

THE ELECTRONIC COMMUNICATIONS POLICY OF THE EUROPEAN UNION

Antonio Alabau and Luis Guijarro



EDITORIAL
UNIVERSITAT POLITÈCNICA DE VALÈNCIA

Antonio Alabau and Luis Guijarro

aalabau@dcom.upv.es
lguijar@dcom.upv.es

**THE ELECTRONIC COMMUNICATIONS POLICY OF
THE EUROPEAN UNION**

**EDITORIAL
UNIVERSITAT POLITÈCNICA DE VALÈNCIA**

First edition 2011

© Of the present edition:
Editorial Universitat Politècnica de València
www.editorial.upv.es

© Antonio Alabau
Luis Guijarro

Print: Fustabloc S.L.

ISBN: 978-84-8363-642-8

Ref. editorial: 2060



Attribution-NonCommercial-NoDerivs 3.0

This work is licensed under a Creative Commons License. You are free to copy, distribute and transmit the work, under the following conditions: you must attribute the work in the manner specified by the author or licensor; you may not use this work for commercial purposes; you may not alter, transform, or build upon this work.

Legal code (full license):

<http://creativecommons.org/licenses/by-nc-nd/3.0/>

Printed in Spain



Prof.
Antonio ALABAU

Born in Alfafar (Valencia) in 1947. He got his PhD in Telecommunications Engineering at the Universidad Politécnica de Madrid in 1973, and at the Université Paul Sabatier in Toulouse (France) in 1972, and his MEng in Telecommunications Engineering at the Universidad Politécnica de Madrid in 1969.

He retired in 2009, and he was a Professor in Telecommunications Policy at the Universidad Politécnica de Valencia (1996- 2009), Jean Monnet Chair in Telecommunications and Information Society Policy at the European Union (1997-2006), Head of Area of Telecommunications at DRAC Group in Valencia (1989-94). Director at the Electronics and Informatics Corporate Group of the Instituto Nacional de Industria in Madrid (1982-88), Professor at the Higher Technical School of Telecommunications Engineers of Barcelona (1972-82), and Visiting Professor at different Universities in the European Union and the Middle East.



Dr.
Luis GUIJARRO

Born in Xixona (Alicante) in 1970, he got his PhD in Telecommunications Engineering in 1998 and his MEng in Telecommunications Engineering in 1993 at the Universidad Politécnica de Valencia (UPV).

He is an Associate Professor in Telecommunications and Information Society Policy at the Higher School of Telecommunications Engineers of the UPV (1995-2010), Assistant to the Jean Monnet Chair in Telecommunications and Information Society Policy at the European Union (1997-2006) and Head of the Strategy and Planning Unit (2004-2006) and Head of the Postgraduate Studies (2006-2007) at the UPV.

His research has covered the field of eGovernment, where he has been focused on the standardisation for technical and organisational interoperability; and Telecommunications Policy and Regulation, where he has been focused on techno economical modelling.

*To our colleagues, responsible for the Telecommunication Policy at the
Ministry of Communications and Technology, Syrian Arab Republic,
who premiered its first Telecommunications Act in June 2010.*

Welcome to the Club!

TABLE OF CONTENTS

PREFACE	15
CHAPTER 1: INTRODUCTION	21
CHAPTER 2: AN OVERVIEW OF THE TELECOMMUNICATIONS POLICY OF THE EUROPEAN UNION	27
1.- INTRODUCTION	27
2.- BASIC ASPECTS ABOUT THE EUROPEAN UNION'S ELECTRONIC COMMUNICATIONS POLICY	27
2.1.- European Union Actions.	27
2.2.- Electronic Communications Policy and Regulation.....	28
2.3.- Legal bases for the development of the Electronic Communications Regulatory Framework.....	29
3.- TELECOMMUNICATIONS, ELECTRONIC COMMUNICATIONS AND THE INFORMATION SOCIETY.	30
3.1.- Telecommunications and Electronic Communications.	30
3.2.- Convergence.....	32
3.3.- Telecommunications, Electronic Communications and the Information Society.....	34
3.4.- The role of European Institutions in the Electronic Communications Policy.....	34
4.- THE STAGES OF THE EUROPEAN UNION.	35
4.1.- The Jenkins Commission. 1976-1981 and the Thorn Commission 1981-1985.	35
4.2.- The Delors Commission. 1985-1994.....	36
4.3.- The Santer Commission. 1995-1999.	37
4.4.- The Prodi Commission. 1999 – 2004.	37
4.5.- The Barroso Commission. Since 2004	39
5.- TYPES OF ACTIONS IN THE ELECTRONIC COMMUNICATIONS POLICY	40
5.1.- The Liberalization process.	40
5.2.- The Harmonisation process of the legislation of Member States.....	40
5.3.- Standardization and Certification of Equipment.	41
5.4.- The corrective measures of free competition.	42
5.5.- Other aspects of the Electronic Communications Policy.	42
6.- THE STAGES OF THE ELECTRONIC COMMUNICATIONS POLICY.	43
6.1.- 1977-1986 Stage. First Steps.....	43
6.2.- 1987-1998 Stage. First Regulatory Telecommunications Framework.....	44
6.3.- 1999-2005 Stage. First reform of the Electronic Communications Policy.	44
6.4.- 2005-2010 Stage. Second reform of the Electronic Communications Policy.....	45
7.- CONCLUSIONS	45

CHAPTER 3: THE PRELIMINARY STAGES OF THE TELECOMMUNICATIONS POLICY. PERIOD 1977 – 1986	49
1.- INTRODUCTION	49
2.- THE INITIAL STEPS OF THE TELECOMMUNICATIONS POLICY.	49
2.1.- Background and context	49
2.2.- The Commission's initial proposals, September 1980	51
2.3.- Parliament Resolution, March 1981	52
2.4.- The Council's reaction.....	53
2.5.- The situation in Great Britain and in the United States. The issue of British Telecom.....	53
2.6.- The Commission's new proposal, June 1983	54
2.7.- The Commission's proposal, September 1983	55
2.8.- European Parliament Resolution, March 1984	57
2.9.- European Commission proposal, May 1984.....	57
2.10.- European Council agreement, December 1984	58
2.11.- Comments on the initial steps of the Telecommunications Policy	59
3.- INITIAL TELECOMMUNICATIONS ACTIONS IN THE EUROPEAN COHESION POLICY.....	59
3.1.- Regional Policy and Cohesion Policy. Overview	59
3.2.- Cohesion Objectives in 1984 Telecommunications strategies.	61
4.- CONCLUSIONS.....	63
CHAPTER 4: THE START OF THE TELECOMMUNICATIONS STANDARDISATION AND CERTIFICATION POLICY. PERIOD 1977 – 1986	67
1.- INTRODUCTION	67
2.- OVERVIEW OF THE STANDARDISATION AND CERTIFICATION OF TELECOMMUNICATIONS.....	67
3.- SUMMARY OF THE EUROPEAN UNION'S STANDARDISATION AND CERTIFICATION POLICY	69
3.1.- The Standardisation Policy in the Treaty of Rome.....	69
3.2.- The Technical Standardisation Commitments of the GATT.....	70
3.3.- The New Approach of the Community's Standardisation Policy.	70
3.4.- Technical Standardisation after the Single Act of 1986.	73
3.5.- Overview of the European Union's Certification Policy.	75
3.6.- The Global Certification Approach of the European Union.....	75
4.- STANDARDISATION AND CERTIFICATION IN TELECOMMUNICATIONS DURING THE PERIOD 1977 – 1986.....	77
4.1.- The first telecommunications standardisation-related actions.....	77
4.2.- The Council's Decision on Standardisation in the field of Information Technologies and Telecommunications, December 1986.....	78
4.3.- The start of Certification and the opening up of the terminal market.	79
5.- CONCLUSIONS.....	81
CHAPTER 5: THE TELECOMMUNICATIONS LIBERALISATION PROCESS. PERIOD 1987 – 1998	85
1.- INTRODUCTION	85
2.- THE STRATEGY OF 1987.....	86
2.1.- Background and context	86
2.2.- The Green Paper on Telecommunications, June 1987.	87
2.3.- The consultation process of the Green Paper, June 1987.....	88

2.4.-	The Terminal liberalisation Directive, May 1988.....	89
2.5.-	The Resolution of the Council, June 1988.....	90
2.6.-	The Resolution of the Parliament, December 1988.....	91
2.7.-	The Decision of the Commission, December 1988.....	91
2.8.-	European Council Agreement, December 1989.....	92
2.9.-	The Commission's Service Directive 90/388 of June 1990.....	93
2.10.-	The reactions to the publication of the Service Directive.....	95
2.11.-	Article 90 (currently Art. 106) of the Treaty.....	96
2.12.-	Comments on the results of the 1987 strategy.....	97
3.-	THE DECISIONS OF 1993.....	97
3.1.-	Background and context.....	97
3.2.-	The review of the sector's situation.....	98
3.3.-	The Commission's Review, October 1992.....	99
3.4.-	The Council Resolution of November 1992.....	101
3.5.-	The European Parliament Resolution of April 1993.....	101
3.6.-	The Commission's Communication to the Council and Parliament on the consultation, April 1993.....	103
3.7.-	The Council Resolution on the review of the situation in the telecommunications sector, June 1993.....	105
3.8.-	Comments on the actions of 1993.....	106
4.-	THE 1995 STRATEGY.....	107
4.1.-	Background and context.....	107
4.2.-	The White Paper on Growth, Competitiveness and Employment, December 1993.....	109
4.4.-	The Europe and the Global Information Society Report, May 1994.....	110
4.5.-	The Communication: "Europe's way to the Information Society, July 1994.....	113
4.6.-	The Council's Agreement on the Information Society, September 1994.....	115
4.7.-	The European Parliament's Resolution on the Information Society, November 1994.....	116
4.8.-	Part One of the Green Paper on the liberalisation of infrastructures, October 1994.....	117
4.9.-	The Council Resolution on Part One of the Green Paper on Infrastructures, November 1994.....	118
4.10.-	Part Two of the Green Paper on Infrastructures, January 1995.....	119
4.11.-	The European Parliament's Reactions to the Green Paper on Infrastructures, April 1995.....	121
4.12.-	The G-7 Ministerial Meeting, February 1995.....	122
4.13.-	The Commission's Communication on the Green Paper on Infrastructures, May 1995.....	122
4.14.-	The Telecommunications Council Meeting, June 1995.....	125
4.15.-	The Directive on the Liberalisation of satellite communications, October 1994.....	126
4.16.-	The Directive on the liberalisation of cable TV network infrastructures, October 1995.....	128
4.17.-	The Directive for the liberalisation of mobile communications services, January 1996.....	129
4.18.-	The Directive on the liberalisation of infrastructures and implementation of full competition, March 1996.....	130
4.19.-	The separation of Telecommunications business and Television businesses.....	133
4.20.-	The Commission's use of Article 90 (currently Art. 106) of the Treaty.....	133
4.21.-	Comments on the actions carried out after 1995.....	134
5.-	CONCLUSIONS.....	134
CHAPTER 6: THE HARMONISATION OF THE MEMBER STATES' LAWS WITHIN THE FIRST REGULATORY TELECOMMUNICATIONS FRAMEWORK. PERIOD 1987 – 1998.....		
137		
1.-	INTRODUCTION.....	137
2.-	HARMONISATION IN THE 1987 STRATEGY.....	138
2.1.-	Approach.....	138
2.2.-	The Open Network Provision principle in the Green Paper of June 1987.....	139

2.3.-	The Activities of the Analysis and Forecasting Group.....	140
2.4.-	Report on the start-up of the Green Paper, February 1998 and the Council Resolution, June 1988.....	141
2.5.-	The Commission's Communication on progress in the definition of ONP, December 1988.....	142
2.6.-	The Council's "Political Agreement", December 1989.....	143
2.7.-	The ONP Framework Council Directive 90/387, June 1990.....	144
2.8.-	The development of the ONP Framework Directive.....	146
2.9.-	The Work Programme of the ONP Committee for 1991, 1992 and 1993.....	147
2.10.-	Comments on the development of ONP during the 1987 strategy.....	149
3.-	DEVELOPMENT OF THE ONP FRAMEWORK DIRECTIVE.....	149
3.1.-	Directive on the application of ONP to Leased Lines, June 1992.....	150
3.2.-	Comments on the ONP Directive on Leased Lines.....	151
3.3.-	The Council's Recommendation on the application of ONP to packet switching data transmission services.....	152
3.4.-	Comments about the Recommendation on ONP in packet switching data transmission services.....	153
3.5.-	The Council's Recommendation on the application of ONP to the Integrated Services Digital Network.....	154
3.6.-	Comments about the ONP Recommendation on the Integrated Digital Services Network.....	155
3.7.-	The Directive ON the application of ONP to Voice Telephony.....	157
3.8.-	Comments on the Directive of ONP in Voice Telephony.....	157
3.9.-	Comments on the development of ONP in the 1987 telecommunications strategy.....	160
4.-	HARMONISATION IN THE DECISIONS OF 1993.....	160
4.1.-	The decisions of 1993.....	160
4.2.-	How ONP was affected by the decisions of 1993.....	160
4.3.-	The ONP Work Programme for 1994.....	161
4.4.-	Consultation on the studies on future areas of application of ONP, July 1994 and gathering of comments on the consultation, February 1995.....	161
4.5.-	ONP Work Programme for 1995.....	162
4.6.-	Comments on the development of ONP in the decisions of 1993.....	163
5.-	HARMONISATION DURING ACTIONS SINCE 1995.....	164
5.1.-	Actions after 1995.....	164
5.2.-	Work Programme of the ONP Committee for 1996 and 1997.....	166
5.3.-	The amendment of the ONP Framework Directive and ONP Directive on Leased Lines.....	167
5.4.-	The Directive on the Interconnection of telecommunications networks and Universal Service.....	167
5.5.-	The Directive on Voice Telephony in a competitive environment.....	169
5.6.-	The Directive on the common framework for General Authorisations and Individual Licenses.....	170
5.7.-	The Privacy Protection Directive.....	171
5.8.-	Comments on the Harmonisation process during the 1995 actions.....	172
6.-	CONCLUSIONS.....	172
CHAPTER 7: THE STANDARDISATION AND CERTIFICATION OF TELECOMMUNICATIONS EQUIPMENT. PERIOD 1987 – 1998.....		175
2.-	STANDARDISATION IN THE 1987 STRATEGY.....	176
2.1.-	Overview of Standardisation in the 1987 Telecommunications Strategy.....	176
2.2.-	The creation of the European Telecommunications Standards Institute – ETSI.....	176
2.3.-	The May 1988 Directive on the approximation of legislations and its amendment.....	178
2.4.-	Harmonised Standards and Common Technical Regulations concerning terminals.....	181

2.5.- Standardisation in the ONP framework.....	182
3.- STANDARDISATION IN THE 1993 AND 1995 ACTIONS.....	184
3.1.- Standardisation on the eve of Full Competition.....	184
3.2.- Standardisation in the new ONP framework of 1997.....	184
3.3.- Standardisation in the context of the Information Society. The start of a new direction.....	186
4.- CONCLUSIONS	188
CHAPTER 8: CORRECTIVE ACTION REGARDING FREE COMPETITION. PERIOD 1987 – 1998.....	191
1.- INTRODUCTION	191
2.- TELECOMMUNICATIONS AND THEIR CONTRIBUTION TO THE ECONOMIC AND SOCIAL COHESION OBJECTIVES.....	192
2.1.- The Cohesion objectives of the 1987 Strategy.....	192
2.2.- The Cohesion Objectives in the actions of 1993.....	193
2.3.- The Cohesion Objectives in the actions of 1995.....	196
2.4.- The Corrective Actions used after 1998.....	198
2.5.- Summary of the Cohesion-related actions during the Period 1987 – 1998.....	200
3.- THE ADAPTATION OF THE IMBALANCES OF THE NATIONAL TELECOMMUNICATIONS OPERATORS.....	202
3.1.- Overview of the situation of incumbent operators.....	202
3.2.- Actions of the 1987 strategy. Safeguarding Operators' economic viability.....	202
3.3.- The Actions of 1993 and 1995.....	204
3.4.- Comments on the situation after 1998.....	206
4.- GUARANTEEING UNIVERSAL SERVICE IN THE TELECOMMUNICATIONS SECTOR.....	207
4.1.- Overview of the Universal Service.....	207
4.2.- The Universal Service in the 1993 strategy.....	208
4.3.- The Universal Service in the 1995 strategy.....	211
4.4.- The Universal Service after 1998.....	214
5.- CONCLUSIONS	216
CHAPTER 9: FIRST REVIEW OF TELECOMMUNICATIONS POLICY. PERIOD 1999 - 2005	219
1.- INTRODUCTION	219
2.- DEFINITION OF NEW REGULATORY FRAMEWORK	220
2.1.- Background	220
2.2.- Summary of the Telecoms Regulatory Framework review process.....	221
3.- LIBERALISATION AFTER 1998.....	222
3.1.- Frame of reference and history.....	222
3.2.- Directive on Competition in networks and services markets.....	223
4.- HARMONISATION AFTER 1998.....	224
4.1.- Frame of reference and history.....	224
4.2.- Local loop regulation.....	225
4.3.- Directive on the electronic communications regulatory framework	226
4.4.- Recommendation on relevant markets	228
4.5.- Authorisation Directive	230
4.6.- Directive on Access and Interconnection	231
4.7.- Universal Service Directive.....	232
4.8.- Privacy and Electronic Communications Directive	233
4.9.- Radio Spectrum Decisions.....	234

