations among the other service providers.<sup>63</sup>

## **2.6. The ePrivacy Directive**

The purpose of the ePrivacy Directive is to harmonise privacy and data protection laws between the Member States.<sup>64</sup> The Directive seeks to protect the privacy interests of individuals, while also inhibiting Member States from preventing the free flow of personal data across borders. The harmonisation of data protection laws is important because inconsistency among Member States would be detrimental to EU wide competition and regulatory enforcement.<sup>65</sup> Communications providers and NRAs depend on the free flow of personal data across borders to pursue their activities. In the UK, the ePrivacy Directive has been implemented by The Privacy and Electronic Communications (EC Directive) Regulations.<sup>66</sup> The Regulations impose obligations on British communications providers to protect and secure the data and privacy of their customers.

## **3. Institutional Structure**

### **3.1. The Network-Based Governance Model**

In the EU, the focus of attention is not only on the proliferation of law, but also on its practical application and enforcement. As the depth and breadth of the EU grows, the Commission has recognised that application and enforcement is becoming a central issue. The Commission has stated that:

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<sup>61</sup> Oftel, 'Designation of BT and Kingston as universal service providers, and the specific universal services conditions: A statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal service Directive' <[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/uso0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/uso0703.pdf)> accessed December 2011.

<sup>62</sup> Universal Service Directive 2002/22 (n 8) arts 12-13.

<sup>63</sup> Communications Act (n 33) ss 70-72.

<sup>64</sup> E-Privacy Directive 2002/58 (n 9) art 1(1).

<sup>65</sup> Farr and Oakley (n 40) 329.

<sup>66</sup> The Privacy and Electronic Communications (EC Directive) Regulations 2003 SI 2003/2426.

The [EU] is founded in law, pursues many of its policies through legislation and is sustained by respect for the rule of law. Its success in achieving its many goals as set out in the Treaties and in legislation depends on the effective application of Community law in the Member States. Laws do not serve their full purpose unless they are properly applied and enforced. The body of legislation is significant – over 9000 legislative measures of which nearly 2000 are Directives each requiring between [forty] and over 300 measures for transposition into national and regional legislation. The EU encompasses [twenty-seven] national administrations and over [seventy] autonomous regions. Over 500 million Europeans enjoy the possibility to query their rights under these laws. Citizens' expectations of the benefits that the EU brings should be met.<sup>67</sup>

As a result of the deepening and widening of the EU, unique governance structures have to be established in order to ensure there is a level of coherence in the application and enforcement of EU law.

Nevertheless, the desire for coherence has to be balanced with the need to respect the autonomy of the Member States. This respect for autonomy is enshrined in the principle of subsidiarity. Article 5(3) of the Treaty on the European Union (hereinafter the 'TEU') states that:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.<sup>68</sup>

Subsidiarity thus ensures that the autonomy of the Member States will only be trespassed upon when action is more effectively taken at the EU level.

In order to balance regulatory coherence with respect for subsidiarity, the EU has developed the network-based governance model to better mediate the interaction between the principal actors in charge of regulatory enforcement. This governance model can be generally defined as 'a set of relatively stable relationships which are of a non-hierarchical and interdependent nature, linking a variety of actors who share common interests with regard to a policy and who exchange resources to pursue these shared interests, acknowledging that cooperation is the best way to achieve common goals'.<sup>69</sup> In other words,

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<sup>67</sup> Commission (EC), 'A Europe of Results: Applying Community Law' COM (2007) 502 final, 5 September 2007.

<sup>68</sup> Treaty on European Union (Maastricht Treaty, as amended) art 5(3).

<sup>69</sup> Tanja A Borzel, 'What's so Special about Policy Networks? An Exploration of the Concept and its Usefulness in Studying European Governance' (1997) European Integration Online Papers No 16, 1 <<http://eiop.or.at/eiop/pdf/1997-016.pdf>> accessed December 2011.

the network-based governance model requires institutions to exchange resources and cooperate in order to achieve common goals.

In the EU, network-based governance is exemplified in the way NRAs, national courts and the Commission coordinate their activities in order to ensure that there is consistent application of communications regulation. NRAs and national courts are given the primary responsibility for regulatory enforcement but the Commission maintains supervision to ensure coherence. Network-based governance contributes to coherence because of the emphasis on notification, consultation and information sharing among the various institutions. The Body of European Regulators for Electronic Communications (hereinafter the '**BEREC**'), an agency consisting of the twenty-seven NRAs, is the institutional platform that facilitates network-based governance.<sup>70</sup>

The following sections will outline the various institutions and the contributions they make to communications regulation. Specifically, the enforcement function of the NRAs, the judicial review function of the national courts, the supervisory function of the Commission and the consultative function of BEREC will be examined.