5.- TELECOMMUNICATIONS STANDARDISATION POLICY AFTER 1998.....	235
5.1.- Standardisation in Terminal Equipment.....	235
5.2.- Standardisation in the 2002 Directives package.....	238
6.- CORRECTIVE MEASURES AFTER 1998.....	239
6.1.- General Framework.....	239
6.2.- Universal Service and Services of General Interest.....	240
6.3.- Broadband Infrastructure Initiatives. Actions in the eEurope 2005 context.....	244
7.- OTHER ASPECTS OF ELECTRONIC COMMUNICATIONS POLICY AFTER 1998.....	246
7.1.- General Framework.....	246
7.2.- Radio Spectrum.....	246
7.3.- Mobile Communications. Third generation systems.....	248
7.4.- The Commission's concerns for mobile communications.....	249
7.5.- Convergence in electronic communications. First proposals on Convergence in 1998...251	
7.5.- Convergence between digital television and mobile communications in the 2002 Directives package.....	254
7.6.- The Interoperability of Interactive Digital TV services.....	255
7.7.- Group of European Telecommunications Regulators.....	257
8.- CONCLUSIONS.....	257
CHAPTER 10: THE SECOND REVIEW OF THE ELECTRONIC COMMUNICATIONS POLICY. PERIOD 2005-2010.....	261
1.- INTRODUCTION.....	261
2.- REFERENCE FRAMEWORK.....	261
2.1.- Strategic Aspects of the 2005 Review.....	261
2.2.- Electronic Communications Policy review process in the i2010 Strategy.....	262
3.- THE 2005 ELECTRONIC COMMUNICATIONS REGULATORY FRAMEWORK REVIEW PROCESS.....	263
3.1.- Summary of the 2002 Electronic Communications Regulatory Framework.....	263
3.2.- 2002 Regulatory Framework follow-up mechanisms.....	264
3.3.- The Public Consultation of June 2006.....	265
3.4.- The 2007 Reform Proposals.....	267
3.5.- The codecision procedure.....	268
3.6.- The approval of the Modified Regulatory Framework and its implementation.....	270
3.7.- Summary of the Modified Regulatory Framework.....	271
3.8.- The Review of the Recommendation on relevant market.....	273
3.9.- Regulation on international roaming.....	274
3.10.- The review of the scope of Universal Service.....	276
4.- THE REGULATORY FRAMEWORK FOR AUDIOVISUAL SERVICES.....	278
4.1.- Reference framework.....	278
4.2.- The proposal for a new Directive on Audiovisual Media Services. Evolution of the Television without frontiers Directive.....	279
5.- CONCLUSIONS.....	281
CHAPTER 11: NEW ELEMENTS OF THE ELECTRONIC COMMUNICATIONS POLICY OF 2005.....	285
1.- INTRODUCTION.....	285
2.- FRAMEWORK.....	285
2.1.- The radio spectrum policy and broadband policy within the i2010 initiative.....	285

3.- RADIO SPECTRUM POLICY	286
3.1.- The Radio Spectrum Decision 2002	286
3.2.- The Review of the Radio Spectrum Policy	287
3.3.- The market-based approach.....	288
3.4.- The flexible approach.....	288
3.5.- The digital dividend.....	290
4.- THE BROADBAND POLICY	291
4.1.- Bridging the Geographic Digital Divide	292
4.2.- The European Economic Recovery Plan.....	293
4.3.- Regulated Access to Next Generation Access Networks (NGA).....	294
5.- RADIO SPECTRUM AND BROADBAND POLICIES IN THE DIGITAL AGENDA	295
5.1.- The Europe 2020 Strategy and the Digital Agenda.....	295
5.2.- The European Strategy for Broadband.....	296
6.- CONCLUSIONS	298
CHAPTER 12: CONCLUSIONS.....	301
APPENDIX I: WORLDWIDE CONTEXT OF THE TELECOMMUNICATIONS POLICY.....	305
1.- INTRODUCTION	305
2.- A SUMMARY OF THE EVOLUTION OF TELECOMMUNICATIONS POLICY IN THE UNITED STATES OF AMERICA	305
2.1.- First Steps.....	306
2.2.- 1934 Communications Act.....	307
2.3.- The appearance of the Internet	308
2.4.- The breakup of AT&T.....	308
2.5.- The Telecommunications Act 1996	309
3.- TELECOMMUNICATIONS AND WORLD TRADE.....	310
3.1.- World Trade in Telecommunications Services	311
3.2.- World Trade in Equipment.....	313
4.- CONCLUSIONS	313

PREFACE

In his classic argument for economic freedom as a necessary condition for political freedom, Milton Friedman wrote in *Capitalism and Freedom* (1962), that under certain market circumstances a monopoly may be the most efficient technical solution to meet total demand, and used as an example, an obvious one for himself, the provision of telephone services in a given geographical area. Friedman referred to these cases as "technical monopolies," and wrote that "when technical conditions make a monopoly the natural outcome of competitive market forces, there are only three alternatives that seem available: private monopoly, public monopoly, or public regulation"

For Friedman, the three alternatives are unsatisfactory, but in the absence of better alternatives, he recommends choosing "among evils." For Henry Calvert Simons, one of the liberal economists who influenced the founders of the Chicago School, the results of public regulation of monopolies in the U.S. in the early twentieth century were so distasteful that he concluded public monopoly would be a lesser evil, just the opposite of what happened to Walter Eucken, one of the fathers of the German social market economy, who observing public monopoly in German railroads found the results so distasteful that he concluded public regulation would be a lesser evil. In view of these two positions, in principle contrary to what one would expect from the ideological trajectory of Simons and Eucken, Friedman "reluctantly" concluded that "if tolerable, private monopoly may be the least of the evils."

No wonder that, for Milton Friedman, telecommunications were a perfect example of technical monopoly during nineteenth and mid-twentieth century, since they met all features that economic theory assigns to the so-called "natural monopolies": decreasing marginal costs with economies of scale and scope, high barriers to entry and exit due to the huge sunk costs, network effects, etc. That is why the preferred option by Friedman, the private monopoly, had been chosen in the U.S., while the telecom monopolies operated for a long time as state monopolies in Europe.

In favour of private monopolies, Friedman argues that "if society were static so that the conditions which give rise to a technical monopoly were sure to remain, [he] would have little confidence" that the private monopoly would be the best option. Nevertheless, "in a rapidly changing society, the conditions frequently change, and [he] suspect[ed] that both public regulation and public monopoly are likely to be less responsive to such changes in conditions, to be less readily capable of elimination, than private monopoly."¹

Whatever we may think about the private monopoly "virtues", Friedman's argument on monopolies in general is pretty solid, at least in two aspects. First, when noting that there may be circumstances where monopoly is the natural outcome of a competitive process aiming at maximum efficiency, and that in this case the portfolio of solutions is rather limited.. And second, we must recognize his insight in pointing out that the dynamics of technology and market may change the conditions that gave rise to natural monopoly, which is precisely what seems to have happened in the case of telecommunications in the last decades. Surely, late in his life, Friedman did not think that telecommunications was a clear case for natural monopoly, and what made him change led, both in the U.S. and in the European Union during the 1980's, to question whether electronic communications should be still regarded as a monopoly, or it was time to open them to competition.

As the book that the reader holds in his hands successfully explains, the monopoly status, public or private, remained, to a greater or lesser extent, until the late twentieth century, when the *Telecommunications Act of 1996* and *Directive 96/1996* culminated decades of reforms, both in the U.S and in the European Union, which sought to prepare the various telecommunications markets to

¹ Friedman, Milton, *Capitalism and Freedom*, Fortieth Anniversary Edition, The University of Chicago Press, 2002, p. 28.

get into a full competition scenario. By those dates, a liberalising policy culminated which had its beginnings in late 1970's and which had been promoted in all areas of the economy by the triumph of neoliberal ideas that President Reagan and Prime Minister Thatcher implemented, precisely heavily influenced by Milton Friedman's ideas. This political practice—which seeks to leave economic decisions of resource allocation in the exclusive hands of the market on the ground that it is an optimal mechanism—is still a dominant factor today, even though its application to financial markets has caused the greatest economic crisis since the Great Depression.

Be it as it may, we are today, almost twenty-five years after the beginning of the liberalisation process of the European Electronic Communications, at a crossroads. The Regulatory framework erected in 1998 and embodied in the 2002 Directives and in its Review concluded in late 2009, keeps its main focus on the opening of the incumbent operators' networks to new entrants, which hopefully would adopt the so-called "ladder of investment" as a mechanism for the infrastructure deployment, to the extent that it is justified by their progressive capture of market share. In the medium term, it is expected that an evolution will take place from a situation of national markets where incumbent operators keep an important power share, to a Europe-wide market where real, effective and sustainable competition exists; a competitive environment based on private infrastructure owned by major market players, thus eventually eliminating the need for regulation.

However, this sole focus on access to traditional incumbent infrastructures is now in question, precisely because of a set of technical and economic factors that have influenced, again, electronic communications, and that we can lump together under the paradigm of Internet, Next Generation Networks and the entire economic fabric that new communications networks enable at a global level, transcending borders and legal and fiscal sovereignty.

Leaving aside the shortcomings and inadequacies of the liberalisation process experienced in the European Union—e.g., the absence of a true Electronic Communications Policy of the European Union to provide rigour to what are now twenty-seven different national policies or the constant confrontation between Member states sovereignty and EU supranationality, among other deficiencies that the authors sensibly point out in their conclusions—the fact is that the constant evolution of the sector, in the wake of powerful technological and economic changes, greatly hampers—and maybe even calls into question—the achievement of the objectives that were set at the time and that the new Digital Agenda renews and expands today. These goals—among which, the creation of a single internal market, stimulating investment in infrastructure and increasing competition—are in a sense contradictory, which makes it difficult the design and implementation of appropriate regulatory policies in an environment that is also subject to constant change.

Among these difficulties, those related to New Generation Access networks (NGAs) deployment should be emphasized. NGAs will replace the old copper pair networks, which have been the main asset of the incumbents for decades, and the sharing of which has been the main target of the classic regulatory paradigm. The long awaited Commission Recommendation on the regulatory approach to NGAs has just seen the light after a tortuous process that has lasted three years, and the conclusions of which the authors have not been able to incorporate in the book due to the tight editorial schedule. May the following paragraphs contribute to the magnificent work of synthesis and historical survey by Prof. Alabau and Dr. Guijarro at the Chair of Telecommunications Policy and Information Society of the Universidad Politécnica de Valencia, without necessarily assuming that they share what is set out below.

As pointed out by Andrea Renda,² the NGAs and the Single Market are the Achilles' heel of the Digital Agenda for Europe, an agenda that promises to usher in a new era where European citizens would achieve prosperity, economic growth and productivity through the adoption of new information services and technologies made available by modern high-speed electronic communications

² Renda, Andrea, *NGAs and the single market: the Achilles' heel of the Digital Agenda*, in *Monitoring EU Telecoms Policy*, NEREC, Madrid, October 2010.

infrastructures. Achieving the Digital Single Market, which the Council wants to see materialized before 2015, is the key element of the new strategy and it may be the most significant reform ever undertaken by the Union, since it is estimated that a Digital Single Market can increase European GDP by more than 4%, and provide many dynamic incentives for innovation and new services.

While the Digital Agenda does not elaborate on how to achieve these goals in practice, it is quite clear that they are not going to materialize unless a way is found to encourage investment in high-bandwidth infrastructure at the European level. Without a significant NGA deployment, it is not feasible to develop innovative services that are to promote e-inclusion, e-health, continuing education, e-government, smart grids or cloud computing, which are thought as essential to increase the productivity and efficiency of our economies. Unfortunately, there are still some obstacles to overcome.

First, we are far from a Single Market, because, as Commissioner Kroes said, "Europe is still a patchwork of national markets. We do not have lines of trucks at the border, but we are far from a Digital Single Market." The differences in both prices and products in the enlarged EU are so great that we are very far from any convergence process. The fragmentation of national markets hampers NGAs investments because individual markets might not have the critical mass needed for profitable investment within a reasonable time span. Furthermore, a Europe-wide Single Market requires actors deploying infrastructure concurrently in several national markets, something that is not the reality that we observe.

Secondly, Member states have taken divergent positions in relation to the NGA Commission Recommendation drafts and in state aid projects to speed NGAs deployment, resulting again in market fragmentation. As an example, the existence of a subset of Member states that have enforced functional separation on the incumbent network has created competition conditions which are very different from one country to another. Moreover, the diversity of measures taken by National Regulatory Authorities while the Commission Recommendation was still under elaboration has contributed even further to this fragmentation.

Wireless technology is another development that significantly alters the competitive environment. 4G networks with standards like LTE promise speeds approaching those of today's fixed networks. If they materialise in practice, joint fixed-mobile markets would have to be defined, which would further an additional reform of the EU Regulatory Framework that would take several years. But the mobile platform operators have no the legal certainty needed to plan their deployments since radio spectrum allocation is still a competence of Member states.

Finally, in spite of the current acrimonious discussions around the concept of "network neutrality", it is likely that the new broadband infrastructure will evolve into joint service and application platforms, which would require layer-based regulations, following the structure of IP protocols; a regulation that could encourage investment in the physical layer, without being detrimental to sustainable competition in the upper layers. This would require to determine the scope of regulations that ensure the neutrality of these networks and to set the rules of competition in the transport, application and content layers, without forgetting search engines neutrality, non-discrimination across public and private "clouds", and personal data protection in the new digital universe.

In short, it is likely that investments in NGAs deployment will not reach the needed volume in the required period unless new entrants are asked to provide a proportionate investment effort, unless neutrality and diversity rules across the Internet ecosystem are not clarified, and unless a consolidation among the European network operators does not take place. Probably only after some consolidation operators will become strong enough players in a market of a size that justifies the expected investment in new networks.

Clearly, with all its shortcomings, the old model of supervised monopolies, whether public or private, was able to provide basic telecommunications services with almost universal coverage over a long enough time, but it seems that the liberalisation process started a couple of decades ago has not yet managed to break the Gordian knot of the introduction of competition without compromising the desirable and necessary investments. We hope that this would be achieved in the coming years; otherwise we may have to rethink the dilemma that Milton Friedman brilliantly exposed, at least as far as physical infrastructures are concerned.

Dr. Marcel Coderch-Collell
Vice-President. Comisión del Mercado de las Telecomunicaciones. Spain

CHAPTER 1

INTRODUCTION



CHAPTER 1

INTRODUCTION

The book that the reader has in his or her hands —quite possibly, on his or her computer screens— is proof that, as the song says, like a corollary of the First Law of Thermodynamics, "nothing is lost, everything transforms"³. This, applied to a variety of aspects related to the book.

Because ... who was going to tell the European Commission officials that someone, even in 2010, will continue making them blush for the way they have been carrying out liberalization of telecommunications in the entire European Union along twenty years?

And ... who was going to say also that this analysis —not reproach— would be so easily accessible on the Internet?

Or ... who was going to say to students of telecommunications engineering that they would have on their hands —again, on their screens— the history of telecommunications before the advent of the Internet at home? For in this we agree, that telecommunications were not born with Internet.

Or, finally, who was going to tell the first author that a year after his well deserved retirement this text would see the light? Or the second author, who would assume the responsibility to continue the project of discussing EU policy on telecommunications.

In short, this book is the result of the strong will of its authors that the recent history of telecommunications policy in the context of the European Union continues to be useful to the group of professionals whose daily work is conditioned to a greater or lesser extent through this process.

Maybe this book could have been called: History of the Policy of Electronic Communications in the European Union, but it should be made quite clear that the reason for not doing so has been to avoid giving readers the false impression that it only refers to this sector's past. Far from it! This book endeavours to afford an in-depth analysis of what happened in order to better understand what will happen in the future.

Indeed, the Electronic Communications Policy of the European Union has an important and promising future as Electronic Communications themselves, a future that will also be decided during 2010, when developing the work plan of the Commission's initiative called "Digital Agenda for Europe."

Yet perhaps you're wondering what exactly Electronic Communications are? After spending one's whole life hearing talk about Telecommunications, the question is quite appropriate and this book tries to answer it.

The first thing to remember is that the term Electronic Communications began to be used in European Union documents when the reform of the Telecommunications sector was launched in 1999.

The second thing that has to be clarified is that, from the very beginning, the European Union has regarded Telecommunications to only refer to traditional voice and data communications services and networks, but not to radio or television and, of course, neither to Internet nor to the world of content.

³ Drexler, Jorge, "Todo se transforma", Eco, Warner Music Spain, 2004.

The third point is that the European Union considers Electronic Communications to be the result of adding, to what it had regarded as Telecommunications, other things that it had not regarded as Telecommunications, with the exception of those other things that it still does not regard as Electronic Communications. And all that as a result of technological convergence. It's that clear!

That clear? You'll wonder. Well, what can we say? That is exactly what one deduces from reading the European Union texts.

According to the definitions that you'll find in Chapter 2, the European Union regards Electronic Communications to mean the combination of Electronic Communications services and Electronic Communications Networks

On the one hand, the European Union considers that Electronic Communications Services does not include either Information Society services, or the services that supply content, or audiovisual media services—in other words radio and television, however they are broadcast.

At the same time, it considers that Electronic Communications Services do include voice and data communications services—in other words, traditional telecommunications services. What remains is the controlled ambiguity of the new borderline services, such as Voice over Internet or interactive mobile TV.

On the other hand, the European Union regards Electronic Communications Networks to mean any of the transmission systems, regardless of the services that are delivered over them.

Now do you get it? This is neither the time nor the place to revive corporatist prejudices but, in our opinion, there was no need for so much waffle.

And in this context, what has happened to convergence? You've already seen it in the previous explanations and you'll get the chance to find out if you decide to read on, because if we tell you now, we run the risk of spoiling the plot.

This book endeavours to track how Electronic Communications Policy has evolved in the European Union from 1977 until the present time. And to make it easier to understand, its contents are divided into four stages: the preliminary stage between 1977 and 1986, the stage that led to the implementation of full competition between 1987 and 1998, the one that gave rise to the first review of the regulatory framework between 1999 and 2005 and, finally that of the second review of the regulatory framework between 2005 and 2010.

Chapter 2 affords an overall perspective of the Electronic Communications Policy in the context of the European Union's evolution.

Chapter 3 commences its analysis of the Telecommunications Policy with a summary of its preliminary stage, which ran from 1977 to 1986.

Chapter 4 analyses the start of the Telecommunications Standardization and Certification Policy, which also occurred between 1977 and 1986.

Chapters 5, 6, 7 and 8 address the period between 1987 and 1998, during which the European Union defined the first Telecommunications Regulatory Framework, which permitted the implementation of full competition. These four chapters examine four complementary aspects. The Liberalization process, the process of Harmonization of the Member States' legislations, the Standardization and Certification process and, last but not least, the Corrective actions on free competition performed during this stage.

Chapter 9 summarizes the stage from 1999 to 2005, which saw the first review of the Regulatory Framework governing Electronic Communications in the European Union, once full competition was in place.

Chapter 10 takes a look to the second review of the Regulatory Framework for Electronic Communications started in 2005 and completed in 2009.

Chapter 11 presents what we understand to be the areas of Electronic Communications Policy which the European Union will focus on during the new period 2010-2020, according to the guidelines that strategic documents published in early 2010 have drawn.

Chapter 12 is the last and, obviously, contains the Conclusions

The book ends with an Appendix that outlines how Telecommunications Policy has evolved throughout the World, and we trust that you find it interesting.

As the reader can see, the book constantly refers to documents that the various European institutions have adopted and that, in a commendable show of transparency, have been made publicly available on their websites. In the case of legislation —directives, regulations or decisions— and working documents of the Commission, either published in the Official Journal of the European Union or not, we direct the reader to EUR-Lex 4, where they can be easily obtained given the reference number provided in the footnotes. We fear that the older records are more difficult to locate through the network, but we believe that the stubborn reader will know how to find them.

It should be pointed out that this is an update of a previous book published by the Vodafone Foundation Spain in 2007 and was titled "The EU and its Electronic Communications Policy." Chapters 3 to 9 have been taken from it.

You may find that, in some parts of this book, the style is rather more that of a report than a critique, and the fact of the matter is that most parts of it were written as and when the events that are described took place and from time to time, the enthusiasm of the occasion may come to light.

We must admit that the document is exceedingly dry and we would have found it impossible to write it in one go if we hadn't already spent many years working in this field. It's been a task that the first author first embarked upon in the mid-80's at what was then the Division of Electronics and Informatics of the National Institute of Industry.

The subject of this book has become our main activity at the Universidad Politécnica de Valencia. The first author planned a teaching and research project for the Telecommunications Policy Chair at the School of Telecommunications Engineers in 1991 than anyone, except perhaps his own students, understood their relevance. This activity received a boost with the creation of the Jean Monnet Chair in Telecommunications Policy and Information Society in 1999 at the request of the European Commission. The second author then joined the activities of the Chair and in the spring of 2010 he decided to undertake the updating of the book with the hope that the results remain useful to the reader.

Thus, for nearly twenty years we have devoted almost exclusively to develop teaching, research and consulting activities on matters related to these EU policies, what we tried to leave written in this book and its predecessors^{5,6,7,8}.

⁴ <http://eur-lex.europa.eu>, visited 15/9/2010.

⁵ Alabau, A. La Unión Europea y su Política de Telecomunicaciones. Fundación Airtel. Madrid 1998

⁶ Alabau, A. The European Union and its Information Society Policy. Vodafone Foundation. Madrid 2001

⁷ Alabau, A. The European Union and its e-government development policy. Vodafone Foundation. Madrid 2004.

⁸ Alabau, A. The European Union and its Electronic Communications Policy. Vodafone Foundation. Madrid 2007.

Throughout this time, we have received the support of dozens of people, but it would be impossible to list them all without risking leaving one of them out; so our thanks and recognition go to all of them. But if someone was very present when we decided to prepare this document, it was all those who have been working on the implementation process of free competition in the telecommunications sector outside the European Union, like our EuroMediterranean partners, and in particular those responsible for the Ministry of Communications and Technology in Syria, who saw the first Telecommunications Act passed in June 2010, at last!. We want to acknowledge that the many lively discussions we have been fortunate to have with all of them have been tremendously rewarding, so much so that we have changed our view of the Telecommunications Policy and of even the European Union. If any of them found what we have written in this book interesting, the work has been worth it.

CHAPTER 2

**AN OVERVIEW OF THE
TELECOMMUNICATIONS POLICY OF THE
EUROPEAN UNION**



CHAPTER 2

AN OVERVIEW OF THE TELECOMMUNICATIONS POLICY OF THE EUROPEAN UNION

1.- INTRODUCTION

This Chapter aims to provide an overview of the evolution of the European Union's Electronic Communications Policy, which will be analysed in detail in this book.

For more than thirty years, the European Union's telecommunications strategies have evolved in parallel to its environment, so that when analysing such strategies, it is vital to understand all the elements which have had an impact on them.

Firstly, you must take into account the ultimate reasons that justify the existence of a European Policy in this field, which must be obtained from the Treaty, including the balance of jurisdiction between the Union Institutions and its Member States. Thus one should analyse the legal framework on which the Electronic Communications Policy is based.

The second point worth mentioning is the role played in this process by Union Institutions, which might be less familiar to the readers who are unacquainted with the way in which the European Union is run.

Thirdly, one must look at the main features that have marked the evolution of the European Union during the period in question, for the purpose of assessing the most important events that have had an impact on the creation of strategies related to Electronic Communications.

Fourthly, it would be interesting to summarize the types of actions taken to consolidate the Electronic Communications Policy within the framework for the fulfilment of the objectives of the European Union, which are clearly defined in Article 3 of the Treaty.

The chapter ends with a bird's eye view of the main stages in to which the European Union's Electronic Communications Policy, which will be explained in depth in this book, has been divided.

2.- BASIC ASPECTS ABOUT THE EUROPEAN UNION'S ELECTRONIC COMMUNICATIONS POLICY.

2.1.- European Union Actions.

When analysing any European Union policy, a clear distinction must be made between the three types of actions that are commonly used for drafting and implementing such policies: Strategic Actions, Regulatory Actions and Budget Actions.

Strategic Actions are defined as the proposals put forward by European institutions when defining the objectives and scope of a given policy.

Regulatory Actions are defined as legal community acts adopted by the European Institutions, in accordance with the powers of the Treaty for the implementation of a given Policy.

Budgetary Actions are defined as the actions related to the use of funds from the European Union Budget.

2.2.- Electronic Communications Policy and Regulation

In addition, before analysing it, the difference between the Electronic Communications Policy and its Regulatory Framework must be defined clearly.

The Electronic Communications Policy is the set of Strategic, Regulatory and, to a lesser extent, Budgetary actions adopted by the Community Institutions for the purpose of achieving the objectives of the European Union through this area of activity.

The Electronic Communications Policy and its predecessor, the Telecommunications Policy, is vast, diverse and evolving, and it constitutes the results of more than 30 years of work that began with the recognition of the importance of this sector in the social and economic development of the then European Economic Community at the end of the 70's.

In addition, the Electronic Communications Policy is usually presented as a result of the progressive technological convergence of telecommunications, media and information technologies. The European Union considers it as an integral part in its Policy for the development of the Information Society.

This is the context within which one must place the Regulatory Framework of Electronic Communications, which will be established by the legal provisions adopted by the European Institutions. The said provisions will be subsequently transposed to the legislation of Member States, for the purposes of regulating the operation of services and electronic communications networks within the framework of free competition, including the establishment of the basic rights of citizens in these areas.

In this respect, also worth noting is the fact that an Electronic Communications Policy must take account of the three socioeconomic levels that interact with this sector. Firstly, the Macroeconomic level, which is of interest to the European Union and its Member States as a whole; secondly, the Microeconomic level which is of interest to the companies operating in the sector; and thirdly, the Individual level that affects all citizens as users of Electronic Communications services.

For obvious reasons, the European Union's Electronic Communications Policy has been and will be regarded as a secondary item in the Member States' Policies in this sector, because the Community cannot define a comprehensive and coherent strategy for the whole European Union that covers all Macroeconomic, Microeconomic and Individual issues.

As usual, the reason lies in the jurisdictions and powers specified in the Treaty on the Functioning of the European Union and, to a lower extent, in the very Treaty of the European Union.

2.3.- Legal bases for the development of the Electronic Communications Regulatory Framework.

Article 3 of the Treaty of the European Union⁹, considers the creation of an internal market as a means to promote throughout the Community a harmonious, balanced and sustainable development of economic activities. Moreover, **Article 26** of the Treaty on the Functioning of the European Union^{10, 11}, establishes that the internal market implies an area without internal frontiers for the free movement of goods, persons, services and capital.

Clearly, Electronic Communications are services and must thus be subject to the provisions that regulate the internal market of the European Union.

Electronic Communications are also defined as general interest economic services and are thus subject to the provisions of **Article 14** of the Treaty on the Functioning that regulates the said communications.

On the other hand, *Title IV - Free circulation of persons, services and capital*, includes **Articles 56 to 62**, which define the general framework for the delivery of services in the internal market.

In addition, **Article 106** of *Chapter 1. Competition Regulations* of *Title VI: Common rules on competition, taxation and approximation of laws*, describes how the undertakings entrusted with the operation of services of general economic interest or having the character of a monopoly are subject to the rules contained in this Treaty, in particular to the rules on competition, giving the Commission the extraordinary legislative power necessary to guarantee this.

And finally, *Chapter 3 of Title VI, Approximation of Laws*, includes **Article 114**, which authorizes the Parliament and Council to adopt, by a qualified majority, the measures for the approximation of the legislations of the Member States which have as their object the establishment of the internal market.

Therefore, the Treaty on the Functioning grants the European Institutions enough powers to address the task of preparing an Electronic Communications Policy and, mainly, a common Regulatory Framework to contribute to the creation of the domestic market in this sector.

The development of the Regulatory Framework of Electronic Communications in the European Union has been based on two cornerstones: the Liberalisation and the Harmonisation of national telecommunications laws.

On the one hand, the Liberalisation process, that means the removal of monopolies and the introduction of free competition, were based on article 106 of the Treaty and the European Commission was entrusted with this process, exercising the extraordinary powers defined in that article.

On the other hand, the Harmonisation process of national telecommunications laws has been implemented by the Parliament and Council, based on article 114, allowing decisions to be adopted by a qualified majority of votes since the reform of the Single Act of 1986.

⁹ Consolidated version of Treaty of the European Union. *OJ C 83. 30 March 2010. P 13.*

¹⁰ Consolidated version of Treaty on the Functioning of the European Union. *OJ C 83. 30 March 2010. P. 47*

¹¹ From 1st December 2009, date of entry into force of the Lisbon Treaty, the title of the 'Treaty establishing the European Community' is replaced by 'Treaty on the Functioning of the European Union (Treaty of Lisbon article 2§1)

3.- TELECOMMUNICATIONS, ELECTRONIC COMMUNICATIONS AND THE INFORMATION SOCIETY.

3.1.- Telecommunications and Electronic Communications.

After making these points, it is worth clarifying how defining the European Union has used the terms “Electronic Communications” and “Telecommunications” to classify the activities and actions in this area.

Evidently, Telecommunications will always be Telecommunication, as expressed by the International Telecommunications Union (ITU), and defined by Spanish laws and most Member States:

***Telecommunication:** any transmission, emission or reception of signs, signals, writings, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems.*

However, throughout history, the European Institutions' politicians and lawmakers have included a series of specific definitions in their Directives with the purpose of clearly marking their scope of application. There is the source of the problem!

If we start from the beginning, we must remember that Directive 90/387¹², Directive 90/388¹³ and all others that represent the set of provisions that configured the Regulatory Telecommunications Framework of 1998, included the following definitions:

***Telecommunications network**¹⁴: The transmission equipment and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means.*

***Telecommunications services:** The services whose provision consists wholly or partly in the transmission and routing of signals on a public telecommunications network by means of telecommunications processes, with the exception of radio broadcasting and television.*

These were the definitions that served as the foundations for the European Union's Telecommunications Policy from 1987 onwards, including traditional voice and data communications and explicitly excluding radio and television services.

However, after the revision started in 1999, the definitions used in Directive 2002/77¹⁵ and Directive 2002/21¹⁶, including those that defined the Regulatory Framework of 2002, were different, as described below

***Electronic communications network:** The 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 electromagnetic means, including satellite networks, fixed (circuit - and packet - switched, including Internet) and mobile terrestrial networks, and*

¹² Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision OJ L 192. 24 July 1999. P. 1

¹³ Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services. OJ L. 192. 24 July 1990. P. 1

¹⁴ Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets. OJ L 74. 22 March 1996. P. 13

¹⁵ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services. OJ L 249. 17 September 2002. P. 21

¹⁶ Directive 2002/21/EC of the European Parliament and of the Council, of 7 March 2002, on a common regulatory framework for electronic communications network and services (Framework Directive). OJ L 108. 24 April 2002. P. 33.

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: *A service normally provided for remuneration¹⁷ 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 exclude 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.*

It is also important to remember the definition of Information Society service mentioned in the previous text, which do not appeared in the said Directive 98/34, but rather in Directive 98/48¹⁸ which amended it.

Information society service: *Any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*

On this basis, in 2002, the European Union started to use the term “Electronic Communications Policy” to refer to all issues relative to “*electronic communications networks, telecommunications services and transmission services in networks used for broadcasting*”, and as clarified, this policy was not to include either “*the services providing or exercising editorial control over, content transmitted using electronic communications networks and services*”, neither “*Information Society services*”.