### **3.2. National Regulatory Agencies**

Under the communications regulatory framework, NRAs are primarily charged with the enforcement of the communications Directives. All NRA decisions must be in accordance with the three objectives outlined in Article 8 of the Framework Directive.<sup>71</sup> In the UK, Section 4 of the Communications Act explicitly requires Ofcom to fulfil the Community objectives outlined in the Framework Directive.<sup>72</sup> In cases of conflict between the objectives, Subsection 4(11) requires Ofcom to 'secure that the conflict is resolved in the manner they think best in the circumstances'.<sup>73</sup>

The communications regulatory framework, through its emphasis on notification, consultation and Commission supervision, is structured to be conducive of regulatory coherence. Article 7(3) of the Framework Directive requires NRAs to circulate draft measures to the Commission and other NRAs prior to making regulatory decisions that could affect communications competition in the Internal Market.<sup>74</sup> After receiving

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<sup>70</sup> Council Regulation (EC) 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1 (BEREC Regulation). BEREC replaces the European Regulatory Group.

<sup>71</sup> Framework Directive 2002/21 (n 5) art 8. The three objectives are the development of the Internal Market, the promotion of competition and the promotion consumer interests.

<sup>72</sup> Communications Act (n 33) s 4.

<sup>73</sup> *Ibid.*, s 4(11).

<sup>74</sup> Framework Directive 2002/21 (n 5) art 7(3).

notification, the Commission and other NRAs have one month to make comments.<sup>75</sup> If comments are given, an NRA must take account of the comments and specify in its reasons how it has dealt with them. Although there is no formal consultation mechanism in the Framework Directive, in practice NRAs may consult the Commission for advice on the proper application of EU law.<sup>76</sup> If the Commission believes that an NRA's decision would negatively affect the Internal Market, contravene the objectives in Article 8 of the Framework Directive or violate EU law, then Article 7(4) of the Framework Directive allows the Commission to veto the decision.<sup>77</sup> The Commission's veto requires the NRA to withdraw its decision and reconsider it.

This procedure for regulatory decision making can be best illustrated through an examination of communications providers that are determined by NRAs to have significant market power (hereinafter '**SMP**'). The SMP procedure was put in place in recognition of the fact that the remaining barriers to market entry and the uneven playing field between incumbents and new competitors may require more interventionist regulatory policies in order to sustain competition.<sup>78</sup> The SMP procedure involves three steps: '(i) selection and definition of the relevant market that is susceptible to *ex ante*<sup>79</sup> regulation; (ii) market analysis and SMP assessment; and (iii) choice of regulatory remedies.'<sup>80</sup>

In the first step, the Commission, with assistance from BEREC, identifies the markets that are susceptible to *ex ante* regulation.<sup>81</sup> The Commission publishes the identified markets in a Recommendation, the most current of which is the Second Markets Recommendation.<sup>82</sup> The Annex to the Recommendation contains a list of the susceptible markets. The

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<sup>75</sup> Visser (n 10) 160-161.

<sup>76</sup> *Ibid.*, 164.

<sup>77</sup> Framework Directive 2002/21 (n 5) art 8.

<sup>78</sup> Walden and Angel (n 36) 129.

<sup>79</sup> Historically, telecommunications regulation consisted of *ex ante* regulation, which aimed at being anticipatory of market failure. In contrast, competition law consists of *ex post* regulation, which intervenes only after there is a finding of anti-competitive behaviour or market abuse.

<sup>80</sup> Laurent Garzaniti & Matthew O'Regan (eds), *Telecommunications, Broadcasting and the Internet EU Competition Law & Regulation* (3rd ed, Sweet & Maxwell 2010) 140-143.

<sup>81</sup> *Ibid.*

<sup>82</sup> Commission Recommendation (EC) 2007/879 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2007] OJ L344/65 (Second Markets Recommendation).