Finally, this set of definitions would not be complete without that of “audiovisual media services”, which appears in the Directive¹⁹ amending the “Television without frontiers” Directive”:

“Audiovisual media service” *means a service as defined by Articles 49 and 50 [56 and 57] of the Treaty the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council”*

You'll realize how hard it is to make the broad definition of Telecommunications of the ITU compatible with the Electronic Communications Networks and Services definitions used by the European Union in its policies. In our opinion, there are three reasons for this, namely strategic, legal and customary reasons.

As regards strategic reasons, it is quite clear that, from the very start, the European Union associated the term Telecommunications to telephone and data transmission, i.e., the services that operators were providing on a monopolistic basis. It is also clear that by changing the name to Electronic Communications, the scope of action was expanded to include other aspects which had not been included in these European strategies at first.

¹⁷ The mention of remuneration stems from the definition of Service that is given in article 85 of the Treaty: Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

¹⁸ Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations. OJ L 217. 5 September 1998. P 18.

¹⁹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. OJ L 332. 18 December 2007. P 27.

The legal reasons follow a similar course. The restrictive Telecommunications Networks definition used in the first package of Directives that made up the 1998 Regulatory Framework justified the creation of new definitions in order to include the networks used for radio and television broadcasts.

And, finally, the change in the definition may also have been impacted by customary reasons, since the use of the term Telecommunications is rather more a custom of Continental Europe than of the English-speaking world, which has had a heavy influence on the European Union's Electronic Communications Policy. Though this is just a subjective interpretation.

The fact is that after the 2002 reform, the European Union started to formally use the term Electronic Communications to define all actions carried out in this sector.

3.2.- Convergence.

One of the most popular terms in the European Union's Electronic Communications Policy is Convergence. Even though it is widely used, in our opinion, it is not very clearly explained in community documents.

It is often repeated, over and over again, that the digitalization of equipment and development of services is driving the convergence of the Telecommunications, Information Technology, including its contents, and Audiovisual sectors. Therefore, the regulatory efforts and policies of the European Union must follow this direction. This argument is repeated, with emphasis on **Why** this must be done, yet without being very clear about **How** to achieve such objectives.

We will explain our opinion on this Convergence matter, based on the definitions included in the previous section. Our explanation will set off from the past situation to better describe the future.

As you already know, from their very outset, the three sectors in question, Telecommunications, Information Technology and Audiovisual, came into being and developed independently, each with their own specific Networks, Services and Regulatory Framework.

The Convergence process in these three sectors is the result of technological evolution. The gradual replacement of traditional electromechanical and analogue technologies by digital technologies gave rise to this approach.

However, with this initial idea and due to the elasticity of the Convergence concept, all sorts of opinions were put forward, which were not backed up by a rigorous approach at times. So to make the situation easier to understand, the impact of the generic convergence process on Networks, Services and Regulatory Frameworks in the three sectors must be analysed separately.

In the **Networks** field, the convergence process took place in the communications infrastructures used in each of the aforesaid sectors. The use of digital transmission systems reduced the differences between voice, data and image communications to an issue of each networks' communication capacity.

In **Services**, the first step in this process started with the arrival of the Internet and the removal of traditional barriers between telecommunication services. In the new digitalized world, the possibility of delivering telephony or television services over the Internet again posed a communication capacity problem.

The second step in the convergence of Services came with interactive digital television, which contributed to blur the frontiers between traditional services. The potential for users and audiovisual service providers to interact once more raised an issue of communication capacity.

And the third step in the Services convergence process appeared with 3G mobile telephony services, with one same handset capable of providing all services: telephony, Internet and television.

Finally, and not surprisingly, the Regulatory Frameworks which were used to regulate each sector would also be affected by the convergence phenomenon, resulting in the main scenario for confusion.

The arrival of free competition in the Telecommunications sector in 1998 prompted the brightest of players to think that maybe the time had come to lift all the regulatory barriers in all sectors, leaving it to the market to impose its own rules. Luckily, good sense prevailed.

Since then, everyone has started talking about Convergence, specially politicians, as usually occurs whenever the Commission manages to coin a word that catches on. The results of the process are described throughout this book.

However, if one follows the definitions included in the main Directives used to regulate each sector, which have been included in the previous section, the situation can be further explained. We are referring to the following definitions:

- Communications Networks
- Electronic Communications Services
- Information Society Services
- Audiovisual Media Services

Here is a short description of the Regulatory Frameworks which regulate each of the elements included in the said definitions, describing how they are affected by the convergence process.

Communications Networks, regardless of the type of Service being transported, are subject to the Regulatory Framework of Electronic Communications with regard to infrastructures. In this case, the convergence process has been completed, derived from the package of Directives adopted before 1998.

Electronic Communications Services, which basically include the usual voice and data Telecommunications Services, are subject to the Regulatory Framework of Electronic Communications. In this case, there can be no talk of true convergence of anything with anything else.

Information Society Services are not subject to any type of specific sector Regulatory Framework, only to the general provisions, such as the data protection, electronic signature, electronic commerce and tax Directives. In this case there has been no convergence either.

Finally, **Audiovisual Media Services** will be subject to the Regulatory Framework derived from the audiovisual media services Directive, as described in Chapter 10. As in the previous case, there has been no convergence by now, unless one deems it to mean that the Directive extends the former legal framework governing television broadcasts to any other type of service that falls under the definition of an audiovisual media service, whatever the communications network used for broadcasting purposes.

Thus, there has been Convergence in the Network Regulatory Framework, but it has yet to happen in the Services Framework. The rest is empty speech.

All in all, this is our interpretation of the current state of convergence that seems to prevail in all actions of the Commission. However, the convergence can be regarded as substantial if we analyse the fact that the European Commission has placed since 2005 the responsibility of Electronic Communications and Audiovisual Policies under the same umbrella.

3.3.- Telecommunications, Electronic Communications and the Information Society.

It is also worthwhile clarifying how the European Institutions have first addressed the concept of Telecommunications and later the concept of Electronic Communications with the Information Society.

In European strategies, Telecommunications were mentioned first and the Information Society was defined at a later stage. As we will explain later on in this book, until free competition came into force in 1998, Telecommunications and the Information Society were viewed as different activities and the concern for the elimination of monopolies was a priority required for the exploitation of new opportunities derived from the use of the Internet.

Not until the year 2000, with the arrival of the Prodi Commission and the celebration of the Council of Europe in Lisbon, did the European Commission put the strategy of the Information Society before the Telecommunications strategy, which had already been considered as an integral part of the latter. Truly, Telecommunications had already been liberalized, while the Information Strategies were yet to be implemented. This situation happened again with the Barroso Commission in 2004.

Thus, after 2000, the eEurope initiatives and i2010 strategy for the development of the Information Society, included the Electronic Communications Policy in their contents.

The new Barroso Commission, which took over in 2010, has launched its strategy for promoting the development of the Information Society under the name, so unfortunate in our view, of Digital Agenda. In this new initiative the Electronic Communications Policy has been weakened, being diluted in a series of proposals designed to "*Stimulate the convergence of information and telecommunications technologies driving the internet revolution*", which should possibly be interpreted as a sign of maturity.

3.4.- The role of European Institutions in the Electronic Communications Policy.

The European Commission's activities related to its Electronic Communications Policy are shared by the Directorate General of the Information Society and Media²⁰ and the Directorate General of Competition²¹ and, to a lesser extent, the Directorate General of Enterprise and Industry²².

If one had to define the responsibilities of the two first Directorates General, the DG Information Society and Media would be responsible for the strategic actions, while the DG Competition would be responsible for operating actions, although this would not be 100% clear since we are talking about the European Union. Finally, the DG Enterprise and Industry would be in charge of the aspects involving the technical standardization of electronic equipment.

In the Council of the European Union, the activities related to the Electronic Communications Policy are handled by the Council of Ministers of Transport, Telecommunications and Energy²³, which holds specific meetings devoted to Telecommunications issues.

²⁰ European Commission. DG Information Society and Media
http://ec.europa.eu/dgs/information_society/index_en.htm, visited 8/9/2010.

²¹ European Commission. DG Competition
http://ec.europa.eu/comm/competition/index_en.html, visited 8/9/2010.

²² European Commission. DG Enterprise and Industry
http://ec.europa.eu/enterprise/index_en.htm, visited 8/9/2010.

²³ Council of the European Union. Transport, Telecommunications and Energy.
http://www.consilium.europa.eu/cms3_applications/applications/newsRoom/loadBook.asp?BID=87&LANG=7&cmsid=354, visited 8/9/2010.

Finally, in the European Parliament, the body responsible for studying and reporting on Electronic Communications-related matters is the Committee on Industry, Research and Energy (ITRE²⁴), which is in charge of the matters involving the Information Society and information technologies, among others. In addition, the Committee on Internal Market and Consumer Protection (IMCO²⁵), deals with some issues related to this area.

4.- THE STAGES OF THE EUROPEAN UNION.

A framework of reference that must be taken into account in the analysis of any Community action and, evidently, of the development of the Telecommunications Policy, is that which refers to the European Union²⁶ and, in particular, to the different stages of the Commission's management. Here is an overview of the said stages.

4.1.- The Jenkins Commission. 1976-1981 and the Thorn Commission 1981-1985.

After its first twenty years of existence and as a result of the first enlargement, which included the problematic incorporation of Great Britain, Ireland and Denmark, the European Community, under the regulatory framework of the Treaty of Rome of 1957, required an in-depth review of its objectives and actions.

In order to address different political and institutional matters, the Summit of Heads of State and Government in Paris December 1974, commissioned Leo Tindemans to produce a report on the future of the European Community, which was presented at the beginning of 1976²⁷, and outlined the need for political and strategic reforms. This Report is now regarded as one of the points of reference in the subsequent reforms of the Treaty.

As regards economic issues, Europe was starting to suffer from the consequences of the oil crisis during the mid 70's, and was finding it hard to react. In this case, the Summit of Heads of State and Government asked the Commission to prepare a White Paper on the Internal Market, which would be presented in 1985.

In addition, as regards the Telecommunications issues, during the presidency of Ronald Reagan in 1982, the United States courts issued a decision which led to the dismantling of the AT&T Group. Similarly, in Great Britain, in 1981 and 1984 Margaret Thatcher managed to have Parliament pass the Telecommunications Acts that brought competition into the sector.

In all the other Member States, telecommunications had, since the turn of the century, been operated as a monopoly, under the supervision of their respective governments.

²⁴ European Parliament. Committee on Industry, Research and Energy. ITRE
http://www.europarl.europa.eu/committees/itre_home_en.htm, visited 8/9/2010.

²⁵ European Parliament. Committee on Internal Market and Consumer Protection. IMCO
http://www.europarl.europa.eu/committees/imco_home_en.htm, visited 8/9/2010.

²⁶ History of the European Union. http://europa.eu/abc/history/index_en.htm, visited 8/9/2010.

²⁷ Tindemans Report http://ec.europa.eu/economy_finance/emu_history/documentation/chapter8/19751229fr037repleotindemans.pdf, visited 27/10/2010.

4.2.- The Delors Commission. 1985-1994.

President Delors spent two terms as head of the European Commission, between 1985 and 1990 and between 1990 and 1994. Both terms were crucial for the development of the European Community and it was during these periods that the keys to the project to develop the Information Society appeared.

During Delors' mandate, the Commission adopted the White Paper on the Internal Market²⁸ and unveiled it to the Council of Europe in Milan on 28th-29th June 1985. In September 1985, the Intergovernmental Conference began holding meetings to address the amendment of the Treaty of Rome, which would be finally signed in February 1986 and was to be known as the Single European Act.

The reforms made to the Treaty by the Single European Act of 1986 had a major impact on the Telecommunications Policy and signalled the start of the process that would lead to the sector's liberalization.

Following the approval of the Single Act and the establishment of the goal of implementing the single market from 1993 onwards, the European Community broached the next reform of the Treaty, the goal being to achieve political and monetary Union.

During 1991, the meetings of the Intergovernmental Conference started again, which led to the signing of the Treaty of Maastricht in February 1992, creating the European Union as it is known now. The Treaty of Maastricht brought in the joint decision procedure, under which the European Parliament can participate with the Council in most of the Community legislative process.

Finally, during the last year of President Delors' term and in the middle of a new major economic crisis, the Commission published the White Paper on Growth, Competitiveness and Employment²⁹, in which it proposed the launch of the Information Society development process, emulating the process then underway in the United States and thus keeping one step ahead of the Member States' possible reactions in this field. A detailed analysis of these matters will be given later on in this book.

The period in question witnessed one of the greatest geopolitical changes in Europe since the end of the Second World War, namely the fall of the Berlin wall and the gradual disappearance of totalitarian regimes in the Central and Eastern European countries. This situation would also be taken into account in the Information Society development process.

Other outstanding events during this period included the Uruguay Round negotiations, leading to the signing of the new General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade and Services (GATS³⁰) and the start of the negotiations for the application of the GATS to the telecommunications services sector.

It was during this period that the European Union passed the first regulatory telecommunications framework, which would lead to the implementation of free competition in 1998.

²⁸ COM(85) 310. White Paper on the achievement of the internal market. Brussels 14 June 1985.

²⁹ COM(93) 700 White Paper on growth, competitiveness, and employment: The challenges and ways forward into the 21st century. Brussels, 5 December 1993.

³⁰ GATS. General Agreement on Trade in Services. http://www.wto.org/english/tratop_e/serv_e/serv_e.htm, visite 27/10/2010.

4.3.- The Santer Commission. 1995-1999.

In January 1995, Jaques Santer took over the presidency of the European Commission.

The major issue raised during his period was the agreement of the future expansion of the European Union and gradual integration of the Central and Eastern European Countries. Tackling this situation entailed amending the Treaty again and addressing the different economic problems derived from the future expansion.

The Intergovernmental Conference was held again and in 1997 the Treaty of Amsterdam, which would come into force in May 1999. The Commission and Council worked hand in hand to design an economic framework for the future of the Union, which would be announced as the Agenda 2000 and which would be approved by the Council of Europe in Berlin on 24th and 25th March, 1999. However, by then the Santer Commission no longer existed. The Commission had tendered its resignation to the Parliament on 15th March 1999, nine months after the end of the official term.

During this period, telecommunications issues remained the responsibility of Commissioner Martin Bangemann, who had been a member of the Commission since 1989, first as the head of Industry and Trade and later as the head of Telecommunications and the Information Society.

As for Telecommunications, one of the Commission's key objectives during this period was to finish designing the regulatory framework that would allow full competition to be implemented in this sector from January 1998, on the date agreed with the United States within the World Trade Organization framework.

After launching the new Information Society idea in 1993, the Commission delegated the responsibility for taking action in this field upon its respective DC's, without showing much enthusiasm for ensuring effective coordination between them³¹.

4.4.- The Prodi Commission. 1999 – 2004.

The European Parliament approved the appointment of Romano Prodi as President of the Commission on 5th May, 1999, even though the new Commission did not take office until 15th September, when it received the approval of the European Parliament, a period when the Union was going through a delicate moment.

Doubts had been cast on the European Commission's credibility by institutional crisis of 1999, the food problems prompted by the measures adopted by the EC in the wake of the mad cow disease, which was in full swing, the contradictions derived from the Kosovo war were still fresh in people's minds and the economic crisis started to threaten Europe. In addition, the dates for the major expansion of 2004 were very near.

When the new members of the Prodi Commission took office, they had to try to find enough energy to cope with the difficult situation that they had inherited from their predecessors. At the start of 2000, the Commission published a document in which it outlined its Strategic Objectives for the period 2000-2005³², including two key ones: creating a more dynamic European Union to regain world leadership and addressing the reforms of the Treaty for the expansion of the Union.

³¹ Alabau A. The European Union and its Information Society Policy. Ed Vodafone Madrid 2002

³² COM(2000)154. Strategic Objectives for 2000-2005. Shaping the new Europe. Brussels, 9 February 2000. OJ C 81. 21 March 2000. P. 1

As a consequence of these proposals, the Commission started the internal reform process³³, began to prepare the publication of a White Paper on Governance in Europe^{34, 35}, laid the foundations for the reform of its Technological Research and Development Policy³⁶, and fully embraced the project for the creation of the Information Society that it had inherited from its predecessors in an unhealthy state.

From then on, the Commission made great efforts to relaunch the Information Society development project.

It was during this stage that the Treaty of Nice was signed, in 2000, and work on drafting the proposal for a European Constitution went ahead. There is no denying that one of the most decisive aspects of this stage was the expansion of the European Union in May 2004, from 15 to 25 Member States.

The Lisbon Strategy.

In 1999, the European Union needed an exciting and revitalizing project, not only to raise its spirits but also to set itself specific objectives towards which to allocate its effort and resources over the next few years.

In this context, the Portuguese presidency of the European Union, during the first semester of 2000, decided to hold an Extraordinary Council in Lisbon, addressing employment, economic reform and social cohesion and got busy preparing for the meeting. The main purpose of this meeting would be to define the objectives of one of the strategies of the Union's socio-economic policies. The euphoria prompted by the dawn of the new millennium and the Internet bubble were two major contributions to the said objective.

From among the many documents drafted in the Council's preparatory phase, one worthy of mention is a first and very early proposal that the Portuguese Presidency³⁷ put forward in January 2000, in which it stated that the new strategic objective for the next decade should make the European Union the *"most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion"*; This phrase is now famous and has become an emblem of the European Union.

Simultaneously, the European Commission presented its proposals in a document³⁸ in February, and the Council of Europe was finally held in Lisbon during March 2000.

The Conclusions of the Presidency³⁹ of this Council meeting became a point of reference for the European Union's subsequent actions. In this sense, the Council decided to devote all its future spring meetings to evaluating the follow-up of what would later be called the Lisbon Strategy.

It was at the European Council of Lisbon that the eEurope initiative for the development of the Information Society was unveiled, and it was the Council of Santa Maria da Feira⁴⁰, held in June 2000, that approved the Action Plan of the eEurope initiative⁴¹ which was revised again in 2002.

³³ COM(2000) 200. White Paper on Reforming the Commission. Brussels 5 April 2000.

³⁴ SEC(2000) 1547. Commission working document. White Paper on Governance in Europe. Brussels, 11 October 2000.

³⁵ COM(2001) 428. European governance. A White Paper. Brussels, 25 July 2001.

³⁶ COM(2000) 6. Towards a European Research Area. Brussels, 18 January 2000

³⁷ Council of the European Union, Doc Ref. 5256/00. Document from the Presidency. Employment, Economic Reforms and Social Cohesion Lisbon, January 2000

³⁸ Council of the European Union. Ref n° 6602/00. Preparation of the European Council of Lisbon. Contribution of the European Commission to the Special European Council of Lisbon. Brussels, 28 February 2002

³⁹ European Council of Lisbon. Conclusions of the Presidency. Lisbon, 24-25 March 2000.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm, visited 8/9/2010

⁴⁰ Conclusions of the Presidency. European Council of Santa Maria de Feira. 19 and 20 June 2000

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en0.htm, visited 8/9/2010

⁴¹ eEurope 2002. Action Plan. Prepared by the Commission for the European Council of Santa Maria de Feira. Brussels, 14 June 2000

In the telecommunications field, in 1999 the Commission had begun to revise the regulatory framework, which would lead it to adopt the package of Directives in 2002 with the first reform of the sector, including the change of name to Electronic Communications.

This period also saw the strategic Internet crisis of 2000, as well as the telecommunications sector investment crisis, which went on until 2004.

4.5.- The Barroso Commission. Since 2004.

When Jose Manuel Barroso took over as President of the European Commission in November 2004, it was clear that attaining the Lisbon objectives was going to be a difficult task and the European Union would require another strong dose of objectives and illusions that would drive it to achieve effective results for the creation of employment and growth of the European economy.

This period did not start with satisfactory results in terms of exciting objectives, due to the proposal for a European Constitution having been rejected in the French and The Netherlands referendums in 2005. In addition, the much wanted European cohesion suffered a hard blow as result of the protectionist measures that the Member States were going to start implementing on behalf of their main strategic industries. All in all, the telecommunications operators had already reached a point of no return on the road to free competition.

In this context, in June 2005, the Commission presented its i2010 strategy⁴² for the development of the Information Society, which would include its Electronic Communications Policy.

During 2005, the Commission began the second review of the Electronic Communications regulatory framework, in order to further convergence between voice and data telecommunications and the audiovisual sector.

This review completed in 2009 with the approval of the Revised Regulatory Framework in late 2009.

Abandoned the Treaty establishing a Constitution for Europe of 2004, negotiations resumed that led to the signing of the Lisbon Treaty on December 13, 2007, which finally came into force on December 1, 2009. Most of the institutional innovations that were agreed at the European Constitution remain in the Lisbon Treaty, while the changes in the voting system were postponed and additional exclusion clauses were granted in some policy areas to certain Member States.

If the stage Barroso did not have a good start, even worse would be the end of his first term and frightening was the beginning of his second term in September 2009. In autumn 2008 the financial crisis, which had started in the U.S., exploded with all its virulence on this side of the Atlantic. The Barroso Commission then proposed a countercyclical approach by injecting 200,000 million Euros to boost demand and confidence in the economy, which took the name of European Economic Recovery Plan⁴³. But the results of this approach were not as expected, or at least expected by investors, since the spring of 2010, during the writing of the book, the crisis had spread and affected the Member states' public accounts, forcing them to undertake drastic plans to reduce public spending and investment.

⁴² COM(2005) 229. i2010 – A European Information Society for growth and employment. Brussels, 1 June 2005

⁴³ COM(2008) 800. An European Economic Recovery Plan. Brussels, 26 November 2008.

In this new context, the Commission presented in March 2010, the new strategy that would replace the Lisbon Strategy. 'Europe 2020'⁴⁴ was named and it materialised, in the field of Information Society, through the Digital Agenda initiative⁴⁵.

5.- TYPES OF ACTIONS IN THE ELECTRONIC COMMUNICATIONS POLICY

All the actions carried out by the European Institutions throughout the different stages of development of the Telecommunications and Electronic Communications Policy can be classified in four main areas, in line with the nature of their objectives: Liberalization, Harmonisation, Standardization and Corrective Measures.

5.1.- The Liberalization process.

The first and main purpose of the European Union's Telecommunications Policy was to liberalize the sector, in other words, to bring full competition to the European Union's equipment and services markets. Although this process first appeared in the 1980 and 1984 strategies, it could not be implemented until the Single Act entered into force in 1986.

The Commission, acting as the guardian of the Treaties, played the leading role in all actions that led to the liberalization of the market for handsets, services and infrastructures. For this purpose, the Commission availed itself of the extraordinary powers bestowed upon it by the Treaty in article 106 (then, article 90), and, based on these powers, adopted a set of Directives on its own.

During this Liberalization process, it must be said that both the Council and, subsequently, the European Parliament, which are the European Union's true legislative authorities, played a secondary role, only being given the chance to express their agreement or disagreement with the Commission's actions, but never adopting the Directives that led to the implementation of the full competition system. This is now history, but it led to major discussions, obtaining all sorts of praise and criticism from different players. The main point of controversy focused on the liberalization of infrastructures. This was a crucial point upon which not all Member States agreed, as is explained later on.

At the end of the day, one wonders whether the same results might not have been reached with the ordinary legislative process, without having to resort to the extraordinary powers laid down in article 106 and without upsetting the balance of powers between the European Institutions. This might have been possible, but without a doubt, the dialectical effort and time period required would have been greater. What is certain is that the whole process was conducted lawfully, in line with European Community law.

The Liberalization process was almost fully implemented during the 1987-1998 period, so in the review that started in 1999, the Commission's main task was to bring together, in a single Directive, all the directives adopted during this period, and this new Directive which would be adopted in the regulatory package of 2002.

5.2.- The Harmonisation process of the legislation of Member States.

As the sector was steadily deregulated, it became necessary for services run on a competitive basis to coexist with others that were still operated on a monopoly basis and on which the former had to

⁴⁴ COM(2010) 2020. Europe 2020. A European strategy for smart, sustainable and inclusive growth. Brussels, 3 March 2010.

⁴⁵ COM(2010) 245. A Digital Agenda for Europe. Brussels, 19 May 2010.

depend. In other words, the relationships between the sector's new operators and its incumbent operators had to be regulated so as to avoid the latter being tempted to abuse their dominant position.

In addition, one of the aims was to carry out this process, which was new to almost all Member States, in a harmonized manner, with a view to guaranteeing the coherence of the future respective telecommunications laws of Member States. This was the key goal of the process of Harmonisation of Telecommunications in the European Union, which will be explained later on in this book.

For reasons that now seem obvious, and due to progress in the Liberalization process, the relationships between new and historical operators changed in time and, as a consequence, so did the regulatory framework.

Unlike the enthusiasm that the Liberalization process aroused among the sector's players, the Harmonisation measures were far from as popular, which is why sometimes it took so long to pass them, with controversial results.

Once there was full competition in the sector, the mechanisms for harmonising the legislations of the Member States have been kept in place both to reviewing and updating the regulatory framework and to implement new aspects of the European Union's Telecommunications Policy. This came to the fore in the 1999 and 2005 reviews.

5.3.- Standardization and Certification of Equipment.

The European Union's concern about Standardization and Certification matters is relatively new and arose at the same time as the start of what one might refer to as its industrial policy of the Eighties.

It must be underscored that, when the Common Market was formed, each Member State's standardization powers remained intact. It was not until 1983 that the European Commission started to design a standardization policy which, at the outset, consisted of the European Community adopting coordination mechanisms equivalent to those defined in the 1979 GATT.

When the telecommunications equipment market was opened up in 1991, it became necessary to define the specifications that terminal equipment had to meet in order to connect to networks, with sufficient guarantees for both. This fact led to the emergence of a telecommunication Standardization and Certification Policy in the European Union.

Furthermore, the satisfactory experience of the collaboration in the development of GSM technologies and the less successful implementation of ISDN highlighted the need to create a European Centre in charge of drafting telecommunications standards. These were the origins of the European Telecommunications Standards Institute (ETSI) in 1998, as a result of the activities carried out within the European Conference of Postal and Telecommunications Administrations (CEPT).

As is explained in the specific Chapters on this matter, the Telecommunications Standardization Policy overlapped different harmonisation actions insofar as technical standards were required to regulate relations between operators and users, and also overlapped liberalization actions insofar as the consequences of the implementation of full competition questioned the Public Administrations' powers to demand compliance of technical standards that might limit the free market for equipment and services.

In addition, the customary arbitration of the Public Sector, between the rights and obligations of users and operators, was put at stake. Experience has shown that the task was not an easy one, either in the voice and data communications sectors, or in the audiovisual sector nor, in particular, in the digital television sector.

During the 1987-1998 period, the European Institutions applied a strategy designed to guarantee the full interconnection of terminals and services through the use of mechanisms for the adoption of Common Technical Regulations, i.e. standards and administrative provisions that were binding throughout the European Union. This was one of the key factors behind the acknowledged success of the GSM system.

Yet in this new free competition scenario, the telecommunications sector's players demanded absolute freedom to decide which standards or technical specifications they would use in delivering their services. As a result, Public Institutions merely ordered them to comply with the technical regulations necessary to guarantee consumer health, as with any other item of consumer electronic equipment. After 1999, the compatibility of telecommunications terminals and equipment became subject to the interests and decisions of operators. This was one of the key reasons why it was so catastrophic to launch the UMTS system.

However, whenever the issues involved are regarded as sensitive for the interoperability of the sector's services, including telecommunications and the audiovisual sector and, in particular, in the interactive television sector, the European Union has reserved the right to impose binding technical regulations whenever it deems them necessary, though has not done so until now.

5.4.- The corrective measures of free competition.

After Ireland joined in 1973, Greece in 1981 and Spain and Portugal in 1986, the European Institutions launched and developed a policy oriented towards the achievement of the economic and social cohesion of all its areas, to which it earmarked a large portion of the Community budget, i.e., the well-known Structural Funds.

Thus, the different stages of the European Union's Telecommunications Policy have taken into account the cohesion objectives⁴⁶.

Before implementing competition in the sector, the goal was to modernize the less developed telecommunications operators. From 1998, the focus was set on guaranteeing that everyone could access telecommunications services under reasonable conditions, through the adoption of the universal service obligations and on steadily updating such obligations within the framework of the European strategy for general interest services. Subsequently, the focus shifted to the expansion of broadband infrastructures and encouraging Member States' governments to take action to achieve such objectives.

One fact underlying all the actions outlined so far is the consideration that the Telecommunications Policy as a whole goes beyond the aspects that strictly regulate free competition, because they are General Interest services. The defence of citizens' interests, together with the macroeconomic aspects of this sector, must be fully compatible with the microeconomic actions that logically govern the regulation of this sector.

5.5.- Other aspects of the Electronic Communications Policy.

As the main aspects of the free competition Regulatory Framework were solved, the European Union started to expand the proposed courses of action of its Electronic Communications Policy.

⁴⁶Alabau, A. An approach to regional telecommunications policies. A reference scheme for the development of the information Society and Telecommunications. Telecommunications Policy. Vol. 21. n° 8 October 1997. pp. 761-771

After the reform that was launched in 1999, the European Institutions started to systematically become involved in different aspects, such as the radio spectrum management and the progressive convergence of the audiovisual service strategies with telecommunications.

As far as the radio spectrum goes, the attempts to implement its centralized management were limited to the start-up of mechanisms for coordinating the Member States' activities with a view to rationalising its use for the development of future mobile services.

As regards convergence, it was clear that the digitalization of networks and contents had gradually done away with the differences between the traditional method for delivering voice, data and image communication services.

Therefore, after the completion of the regulatory telecommunications framework in 1998, the Commission began to consider the need to address the convergence between telecommunications and the audiovisual sector, which led to the term Telecommunications being replaced by the term Electronic Communications, as already mentioned above. These matters will also be discussed in this book.

6.- THE STAGES OF THE ELECTRONIC COMMUNICATIONS POLICY.

The Electronic Communications Policy has evolved in successive stages, from 1980 until now. In each stage, the European Union's successive strategies in this sector are clearly defined.

Each stage has had its own specific and unique roots, contents and development, due both to the circumstances in place when they were defined and executed, and to the interests of the different political and economic agents in the sector at each moment, among other factors.

The next paragraphs briefly summarize each of the said stages and give an overview of the different aspects addressed in the following Chapters of this book.

6.1.- 1977-1986 Stage. First Steps.

After the first suggestions made in 1977, in 1980 the Commission presented a proposal to the Council which stated the need to address telecommunications issues in the Community framework. This proposal, which was merely an introduction, referred to the terminal markets and the need to harmonize the development of future services. However, it did not question their monopolistic nature. When the first proposal was drafted in 1980, the European Community was governed by the Treaty of Rome, which had almost reached rock bottom.

The first Action Plan, which the Commission drew up in liaison with the Council, did not appear until after 1984, was purely industrial and proposed opening up the handset market, although it explicitly protected and preserved State monopolies in the operation of the services.

This proposal aimed to foster the industrial growth of the telecommunications equipment production sector, whilst trying to contribute to the economic and social cohesion of the less developed Regions in the Community through the use of telecommunications. The 1984 strategy was drafted during the restructuring of the European Community, from the Treaty of Rome to the Single Act of 1986, when the European Institutions had still not decided to use their powers in the telecommunications sector although they, and the Commission in particular, clearly aspired to do so.

6.2.- 1987-1998 Stage. First Regulatory Telecommunications Framework.

The entry into force of the Single European Act in 1987 allowed the Commission to prepare the strategy that would lead to the introduction of free competition in the telecommunications sector.

The first stage of this strategy was adopted in 1987 by the Commission, with the initial opposition of the Council, and allowed the introduction of free competition in the handset market and added value service market. However, the monopolies offering voice telephony services were maintained. One of the key goals of these courses of action was to promote growth in the sector, in particular in the advanced telecommunications services sector.

The objectives of the 1987 strategy were a consequence of the adoption of a Single Act, including the mandate received by the Commission to start up the single market, with the purpose of achieving the free circulation of goods and services in the Community. Said strategy coincided with the start of the GATT's Uruguay Round negotiations and its decision to draw up a General Agreement on Trade in Services– GATS.

In 1993, the telecommunications strategy was readjusted as a result of progress in the GATS talks. At the Commission's proposal and with the backing of economic players, 1998 was set as the date for the liberalization of voice telephony, and the need was seen to define how telecommunications infrastructures would be operated in the future. The approval of the strategy 1993 coincided with the end of the process for the implementation of the single market and the start of the European Union of Maastricht, while Europe began to move towards a severe economic crisis.