Recommendation also sets out the three criteria that the Commission has used to identify susceptible markets:

- (a) the presence of high non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;
- (b) a market structure which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry;
- (c) the insufficiency of competition law alone to adequately address the market failure(s) concerned.<sup>83</sup>

In addition to the Recommendation, the Commission has published the SMP Guidelines which provide principles to assist NRAs in their analysis of markets and effective competition when applying communications regulation.<sup>84</sup> When conducting a market analysis in their national area, NRAs must collaborate, when appropriate, with national competition authorities.<sup>85</sup> An NRA can choose to analyse one of the markets that is already listed in the Annex of the Commission's Recommendation. Alternatively, the NRA can choose to analyse a market that is not listed but it has to justify its selection on the basis of the three criteria set out in the Recommendation.<sup>86</sup>

In the second step, an NRA is required to undergo an assessment of SMP. When the NRA has identified the relevant market, it must then determine, in collaboration with national competition authorities, whether any of the providers operating in that market possess SMP.<sup>87</sup> A provider has SMP 'if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'.<sup>88</sup> If a provider has been determined to have SMP, it may also be designated as SMP in a closely related market.<sup>89</sup> This is permitted where the markets are so related that a provider's market power in one market can be leveraged in the other market. An NRA that intends to designate a provider as having SMP must notify other NRAs

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<sup>83</sup> *Ibid.*, s 2.

<sup>84</sup> Commission Guidelines (EC) 2002/C165/03 on market analysis and the assessment of SMP under the Community regulatory framework for electronic communications networks and services [2002] OJ, C 165/6 (SMP Guidelines).

<sup>85</sup> Framework Directive 2002/21 (n 5) art 16(1).

<sup>86</sup> Second Markets Recommendation 2007/879 (n 82) rec 17.

<sup>87</sup> Framework Directive 2002/21 (n 5) art 16(1).

<sup>88</sup> *Ibid.*, art 14(2).

<sup>89</sup> *Ibid.*, art 14(3).

and the Commission of its proposed decision. If the Commission disagrees with the proposed decision it may exercise its veto power.

In the last step, once an NRA has determined that a provider has SMP in a certain market it must then choose a remedy. The remedy will be dependent on whether the provider is operating in a wholesale or retail market. If the provider operates in a wholesale market, the NRA must impose at least one of the remedies outlined in the Access Directive.<sup>90</sup> If the provider operates in a retail market, the NRA must impose at least one of the remedies outlined in the Universal Service Directive.<sup>91</sup> In order to ensure coherence in the application of remedies, the European Regulatory Group (hereinafter the 'ERG'), BEREC's predecessor, published a document to guide NRAs in their application of remedies.<sup>92</sup>

The SMP procedure illustrates how network-based governance has been used to bring greater coherence to communications regulation. During the first stage, the Commission must consult with BEREC when identifying relevant markets. In the second stage, NRAs must conduct a market analysis using the Commission's Recommendation and SMP Guidelines. In the last stage, an NRA is required to impose a remedy in accordance with the ERG Common Position on Remedies. Through notification, consultation and collaboration, network-based governance allows the Commission to rely on NRAs for primary enforcement of EU law without having to sacrifice regulatory coherence.

### 3.3. National Courts

Article 4 of the Framework Directive requires that Member States establish a right of appeal mechanism for users and communications providers affected by NRA decisions.<sup>93</sup> The mechanism must be both effective and independent of the parties involved. In the UK, the right of appeal mechanism is outlined in Sections 192 to 196 of the Communications Act.<sup>94</sup> According to these provisions, Ofcom's decisions may be appealed to the Competition Appeal Tribunal (hereinafter the 'CAT'). The CAT's decisions may be then appealed to the Court of Appeal and, ultimately, to the House of Lords. Although this is the appeal process outlined in statute, there is still the possibility to appeal Ofcom's decisions to ordinary courts, such as the Administrative Court of the Queen's Bench Division.<sup>95</sup>

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<sup>90</sup> Access Directive 2002/19 (n 6) arts 8-13.

<sup>91</sup> Universal Service Directive 2002/22 (n 8) arts 17-19.

<sup>92</sup> European Regulatory Group (ERG), 'Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework' ERG (06) 33, 19 May 2006 (ERG Common Position on Remedies).

<sup>93</sup> Framework Directive 2002/21 (n 5) art 4.

<sup>94</sup> Communications Act (n 33) ss 192-196.

<sup>95</sup> Visser (n 10) 111.