Finally, in 1995, the Commission and Member States decided to fully liberalize the infrastructures from January 1998 onwards. This stage of the telecommunications strategy was marked by the project to create the Information Society and the measures designed to pull Europe out of the economic crisis and boost employment, just as the negotiations for the preparation of the Treaty of Amsterdam, which was eventually adopted in 1998, were starting.

6.3.- 1999-2005 Stage. First reform of the Electronic Communications Policy.

Once full competition had been implemented in 1998, the Commission embarked upon a review of the package of Directives adopted between 1990 and 1997, for the following two reasons.

Firstly, it wanted to review the scope of the provisions adopted during the previous stage in the light of the experience gained during the short period after its implementation. One of the purposes was to reduce State involvement in the telecommunications sector as far as possible, and instead rely on competition steadily and increasingly working better. Besides, the texts of the series of Directives that had regulated the sector since 1990 needed to be consolidated for legal purposes.

The second aim was to expand the scope of the Telecommunications policy to the broader field of Electronic Communications, so as to address aspects related to the convergence of infrastructures and interoperability of services.

This stage ended with the adoption of a package of Directives in 2002, continuing with the lengthy process of transposing them into each Member State's legislation and the adjustment between Member States and the Commission of the market analysis criteria, in accordance with article 7 of the Framework Directive.

This stage fully coincided with the unveiling of the Lisbon Strategy and the launch of the eEurope initiative that sought to integrate Electronic Communications in the European Union Policy for the development of the Information Society.

6.4.- 2005-2010 Stage. Second reform of the Electronic Communications Policy.

2005 heralded a new stage of the European Union's Electronic Communications Policy, with the launch of another review of its Regulatory Framework.

Many of the objectives of this new stage were similar to those of the previous one, that is to say, reduction of public intervention in the sector and furthering of convergence between telecommunications and the audiovisual sectors. In addition, it aimed to consolidate European Union policy on radio spectrum management-related issues, among others. In this Review process there appeared, on the one hand, issues which designed to adjust the institutional architecture of the Regulatory Framework taking into account the years of experience accumulated by the Member States and the Commission, and on the other, issues with a political weight, such as radio spectrum management and the extension of broadband. This Review concluded with the adoption of the amended regulatory framework in late 2009, so that its transposition into national law will occur before May 2011.

So intertwined with the Review of the Regulatory Framework, the First Review of the scope of Universal Service took place in 2005 and the second review in 2008, which in the course of 2010 is expected to conclude. This Review has opened the discussion of the role of Universal Service as a political tool to contribute to broadband extension.

Ultimately, as we argue in the body of the book, the evolution of the Second Review of the Regulatory Framework provides evidence that the regulation is no longer an object of the Community Policy for Electronic Communications and that the European institutions, notably the Commission, are focusing its activities on promoting investment in New Generation Access Networks and the harmonisation of a flexible market-based approach for spectrum

7.- CONCLUSIONS

The main aim of this chapter has been to afford an overview of the contents of the book, describing certain aspects which will help you get a general idea about the different issues explained here.

The following Chapters analyse the main events that have marked the different stages in which the European Union has developed its Electronic Communications Policy.

CHAPTER 3

THE PRELIMINARY STAGES OF THE TELECOMMUNICATIONS POLICY. PERIOD 1977 – 1986



CHAPTER 3

THE PRELIMINARY STAGES OF THE TELECOMMUNICATIONS POLICY. PERIOD 1977 – 1986

1.- INTRODUCTION

The objective of this Chapter is to analyse the initial steps of the European Union's Telecommunications Policy from the publication of the first documents at the end of the 1970s, to the adoption of the Single European Act of 1986, which made the necessary reforms to the Treaty Establishing the European Community thus enabling the implementation of free competition in this sector.

Firstly we will analyse the Commission's initial proposals and the Council's reaction to such initiatives. Although this involves a distant period of time we believe that it is necessary to understand it in order to comprehend the events that followed. At that time, the jurisdiction relating to telecommunications rested with the Member States and this situation was not questioned by the European Institutions with the result that the first actions in this sector were largely of an Industrial Policy nature aimed at the creation of a single market for electronic handsets and at the harmonisation of new services.

Secondly, it was also thought that it would be interesting for this Chapter to include a review of the early telecommunications-related actions carried out in the context of the European Cohesion Policy, particularly in its Regional development strategies which made it possible to improve network coverage and telecommunications services in the most disadvantaged areas of the European Community. It was undoubtedly a question of demonstrating the conviction that citizens throughout Europe had an equal right to access telecommunications networks and services.

2.- THE INITIAL STEPS OF THE TELECOMMUNICATIONS POLICY.

2.1.- Background and context

In order to analyse the European Community's initial actions with regards to telecommunications it makes sense to start with two important European events: the industrial crisis in the second half of the 1970s and the Institutional crisis during the same period which occurred as a result, among other things, of enlarging the Community and the accession of the United Kingdom, Denmark and Ireland.

Where Telecommunications are concerned⁴⁷, the first actions date back to early 1977 with the first Council Declaration⁴⁸ on this matter. Subsequently, in December of that same year, the Commission, in collaboration with the Member States, created a Working Group to study the situation of future telecommunications networks. Likewise, the Summit of Heads of State and Government which took

⁴⁷ Noam, E. Telecommunications in Europe. Oxford University Press. Oxford 1992

⁴⁸ Déclaration du Conseil concernant les organismes chargés dans les États membres des services de télécommunications. JO C 11 de 15 Janvier 1977. P. 3

place in Strasbourg in June 1979⁴⁹ asked the Commission to prepare a report on the matter. As a result of both initiatives, in September 1980, the Commission produced and submitted the first telecommunications proposal to the Council⁵⁰.

Where the industrial crisis was concerned, the European Community thought about the need to act in specific economic sectors, one of them being that of new Information Technologies. From the middle of the 1970s onwards, the Commission presented the Council with various proposals for action in the field of Information Technology. Specific mention must be made of the fact that at the June 1979 Summit of Strasbourg, the Commission was tasked with producing a paper containing proposed actions. In accordance with this request the Commission produced a report which it submitted at the Summit of Dublin in November 1979⁵¹. As a result of these proposals, the first Community actions in the area of computing and microelectronics were carried out⁵².

Where the Institutional crisis was concerned, the difficulties in achieving economic and monetary union in the Community foreseen in the Barre Plan in 1969⁵³, as well as the budgetary problems derived from its enlargement, among other things⁵⁴, forced the Council to ask the Commission, in May 1980, to prepare an Action Plan which would allow it to get out of the aforementioned impasse.

As such, in June 1981, the Commission, as a result of the Council mandate, published a proposal which considered the need to carry out a far-reaching institutional reform in the European Community⁵⁵. This proposal would subsequently lead to the preparation of the 1985 White Paper on Completing the Internal Market⁵⁶ and, would eventually result in the signing of the Single European Act in 1986⁵⁷ which was the first major revision of the Treaty Establishing the European Community.

The White Paper presented by the Commission to the Council contained, among other things, the proposals to implement an industrial policy taking advantage of the size of the internal market and the advisability of carrying out actions in disadvantaged areas. These ideas also featured in the documents that the Commission prepared concerning telecommunications at the same time.

Where the Commission's support for Research and Development activities was concerned, it must be remembered that, at that time, vice president Davignon, under pressure from companies in the sector looking for support, helped come up with the term *precompetitive research* and proceeded to create, in Archimedes 25, the Information Technology and Telecommunications Task Force out of the Directorate General III: Industry, which would be responsible for managing, firstly, the ESPRIT programme and then the RACE programme, both arising out of the first microelectronics research programme in 1982^{58, 59}.

⁴⁹ European Council. Strasbourg 21-22 June 1979. http://aei.pitt.edu/1394/01/strasbourg_june_1979.pdf, visited 8/9/2010.

⁵⁰ COM(80) 422. Recommandations Concernant les Télécommunications. Bruxelles, 1 Septembre 1980

⁵¹ COM(79) 650. European society faced with the challenge of new information technologies. A Community response. Brussels, 23 November 1979

⁵² Carpentier, M. et al. Les Télécommunications en liberté surveillée. Ed. Lavoisier, Paris 1991

⁵³ Plan Barre. Commission Memorandum to the Council on the co-ordination of economic policies and monetary co-operation within the Community. Secretariat of the Commission. 12 February 1969.

http://ec.europa.eu/economy_finance/emu_history/documentation/chapter2/19690212en01Scoordineconpoli.pdf, visited 28/10/2010.

⁵⁴ European Commission. Historical documentation of EMU and the Euro http://ec.europa.eu/economy_finance/emu_history/documentation.htm, visited 28/10/2010.

⁵⁵ COM(81) 300. Rapport de la Commission sur le mandat de 30 mai 1980. Luxembourg, 24 juin 1981. Bulletin des Communautés européennes. 1981, n° Supplément 1/81, p. 5

⁵⁶ COM(85) 310. Communication of the Commission to the Council. White Paper on the achievement of the internal market. Brussels, 14 June 1985.

⁵⁷ European Single Act. OJ L 169. 29 June 1987.

⁵⁸ COM(80) 513. New Information Technologies. First Commission report. Brussels, 1 September 1980

⁵⁹ Ungerer, H. et al. Telecommunications in Europe. Office for Official Publications of the European Communities 1988

At that time, in Great Britain, Margaret Thatcher's Conservative government had passed the British Telecommunications Act 1981⁶⁰ and started creating British Telecom⁶¹ out of the State-owned Telecommunications Company. The process to privatize both public telecommunication companies was to be launched immediately: the recently created British Telecom, which looked after domestic telecommunications services and Cable & Wireless⁶², deeply-rooted in telecommunications with overseas territories. With the participation of Cable & Wireless, the banking group Barclays and the company British Petroleum, Mercury was created, which would subsequently belong entirely to Cable & Wireless. In this context and overseen by the British government, a duopoly was created to operate telecommunication services, and the new Telecommunications Act 1984 was passed⁶³.

In the United States, the federal government's legal action against AT&T was being hotly debated^{64 65}. The consequences of the ruling in favour of the government's demands were to include the disbanding of the AT&T group in 1982, the creation of a group of bell regional companies so as to continue to exploit intrastate communications according to the rules on monopolies, the relaunch of AT&T in the long distance communication market and the consolidation of its international reputation, with the US government's help^{66 67}.

Where Europe was concerned, it must be remembered that the relationship between the Community Institutions was, at that time, governed by the Treaty of Rome, with a Council on Ministers that was strong but required to make decisions unanimously, a Commission with no jurisdiction in industrial or commercial matters and a very weak Parliament which served as the Council's consultative body.

This was the context in which the Commission first presented the Council with a plan of action relating to telecommunications.

2.2.- The Commission's initial proposals, September 1980

In a document written in 1979⁶⁸ for the Dublin Summit of Heads of State and Government, the Commission proposed, among other measures for achieving the Community's economic and industrial revival, carrying out the following actions in the area of telecommunications:

““That the Community:

- use the normative powers of the Community to create a homogeneous European public market for telematic equipment and services through council decisions that:*
 - . commit the telecommunications administrations to introduce common harmonised services ... from 1983 and to purchase for them only harmonised equipment from 1985*
 - . establish the principle of an Open Community market for terminals, in which private industry can compete*
 - . initiate in 1981 a first phase of action by the telecommunications administrations to enlarge their potential sources of supply...*

⁶⁰ British Telecommunications Act 1981, 27 July 1981. Ed. HMSO. London

⁶¹ The historical development of BT. <http://www.btplc.com/Thegroup/BTsHistory/History.htm>, visited 8/9/2010.

⁶² Cable and Wireless. A History. <http://www.porthcurno.org.uk/page.php?id=104>, visited 28/10/2010.

⁶³ Telecommunications Act 1984. 12 April 1984. HMSO. London

⁶⁴ Temin, P. The Fall of the Bell System. Ed. Cambridge University Press, Cambridge 1987

⁶⁵ Kellog, K. et al.. Federal Telecommunications Law. Little, Brown and Co. Boston, 1992

⁶⁶ Richonier, M. Les Métamorphoses de L'Europe. Ed. Flammarion, Paris 1985

⁶⁷ Saprnov, W. Telecommunications and the law. Computer Science Press. Rockville, 1988

⁶⁸ COM(79) 650. European society faced with the challenge of new information technologies. A Community response. Brussels, 23 November 1979

- *commit the public administrations of Member States from 1983 to buy informatics equipment and software only when it conforms to common standards.*

As a consequence of the above, the Summit asked the Commission to continue studying this matter which led to the Commission presenting the Council, in September 1980, with a report⁶⁹ entitled “Recommendations concerning Telecommunications” which contained an initial set of proposals for Community actions in this area.

This was the first proposal submitted to the Council that dealt specifically with telecommunications, despite the fact that in the document the Commission referred to analysis work which had been taking place since 1977.

This report drew attention to the growing importance of telecommunications in the Community’s economic development and highlighted the huge market potential of the handsets which would be required to access the future telematics services.

The Commission emphasized the need to coordinate the actions carried out by the Member States with the objective of harmonising them across the Community.

In this document, the Commission proposed to the Council the adoption of a set of recommendations which are summarized in Table 3.1 below.

Table 3.1	
TELECOMMUNICATIONS PROPOSAL 1980	
ACTION PLAN	
A	Implementation of harmonization actions in the field of telecommunications in the following aspects : <ul style="list-style-type: none"> - Creation of a range of telematics services harmonized across the Community - Creation of a dynamic Community market for the new generations of telecommunications equipment
B	Creation of a Community market for telematics equipment
C	Implementation of the first phase of the opening up of the public telecommunications markets
D	Creation of a joint committee, involving the Commission and the telecommunications administrations to monitor the progress of this programme, identify the industrial policy issues and put forward the associated plans of action

2.3.- Parliament Resolution, March 1981

The European Parliament was also consulted by the Council on the subject of the Commission’s proposals and in April 1981 it adopted a Resolution⁷⁰ based on a report produced by its economic and monetary Commission⁷¹.

⁶⁹ COM(80) 422. Recommandations concernant les Telecommunications. Bruxelles, 1 Septembre 1980

⁷⁰ Résolution du 27 avril 1981, portant avis du Parlement européen sur les recommandations de la Commission des Communautés européennes au Conseil concernant les Telecommunications. OJ C 144, 7 May 1981. pp.71-75

⁷¹ Document 1-138/81. Rapport fait au nom de la Commission économique et monétaire concernat les Telecommunications. Parlement Européen. Documents de Séance. 27 Avril 1981

In the text of its Resolution, the Parliament agreed with the Commission's proposals, however it also considered them to be insufficient, expressing itself in the following manner:

"approves the general objectives described by the Commission",

"would have preferred the Commission to have used the instrument of the Directives instead of the Recommendations, in this field in which energetic actions must be adopted urgently."

Where the proposals concerning the handset market for new telematics applications were concerned, the Parliament went further than the Commission's proposals and stated that it was necessary to reach total liberalization:

"unreservedly approves the objective of creating an open and competitive market in which all users have, throughout Europe, the chance to freely purchase or rent any type of telematic terminal, both from private suppliers and from the administrations, as well as to connect them to public networks"

Finally, the Parliament addressed the Council advising it to act:

"hopes that the Council, aware of our delay and of the need to react fast and vigorously, approves the Commission's proposals "

2.4.- The Council's reaction

The measures proposed by the Commission implied the beginning of interference in the Member States' traditional jurisdiction in the area of telecommunications and the operation of networks and services by monopolies.

Of the set of proposals put forward by the Commission, that which met with the greatest opposition from the Member States was that which referred to the creation of a Community handset market.

The Council blocked this Commission proposal although it carried out the remaining points of this initiative. The initiative to perform sector harmonization actions and that concerning the opening up of public telecommunications equipment markets later resulted in Council Recommendations^{72, 73}, which were adopted in November 1984.

It is worth highlighting that in the 1980 proposal, the Commission neither specifically mentioned the services market, nor questioned the business models of telecommunications administrations in the Member States.

2.5.- The situation in Great Britain and in the United States. The issue of British Telecom

In Great Britain, in April 1981, the British Telecommunications Act had been passed establishing the creation of the company British Telecom out of the telecommunications administration, as well as its privatization.

⁷² Council Recommendation 84/549/EEC of 12 November 1984 concerning the implementation of harmonization in the field of telecommunications. OJ L 298. 16 November 1984. P. 49

⁷³ Council Recommendation 84/550/EEC of 12 November 1984 concerning the first phase of opening up access to public telecommunications contracts. OJ L 298. 16 November 1984. P. 49

As a result of the enactment of this law, the first disputes concerning the introduction of free competition in the telecommunication services market started to emerge.

The so-called British Telecom case is well known, and fully explained in the literature⁷⁴. In this case the Commission found in favour of a British company which considered its interests to be damaged by the British Telecoms decisions which prevented it from carrying out business related to forwarding international telegrams from London which had originated from other Member States.

From then on, the first disagreements between the Commission, which was in favour of implementing free competition in the telecommunications sector, and the Member States who were determined to continue maintaining the telecommunication administrations monopoly in their respective countries emerged.

The Commission's proceedings against British Telecom for abusing a dominant position⁷⁵ and the Republic of Italy's appeal against the Commission at the European Court of Justice⁷⁶ clearly illustrated these discrepancies.

The Court of Justice's ruling of March 1985⁷⁷ not only found in the Commission's favour but clearly established that from then on competition rules would apply to telecommunications administrations given the commercial nature of their activity.

It must be remembered that at that time the United States government's lawsuit against the AT&T group was before the US courts which was to end in August 1982, with the ruling which led to the dismantling of this telecommunications group⁷⁸.

In this context, the fact that a change in the way telecommunications had been traditionally managed throughout the world, and particularly in the United States and Great Britain, was possible represented a worry for the Member States of the European Community sitting on the Council and at the same time it was an incentive for the Commission.

2.6.- The Commission's new proposal, June 1983

In view of the little success of its 1980 proposal, in June 1983 on the occasion of the Summit of Heads of State and Government which was to be held in Stuttgart, the Commission submitted a new Report concerning telecommunications⁷⁹.

This document once again discussed the importance of telecommunications for European economic recovery and highlighted the importance of using the European dimension of these markets.

Likewise, the Commission emphasized the difficulty of reaping the benefits of this European arena and warned that:

⁷⁴ Noam, E. Telecommunications in Europe. Ed. Oxford University Press, Oxford, 1992

⁷⁵ 82/861/EEC: Commission Decision of 10 December 1982 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.877 - British Telecommunications). OJ L 360. 21 December 1982. P. 36

⁷⁶ Case 41/83. Italian Republic v Commission of the European Communities. Court of Justice 1983.

⁷⁷ Judgment of the Court of 20 March 1985. - Italian Republic v Commission of the European Communities. - Abuse of a dominant position (Article 86) - Public undertakings (Article 90) - International agreements (Article 234) - Article 222 - Article 190 of the Treaty. - Case 41/83.

⁷⁸ Taske, P. After Divestiture. Ed. State University of New York Press. Albany 1990

⁷⁹ COM(83) 329. Télécommunications. Bruxelles, le 6 juin 1983

".. the problem is precisely that it is up to the ten Member States, through their PTTs, to determine... what should be on offer in the field of telecommunications: what networks and what services?, In what quantity?, At what cost?, How soon?.

If the Community were to limit itself this time to intervening in a pragmatic and ad hoc way, there would be strong fears that it would be completely ineffectual as has been the case in the past."

In order to break the stalemate of this situation the Commission put forward a series of proposals and said that:

- "1. The second area of thought relates to the setting-up of a European telecommunications body.*
- 2. Since the Commission does not itself possess the necessary skills for bringing these tasks to a satisfactory conclusion, a specialized Community could provide a suitable structure for:*
 - taking Community decisions.*
 - negotiating in international organisations on the basis of a joint position*
 - facilitating cooperation within the Community in this field.*
- 3. This body... placed under the authority of the Commission, ...would be instructed to submit an initial policy report in December 1983 and its final conclusions in March 1984."*

These Commission proposals which were made from a weak position were also disregarded by the Council; the benefit of creating a Telecommunications Body, as proposed by the Commission, was not considered. It must be remembered that the Conference of European Postal and Telecommunications Administration – CEPT⁸⁰, had existed since 1959 and had been coordinating the PTTs in European countries.

In the aforementioned European Council what was known as the "Solemn Stuttgart Declaration"⁸¹ took place in which the Commission was asked to produce a report on what was to be the White Paper on completing the Internal Market⁸² prior to the Single European Act.

2.7.- The Commission's proposal, September 1983

In view of the Council's unenthusiastic attitude, in September 1983, the Commission submitted a new Telecommunications proposal⁸³. In this document the Commission once again emphasized the same arguments that had been used in the past in the following terms:

" The telecommunications industry offers an infrastructure that is essential for the development of countless aspects of information technologies.

⁸⁰ CEPT. <http://www.cept.org/>, visited 8/9/2010.

⁸¹ Solemn Declaration of the European Union. Stuttgart 19 June 1983. http://aei.pitt.edu/1788/01/stuttgart_declaration_1983.pdf, visited 8/9/2010.

⁸² COM(85) 310. Communication of the Commission to the Council. White Paper on the achievement of the internal market. Brussels, 14 June 1985

⁸³ COM(83) 573. Communication de la Commission au Conseil sur les Télécommunications. Lignes d'Action. Bruxelles, le 29 Septembre 1983

During the period 1983-1993, the telecommunications equipment sector, together with the services sector, will become one of the biggest sectors of industry.

A telecommunications strategy oriented towards the future should create a space for telecommunications and telematic markets on a Community level"

In order to implement these objectives, and in accordance with the "spirit of Stuttgart to develop new Community policies", the Commission proposed to the Council the adoption of the Action Plan which appears in Table 3.2.

Table 3.2	
TELECOMMUNICATIONS PROPOSALS 1983 and 1984	
ACTION PLAN	
A	Establish medium and long-term telecommunications objectives within the Community
B	Definition and implementation of joint research and development action in telecommunications.
C	Expansion of handset market and implementation of joint Community actions at international forums.
D	Joint development of the international part of the future telecommunications infrastructure in the Community.
E	Extensive use of modern telecommunication techniques to progress and develop the most disadvantaged areas of the Community.
F	Progressive expansion of the area of the communication equipment markets controlled by network operators' purchases.

These new Commission proposals contained some of those that featured in the 1980 proposal along with others from general policy documents the Commission was preparing at the time.

One of these new proposals, specifically that referring to the use of telecommunications techniques to progress and develop the most disadvantaged areas of the Community, appears here as a consequence of the reform of the 1984 ERDF Regulations⁸⁴, which created the role of the Community Programme for Regional Development and would subsequently lead to the STAR Programme.

In this context, the Council could not put off considering the Commission proposals to carry out actions in the area of telecommunications any longer, however, it seemed risky to allow the Commission to act on its own and lose control of the possible results.

Instead of the Telecommunications Body proposed by the Commission, in November 1983, the Council created the Senior Officials Group on Telecommunications – SOG-T⁸⁵.

The Commission accepted the collaboration of the SOG-T until, as a consequence of the Single European Act, it had the necessary jurisdiction to act on its own and implement its own proposals. From then on, the Commission could dispense with the collaboration of such a senior Group.

⁸⁴ Council Regulation (EEC) No 1787/84 of 19 June 1984 on the European Regional Development Fund. OJ L 169, 28 June 1984

⁸⁵ Decision of the Council of Ministers of Industry on the creation of a Seniors Officials Group of Telecommunications (SOG-T). Brussels, 4 November 1983

2.8.- European Parliament Resolution, March 1984

As a consequence of the two new Commission proposals and in view of the Council's passiveness, the Parliament produced, *motu proprio*, a new Resolution concerning telecommunications⁸⁶, based on a report written by its economic and monetary Commission⁸⁷.

This was an interesting document that had gone unnoticed in which the Parliament had clearly analysed the situation in the telecommunications sector. It must be remembered that in May 1981, the Parliament had already addressed this issue⁸⁸.

The Parliament, in this case, expressed itself in the following terms:

" Considers that is necessary to prepare, as soon as possible, a Strategic European Plan on the Telecommunications industry"

"Considers that the Commission must propose the guidelines of the strategy for the telecommunications industry, in collaboration with the representatives of the Member States, the PTTs, manufacturers and users"

" Considers that the Strategic Plan should encompass action in the following areas:

- promotion of investment in basic telecommunications infrastructures.*
- establishment of a European policy on telecommunications standards, both for network equipment and for terminals, in order to prevent a possible standards war*
- modification of the existing regulatory systems so as to ensure greater freedom for the development of new products and services*
- launch, by the Commission, of major research and development initiatives in order to leverage on the advantages afforded by the European dimension.*
- launching of pilot projects at a Community level"*

This parliamentary document analysed other aspects, some of them relating to tariffing policy, which until then had not been tackled in the documents we have referred to.

As we stated earlier, given the consultative nature of the Parliament, this Resolution was not considered by either the Commission or the Council.

2.9.- European Commission proposal, May 1984

As a result of its collaboration with the SOG-T, in May 1984 the Commission produced a Communication⁸⁹ containing an initial set of proposals for a Telecommunications Action Programme which included all of its proposals from September 1983 and had a lengthy preamble in which issues such as those detailed below were put forward.

⁸⁶ Résolution du Parlement Européen, du 29 mars 1984 sur les télécommunications. DO C 117, de 30 de avril de 1984, pp. 75-82

⁸⁷ Document 1-1477/3. Rapport fait au nom de la Commission économique et monétaire sur les télécommunications. Parlement Européen. Document de séances, 3 mars 1984

⁸⁸ Résolution du 27 avril 1981, portant avis du Parlement européen sur les recommandations de la Commission des Communautés européennes au Conseil concernant les Télécommunications. OJ C 144, 7 May 1981. pp.71-75

⁸⁹ COM(84) 277. Communication de la Commission au Conseil sur les Télécommunications. Etat d'avancement de la réflexion et des travaux dans ce domaine et premières propositions d'un programme d'action. Bruxelles, le 18 Mai 1984

In reference to the handset market the document said the following:

" If the Community is to become more competitive, it must have a common terminals market.

Furthermore, producers will benefit from a larger internal market since inherent economies of scale will then permit them to distribute their products both within the Community's internal market and abroad".

In reference to the services market the document made the following clear:

"Telecommunications are subject to the obligations of a public service and are managed by a State monopoly in the nine Member States of the Community ".

This shows how the 1984 Telecommunications Action Programme avoided any mention of a possible change in the operating model for Telecommunications Services and made the Member States' role in this area very clear.

2.10.- European Council agreement, December 1984

Finally the Council decided to take action, among other reasons because it had no other option but to do so.

At its meeting on 17th December 1984, the Council adopted an Agreement⁹⁰, in which it approved the Telecommunications Action Programme proposed by the Commission in its final document in May 1984 and drawn up with assistance from the SOG-T, the content of which appears in Table 3.3.

Table 3.3	
1984 EUROPEAN COUNCIL DECISION CONCERNING TELECOMMUNICATIONS ACTION PLAN	
A	Creation of a Community handset and telecommunications equipment market <ul style="list-style-type: none"> * Development of a normalization policy * Gradual application of mutual recognition procedures for handsets
B	Improve service development and advanced networks <ul style="list-style-type: none"> * Holding debates on the following points <ul style="list-style-type: none"> - producing infrastructures of common interest - launch of a technology development programme for broadband networks * Definition of the implementation of a video communication system for the Community institutions
C	Improve access to networks and telecommunication services in the most disadvantaged areas
D	Coordination of the negotiating positions at the heart of international organizations, based on the debates held with the SOG-T

⁹⁰ Press release 11460/84. Council meeting n° 979. Agreement of the Council of Ministers of Industry. Approval of Telecommunications Programme. Brussels 17 December 1984.

From then on, the Commission proceeded to develop the content of this Programme. The Commission periodically informed the Council of the level of progress with the Community Telecommunications Policy via documents containing the completed actions^{91, 92, 93}.

2.11.- Comments on the initial steps of the Telecommunications Policy

From the analysis of the documents containing the Community telecommunication actions during this period, it is worth making a few comments, amongst which we highlight the following:

- The Commission, with barely any jurisdiction in this field, addressed telecommunications due to its relationship with the industrial equipment sector considering its involvement necessary for the purpose of taking advantage of the capacity of the Community-wide markets.
- The Council maintained an absolutely passive stance in the face of the Commission's proposals, confident of its decision-making capacity and trying to avoid interference from any other Community Institution in what it considered to be an issue falling entirely under the jurisdiction of the Member States.
- The Parliament, without any important role to play, showed its clarity by extending the Commission's points of view and promoting the Council's action.

In our opinion, there were two proposals throughout this period which were worthy of consideration:

- The Commission's proposal, in June 1983, to create a European Telecommunications Body
- Parliament's proposal, in March 1984, to draw up a Strategic Telecommunications Plan for the European Community.

The conclusions from this period are clear: the Commission preferred to wait to have all the necessary powers before acting freely in the area of telecommunications equipment and services. This was to arrive with the enactment of the Single European Act.

3.- INITIAL TELECOMMUNICATIONS ACTIONS IN THE EUROPEAN COHESION POLICY.

3.1.- Regional Policy and Cohesion Policy. Overview

At the time the European Community was established in 1957, the disparities between the regions of the six founding Member States: Belgium, France, Germany, Italy, Luxembourg and The Netherlands were limited with the exception of the southern regions of Italy, and the actions derived from the Common Agricultural Policy were thought sufficient to address many of the existing imbalances.

⁹¹ COM(85) 276. Communication de la Commission au Conseil sur l'état d'avancement de la Politique Communautaire des Télécommunications. Bruxelles, 30 May 1985

⁹² COM(86) 325. Communication from the Commission to the Council on European telecommunications policy. Brussels, 5 June 1985.

⁹³ COM(88) 240. Progress report on the implementation of a community telecommunications policy. Brussels, 31 May 1988

With the incorporation of Denmark, Great Britain and, specifically, Ireland in 1973, it became necessary to launch a regional development Policy especially aimed at helping to correct the imbalances between the different Community Regions. In this context and with this objective, in 1975 the European Regional Development Fund – ERDF was created⁹⁴. The objective of these initial measures was to jointly finance private investments in industrial activities aimed at creating jobs and, above all, public investments for infrastructure development. The programmes to be financed were put forward by the Member States and selected by the Commission.

It must be remembered that the Treaty of Rome made no explicit mention of carrying out actions of this kind and it is curious to see that the Council invoked Article 2 of the Treaty of Rome as the legal basis for creating the ERDF, this article apparently assigning the Community the task of promoting harmonious development of economic activities throughout its territory. We do not believe that the spirit with which this article was written contemplated this but we must say that we consider this to be a very fortunate interpretation of Article 2 which laid the foundations for a Community regional policy.

Following the accession in 1981 of Greece to the European Community there was a reform of the ERDF Regulations in 1984⁹⁵ which led to better coordination between national policies and Community actions with the objective of optimising public actions.

Where the 1984 reform is concerned it is worth highlighting the implementation of a financing system for long-term programmes which substituted the previous Project-based financing system. Two broad types of programme were established: National Programmes of Community Interest and Community Programmes. The definition of the former was the Member States' responsibility whilst that of the latter fell to the European Institutions. The approval of any of the programmes required the adoption of a Council Regulation.

It was the concept of the Community Programme that would allow the first corrective measures to be carried out in the area of Telecommunications in the European Community under the name of the STAR programme.

The Single European Act which was signed in 1986, and coincided with Spain and Portugal's accession to the Community, introduced significant modifications to the text of the Treaty, particularly Section V: Economic and Social Cohesion and article 130 A specifically

It may be said that from then on the regional policy aimed at achieving the objectives of economic and social cohesion naturally played a part and as a consequence, in 1988⁹⁶ there was a reform of the set of instruments available to the Community to act in this area: the European Regional Development Fund – ERDF, the European Agriculture Guidance and Guarantee Fund – EAGGF, European Social Fund – ESF and the actions of the European Investment Bank – EIB.

Out of the 1988 reforms it is worth highlighting the definition of the following objectives of the Structural Funds:

- Objective 1: To promote the development and structural adjustment of the most disadvantaged regions
- Objective 2: To rationalize the regions or parts of them affected by the industrial decline
- Objective 3: To combat long-term unemployment

⁹⁴ Regulation No 724/75 of the Council of 18 March 1975 establishing a European Regional Development Fund. OJ L 73, 21 March 1975

⁹⁵ Council Regulation No 214/79 of 6 February 1979 amending the European Regional Development Fund. OJ L 35, 9 February 1979

⁹⁶ Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments. OJ L 185, 15 July 1988. P. 9

- Objective 4: To facilitate the professional integration of young people
- Objective 5A: To accelerate the adaptation and modernization of agricultural structures
- Objective 5B: To promote development in rural areas

The Community Regions were classified in accordance with these objectives.