Various tools are available to national courts in order to ensure there is a level of consistency in the judgments being rendered. For instance, the Commission has created a special section on its website of judgments rendered by national courts.<sup>96</sup> These decisions are voluntarily reported by national courts and NRAs. The website provides national courts with a resource to consult when they want to ensure that their judgments are consistent with those being rendered by other national courts. In addition, national courts can seek assistance from the CJEU. Article 267 TFEU allows national courts to ask the CJEU for a preliminary ruling on EU law.<sup>97</sup> The Commission also holds educational seminars for national court judges to assist them in their application of EU communications law.<sup>98</sup>

### 3.4. The European Commission

The Commission is the principal institution in charge of ensuring regulatory coherence. It fulfils this function by maintaining a supervisory role over NRAs who are given the main responsibility of applying EU communications law. Within the Commission, the responsibility for overseeing the communications sector is delegated to the Directorate-General Information Society & Media (hereinafter '**DG INFSO**') and its Commissioner.<sup>99</sup> Reviewing NRA notifications is the responsibility of both DG INFSO and the Directorate-General for Competition (hereinafter '**DG COMP**') since communications law involves the effective regulation of competition in the communications sector.

The Commission can use various tools to ensure coherence. As mentioned above, Article 7(3) of the Framework Directive requires an NRA to send a notification to the Commission when it intends to make a regulatory decision that could affect communications competition in the Internal Market.<sup>100</sup> Article 7(4) of the Framework Directive also permits the Commission to veto draft measures by NRAs, which forces the decision to be withdrawn and reconsidered, if it believes that the decision will have a negative impact on the Internal Market, contravenes the objectives outlined in Article 8 or violates EU law.<sup>101</sup> By the end of 2011, the Commission has exercised its veto power only five times.<sup>102</sup> This proves that the

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<sup>96</sup> Commission (EC), 'Decisions of national judiciaries'  
<[http://ec.europa.eu/information\\_society/policy/ecomm/implementation\\_enforcement/eu\\_consultation\\_procedures/national\\_judiciaries/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/eu_consultation_procedures/national_judiciaries/index_en.htm)> accessed December 2011.

<sup>97</sup> TFEU (n 2) art 267.

<sup>98</sup> Commission (EC), 'Past events/EC on electronic communication'  
<[http://ec.europa.eu/information\\_society/policy/ecomm/implementation\\_enforcement/eu\\_consultation\\_procedures/events/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/eu_consultation_procedures/events/index_en.htm)> accessed December 2011.

<sup>99</sup> Visser (n 10) 150-151.

<sup>100</sup> Framework Directive 2002/21 (n 5) art 7(3).

<sup>101</sup> Ibid., art 7(4).

<sup>102</sup> Visser (n 10) 177-182.

regulatory framework is generally effective at fostering a collaborative relationship between the Commission and NRAs.

Beyond its veto power, the Commission also has less intrusive tools to ensure regulatory coherence. For instance, when a notification is given, the Commission can contribute its comments to the draft measure.<sup>103</sup> The most important of these comments are followed by a press release to draw attention to them. This was done with the Commission's comments endorsing Ofcom's approach to defining sub-national geographic markets. By endorsing draft measures, the Commission identifies best practices to be adopted by other NRAs. In addition, the Commission publishes numerous guidelines, communications and recommendations to guide NRAs in their application of EU communications law. The most important examples of these include the SMP Guidelines<sup>104</sup> and the Second Markets Recommendation.<sup>105</sup> Article 7a of the Framework Directive also allows the Commission to make recommendations on remedies, either for an individual case or for application by all NRAs.<sup>106</sup> In addition, NRAs may also go to the Commission to advise them in their interpretation or application of EU communications law.<sup>107</sup>

If NRAs do not apply EU communications law correctly, or refuse to apply it at all, then the Commission has various means to directly enforce EU law. For instance, Article 258 TFEU allows the Commission to bring infringement proceedings before the CJEU against Member States who are allegedly violating EU law.<sup>108</sup> In addition, Article 105 TFEU permits the Commission to directly enforce EU competition law against communications providers.<sup>109</sup> In *Deutsche Telekom*, the CJEU affirmed the Commission's power to enforce EU competition law against a provider that is already being regulated by EU communications law.<sup>110</sup> The CJEU's decision allows the Commission to override an NRA's misapplication of EU communications law through the enforcement of EU competition law. Nevertheless, the Commission is likely to be hesitant to use these more intrusive tools since it may alienate Member States.<sup>111</sup> Alienating Member States could have disastrous consequences since the

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<sup>103</sup> Ibid., 149.

<sup>104</sup> SMP Guidelines 2002/C165/03 (n 84).

<sup>105</sup> Second Markets Recommendation 2007/879 (n 82).

<sup>106</sup> Framework Directive 2002/21 (n 5) art 7a.

<sup>107</sup> Visser (n 10) 150.

<sup>108</sup> TFEU (n 2) art 258.

<sup>109</sup> Ibid., art 105.

<sup>110</sup> *Deutsche Telekom* (n 17).

<sup>111</sup> Visser (n 10) 146.

network-based approach to communications regulation relies on a high degree of cooperation between NRAs and the Commission.

### 3.5. The Body of European Regulators for Electronic Communications

BEREC was created as an alternative to establishing a European Regulatory Agency.<sup>112</sup> The agency consists of the twenty-seven NRAs. Article 2 of the BEREC Regulation summarises the role of the agency:

- (a) develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework;
- (b) on request, provide assistance to NRAs on regulatory issues;
- (c) deliver opinions on the draft decisions, recommendations and guidelines of the Commission, referred to in this Regulation, the Framework Directive and the Specific Directives;
- (d) issue reports and provide advice, upon a reasoned request of the Commission or on its own initiative, and deliver opinions to the European Parliament and the Council, upon a reasoned request or on its own initiative, on any matter regarding electronic communications within its competence;
- (e) on request, assist the European Parliament, the Council, the Commission and the NRAs in relations, discussions and exchanges with third parties; and assist the Commission and NRAs in the dissemination of regulatory best practices to third parties.<sup>113</sup>

The primary purpose of BEREC is to act as an advisory body that must be consulted in certain situations. BEREC also fosters regulatory coherence with its opinions and ability to facilitate cooperation.

Article 3 of the BEREC Regulation outlines specifically the agency's various tasks.<sup>114</sup> Notably, BEREC assists NRAs throughout all steps of the SMP procedure. It is consulted when defining markets susceptible to market failure, drafting notifications and imposing remedies. Article 3(3) of the BEREC Regulation requires that NRAs and the Commission 'take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC'.<sup>115</sup>

By acting as the institutional platform for cooperation and information sharing, BEREC is the centrepiece in the network-based governance model that is integral to regulatory

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<sup>112</sup> Garzaniti and O'Regan (n 80) 70-71.

<sup>113</sup> BEREC Regulation 1211/2009 (n 70) art 2.

<sup>114</sup> *Ibid.*, art 3.

<sup>115</sup> *Ibid.*

coherence. The linking of NRAs together under BEREC forces the NRAs to think with a more European perspective rather than focusing on narrow domestic interests.<sup>116</sup> NRAs are linked together in a relationship of mutual dependence since they rely on each other for information, advice, legitimacy and authority. The more dependant NRAs are to one another, the more they can exert influence over one another's decision.

#### **4. Conclusion**

The EU is moving towards ever increasing expansion and integration. Croatia, Iceland, Macedonia, Montenegro and Turkey wait in the wings as they work their way towards EU membership. The European sovereign debt crisis has also lead to calls for accelerated economic and fiscal integration. These pivotal events raise the question of how the EU is going to manage this sprawling growth.

An expanding and deepening of the EU creates serious problems with regards to the balancing of two competing concerns: respect for the principle of subsidiarity and legal coherence. The principle of subsidiarity requires that Member State autonomy be preserved when reasonably possible. Subsidiarity can be both advantageous and disadvantageous depending on how it is implemented. Giving Member States the primary role of applying EU law can allow them to address regional concerns and be more flexible. Nevertheless, too much variation in the application of EU law can lead to uncertainty and arbitrariness.

In the realm of communications law, the EU has established a unique form of governance that diverges from both the traditional centralised and decentralised models. In a centralised model, the Commission is given the primary role of enforcement. The centralised model is problematic because the Commission is often cumbersome and sluggish. These issues arise in every monolithic bureaucracy. In a decentralised model, Member States are given the primary role of enforcement. The decentralised model is problematic because expertise, resources and information can often vary drastically between Member States. The result is often large inconsistencies and uncertainty in the enforcement of EU law. In contrast, the network-based governance model remedies most of these problems encountered by the centralised and decentralised models. Although the network-based governance model gives the primary role of enforcement to Member States, various mechanisms are put in place to ensure that there is a level consistency in the application of EU law. Network-based governance ensures this by facilitating cooperation, mutual reliance and information sharing. This process is enshrined in the Directives that constitute the communications regulatory framework. The Directives put in place various procedural mechanisms that require notification and consultation between NRAs and the Commission.

The network-based governance model allows the EU to balance respect for subsidiarity with regulatory coherence through the reliance on non-intrusive tools (such as

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<sup>116</sup> Visser (n 10) 238.

communication and dialogue) rather than intrusive tools (such as legal coercion). This model will be useful as the EU expands and deepens. It exemplifies the EU's ability to come up with innovative governance structures to meet the challenges of the future.