One of the contributions of the 1988 reforms was the creation of the Community Initiative, the least rigid elements of the former Community Programme system which would enable the Community Institutions to carry out specific actions in fields considered to be of interest. The responsibility for creating a Community Initiative belonged to the Commission and it was announced through a simple Communication from the Commission to the Member States.

It was the Community Initiative which was to allow the implementation of a second corrective measure specific to telecommunications: the TELEMATICS Initiative.

Finally, the Treaty on European Union signed in Maastricht in 1992 introduced significant changes in relation to the Cohesion Policy amongst which it is worth highlighting the creation of the Cohesion Fund which is basically devoted to carrying out actions affecting the environment and trans-European communication networks. The Committee of Regions was created in the Maastricht Treaty as a consultative body for the rest of the Community Institutions.

As a result of this reform of the Treaty, during 1993 a new reform of the Community Structural Funds took place. It must be said that the Community Initiatives role was maintained even though it was no longer going to be used to carry out specific telecommunications actions.

It must be mentioned that in Article 10 of the Regulations amending the ERDF⁹⁷, up to 1% of the ERDF funds budget was reserved for Community Interventions for the development of Studies and pilot Projects to be performed as a result of a Commission initiative. It was to be this instrument that would enable specific actions to plan the introduction of the Information Society to the Regions: The IRISI and RISI projects to which we will refer later.

3.2.- Cohesion Objectives in 1984 Telecommunications strategies.

The first specific action by the Community Institutions with the objective of implementing corrective measures in the telecommunications sector featured in the 1984 Commission proposal. As a consequence of this, in the Decision adopted by the Council in 1984⁹⁸, the following appeared as one of the lines of action:

“C) Improvement of access by the less favoured regions to telecommunications networks and services”

The inclusion of this action plan in a Council Decision is the consequence of the level of interest that Regional Policy was starting to generate at that time and of the Community Institutions' aim to include the regional dimension in its actions. It was clear that in States like Ireland and Greece the telecommunications situation displayed notable differences to the rest of the Member States and that the same occurred with Spain and Portugal which were in the final stages of negotiating their accession to the Community. An action seemed justified in this respect.

⁹⁷ Council Regulation (EEC) No 2083/93 of 20 July 1993 amending Regulation (EEC) No 4254/88 laying down provisions for implementing Regulation (EEC) No 2052/89 as regards the European Regional Development Fund. OJ 193. 31 July 1993. P. 34

⁹⁸ Press release 11460/84. Council meeting n° 979. Agreement of the Council of Ministers of Industry. Approval of Telecommunications Programme. Brussels 17 November 1984.

On the other hand, as we previously stated, the ERDF reform in 1984, which had been adopted months previously, created the role of the Community Programme in Article 7 as:

“...a series of consistent multiannual measures directly serving community objectives and the implementation of Community policies...”

As such, with the concurrence of these two circumstances, it was possible to create the STAR Community Programme.

In January 1986, the Commission submitted a Regulation proposal to the Council⁹⁹ for the launch of a Community Programme concerning the development of telecommunications in certain disadvantaged Regions of the Community, which from the start was known as the STAR programme. The Commission document just referred to is a clear illustration of the telecommunications situation at that time as well as of the Commission’s intentions in launching this programme aimed at promoting what came to be known as advanced telecommunications: network digitalization and the linking up of the most disadvantaged regions with the rest of the networks using broadband networks and infrastructures.

Finally, in October 1986 the Council adopted the Regulation leading to the creation of the STAR programme¹⁰⁰. The duration of the Programme was set at five years, between 1987 and 1991, and it provided for the joint financing of two kinds of project:

- Infrastructure and equipment investment
- Actions to promote the supply and demand of advanced telecommunications services

The Regions which were to benefit from this programme were indicated in the text of the Regulation itself and would match, to a certain extent, those which would be known as Objective 1 regions after the ERDF reform in 1988.

At the end of the STAR Programme the Commission requested an evaluation of the results¹⁰¹. According to the contents of this document the Community’s contribution to the programme’s total budget was 760 mECU paid to the ERDF. The financial support from the European Community, to projects carried out in line with the rules stipulated in the Regulation depending on the kind of project, ranged from 50% to 75% of the cost depending on each case.

Of the total STAR budget, 80% was allocated to financing telecommunications operators’ networks and infrastructures and only 20% was allocated to financing projects for telematics applications.

Overall, the actions scheduled and carried out under the STAR Programme may be viewed as the Commission’s first attempt at supporting the promotion of advanced telecommunications in the Regions with the involvement of the Member States’ governments. This programme was managed by the Member States and by the telecommunications operators but never by the affected Regions.

It must be said that this Programme emerged and made sense at a time in which telecommunications were managed in a monopoly and domestic operators were the only entities with the authority to create infrastructures and provide services. This meant that no transfer of capital to the operators’ accounts ran the risk of violating the principles of free competition. As a consequence of the STAR Programme,

⁹⁹ COM(85) 836. Proposal for a Council Regulation instituting a community programme for the development of certain less-favoured regions of the community by improving access to advanced telecommunications services (STAR Programme). OJ C 356. 31 December 1985. P. 66

¹⁰⁰ Council Regulation (EEC) No 3300/86 of 27 October 1986 instituting a Community programme for the development of certain less-favoured regions of the Community by improving access to advanced telecommunications services (STAR programme). OJ L 305. 31 October 1986. P. 1

¹⁰¹ Ewbank Preece Ltd. STAR Special Telecommunication Action for Regional Development. Community Level Evaluation. Brussels 1993.

the Member States, through their telecommunications operators, received financial support which helped to finance improvements to their infrastructures and networks.

Likewise, it must be said that the assistance received by private companies to jointly finance their projects was not only less but, generally, thinly distributed among projects with a limited scope at a time when technological progress quickly led to obsolescence.

4.- CONCLUSIONS

This Chapter has reviewed the European Institutions' initial steps towards defining a Telecommunications Policy at a time in which telecommunications were still managed under a monopoly controlled by the Member States.

It has also looked at the early attempts to avoid what has today become known as digital divide, which involved including the improvement of telecommunications networks and services in the most disadvantaged areas of the Community in the Regional Development Policy objectives.

The study of this initial period will be completed by the analysis of the Standardisation Policy and its application to telecommunications equipment which is addressed in the next Chapter.

CHAPTER 4

THE START OF THE TELECOMMUNICATIONS STANDARDISATION AND CERTIFICATION POLICY. PERIOD 1977 – 1986



CHAPTER 4

THE START OF THE TELECOMMUNICATIONS STANDARDISATION AND CERTIFICATION POLICY. PERIOD 1977 – 1986

1.- INTRODUCTION

This Chapter looks at the start of the actions related to the Standardisation and Certification of terminal equipment as part of the European Union's Telecommunications Policy during the period 1977 – 1986.

The creation of the single market encouraged the development of a European Community Standardisation Policy, which was also applied to the telecommunications sector.

This Chapter starts by analysing the general aspects of the Standardisation Policy that the European Community designed during the said period, with the purpose of creating a single market. The prominence of European Standards, versus those being developed by Member States, and the CE marking, were the major achievements of the said actions.

It goes on to examine the evolution of specific standardisation and certification actions in the telecommunications sector within the framework of the first directions of the Telecommunications Policy described in the previous Chapter.

2.- OVERVIEW OF THE STANDARDISATION AND CERTIFICATION OF TELECOMMUNICATIONS

The drafting of telecommunications standards and recommendations goes back to the origins of this sector. The first patents for telephones and other related equipment, the specific nature of telecommunications networks and the need for the interoperation of their different distributed elements soon underscored the need to unify the technical characteristics of the different items of equipment used.

As soon as it became possible to interconnect the telecommunications networks owned by different companies, with the purpose of providing national and international services, the use of common technical specifications was no longer only advisable, but necessary so as guarantee the interoperation of different systems. The birth of the International Telegraphic Union in 1865 and its subsequent transformation into the International Telecommunications Union (ITU)^{102, 103}, was a response to these needs.

¹⁰² ITU History <http://www.itu.int/es/history/Pages/default.aspx>, visited 8/9/2010.

¹⁰³ Macpherson, A. International Telecommunication Standards Organizations. Artech House. London 1990

The recognition of the ITU in 1947 as a Specialized Agency of the United Nations endorsed this situation and guaranteed the continuity of its actions. It is well known and acknowledged that the ITU, and in particular that of its former committees, the CCITT and CCIR, contributed enormously to the drafting of technical and functional Recommendations which have been used as the base for the development of global telecommunications equipment and services.

However, the specific nature of the management of telecommunications businesses in Europe, mostly based on national monopolistic regimes, drove the development of national standards for their specific application in each of the Member States, in parallel to the drafting of international Recommendations.

In many cases, these National Standards were merely a translation of the ITU Recommendations. However, the technological evolution and economic and social progress of the different countries led the respective administrations to consider themselves under the obligation to add certain specific characteristics to these international recommendations, and also to demand their compliance in all telecommunications activities performed in their territory.

Consequently the first decades of the second half of the 20th century witnessed an upsurge in the standardisation activities of the different European States, giving rise to logical differences between the standards drafted by each country. Not only were these national standards regarded as beneficial for the development of telecommunications services, but also as vital for the development and progress of the equipment supply industry of national operators.

Furthermore, this situation was coherent with the existence of national monopolies for the supply of equipment and operation of services. Likewise, this was not specific to the telecommunications sector and, to a greater or lesser extent, was also to be seen in other sectors of economic and industrial activity.

With the globalization of economic activities, in particular, within the framework of the different editions of the General Agreement on Tariffs and Trade – GATT¹⁰⁴, the use of standards for benchmarking the characteristics of the products being marketed became widespread, and there began to be concern that the use of national standards might hinder international trade. In any case, this situation did not have an impact on services, in particular, on telecommunications services, for a long period of time, for obvious reasons.

When the European Union started to deal with the issues in the telecommunications sector, firstly with the aim of relaunching the equipment industry and subsequently with the idea of opening up the services market to competition, the standardisation issues began to grow in importance.

Striking a balance between the need to define a standardisation policy capable of guaranteeing the consolidation of a single European market and permitting the interconnection of equipment, networks and services from different providers, and the need to respect the principles of free competition, was the objective of the actions in this field as an integral part of the Telecommunications Policy of the European Community.

The actions during the period 1980-1986 marked the start of the European Standardisation Policy, geared towards strengthening of the industrial development of telecommunications under a monopolistic regime, as described below. In this context, the telecommunications actions were aimed at applying the Community's general standardisation guidelines to the terminals market.

The following sections analyse the Community Institutions' main actions during this period, but first it would be useful to recall the general framework of the European Union's Telecommunications Standardisation and Certification Policy in which such actions took place.

¹⁰⁴ GATT. A brief history http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, visited 28/10/2010.

3.- SUMMARY OF THE EUROPEAN UNION'S STANDARDISATION AND CERTIFICATION POLICY.

3.1.- The Standardisation Policy in the Treaty of Rome

Article 2 of the Treaty of Rome described the missions and aims of the European Community.

Article 2.

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Everyone knows that the Community's goals, as described in the Treaty, did not include any that referred to any activity related to the industry or other standardisation activities either per se or as part of other Community policies. Nonetheless, the Treaty did explicitly refer to free trade and free competition objectives as being the cornerstones of the common market. Article 3 clearly mentioned these issues:

Article 3.

For the purposes set out in Article 2, the activities of the Community shall include, as provided by this Treaty and in accordance with the timetable set out therein:

- a) the elimination as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;*
-*
- g) a system ensuring that competition in the common market is not distorted;*
- h) the approximation of the laws of the Member States to the extent;*

The elimination of measures having equivalent effect can be interpreted as including the prohibition of any obligation to comply with technical standards or regulations that might hinder the free circulation of goods.

The main body of the Treaty fully described the aforesaid principles, in particular those that referred to the free movement of goods, elimination of quantitative restrictions and approximation of national laws.

The free movement of goods between Member States, explained in Article 9 (now Art. 28), was based on the creation of a Customs Union and the elimination of charges having an equivalent effect to the custom duties. The said elimination of quantitative restrictions between Member States, dealt with in Articles 30 (now Art. 34) and subsequent articles, prohibited quantitative restrictions affecting exports or measures having an equivalent effect. Finally, Article 100 (now Art. 115) mentioned that the

Council could issue Directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment of the common market.

The industrial crisis of the mid 70's prompted the Member States to make further use of national standards, which they regarded as true technical barriers, in order to protect their own industries from products from other European Community countries. Therefore, the use of the so-called "equivalent measures" was later to become a standard practice. The European Institutions' efforts to implement the technical harmonisation process and develop common standards throughout the Community were clearly not effective enough to counteract the Member States' actions aimed at protecting their national interests.

3.2.- The Technical Standardisation Commitments of the GATT.

At this stage of the analysis of the European Community's standardisation actions, reference must be made to the commitments derived from the signing of the General Agreement on Tariffs and Trade – GATT, in 1979. All the Member States had signed the GATT in 1979, following the Tokyo Round negotiations that lasted from 1973 to 1979, producing the new framework for regulating international trade, which replaced the old GATT that dated back to 1967.

The 1979 GATT document¹⁰⁵ included the Agreement on Technical Barriers to Trade. With the view to fostering international trade and contributing to remove any technical barriers capable of hindering it, the countries that signed the agreement undertook to implement a series of rules that would be based on the following principles, among others:

- Elimination of standards or regulations that might act as barriers to international trade.
- Predominance of international standards over national standards.
- In the event of the absence of an international standard, establishment of clear procedures for informing the Agreement's other signatory countries about one country's intentions to develop national technical regulations or standards.
- Fair application of conformity tests, for national products and products from the Agreement's other signatory countries.
- Invitation to accept the conformity certificates issued by institutions from other countries.

Surprisingly, the technical standardisation and certification commitments between the European Community's Member States stemmed more from they had signed the GATT than from their membership of the Community. The Community Institutions were fully aware of this fact and geared all their efforts over the next few years to transforming what until then had been GATT commitments, into Community laws.

3.3.- The New Approach of the Community's Standardisation Policy.

Within the framework of the Treaty of Rome, one of the main principles of the Community's actions for the achievement of the common market was the approximation of the laws of the Member States and Article 115 of the Treaty was the instrument used in this area. It must be said that the European institutions' initial actions in terms of technical standardisation were timid and inefficient. Thus, the

¹⁰⁵ Agreement on Technical Barriers to Trade. GATT 1979

problems that arose in approximating national laws in the standardisation field^{106, 107} and, in particular, the industrial crisis of the 70's, fostered a conviction that more vigorous action was required in this field.

Following a proposal from the Commission¹⁰⁸, in March 1983 the Council adopted Directive 83/189/EC, laying down a procedure for the provision of information in the field of technical standards and regulations¹⁰⁹. This served as the basis for what would later be called the "New Approach in the European Community's Technical Harmonisation and Standardisation Policy".

The document in question basically enshrines the spirit of the 1979 GATT Agreement on Technical Barriers to Trade, moving ahead with new standardisation action reporting procedures. Moreover, this was the first Community document to include the definitions of technical specifications, standards and technical regulations, which were word-for-word matches of the GATT definitions, as shown below:

“Technical Specification: *A specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards terminology, symbols, testing and test methods, packaging, marking or labelling.*”

Standard: *Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*

Technical regulation: *Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*

Under this Directive, Member States were obliged, inter alia, to:

- Inform the Commission and all other Member States of national standard drafting programmes every three months.
- Invite the Commission and all other Member States to participate in the national standard drafting processes.
- Inform the Commission and all other Member States of all proposed national standards.
- Refrain from starting to draft national standards while European standards were being drafted.
- Inform the Commission of any national project to draft technical regulations, except in the case of a simple transposition of an International or European standard.
- Suspend the application of technical regulations if the Commission or another Member State considers that such application is a barrier to free trade.

¹⁰⁶ Agreement of the Council of 28 May 1969 on the Status Quo. OJ C 76. 17 June 1969. P. 9

¹⁰⁷ Agreement amending the Council Agreement of 28 May 1969 on the Status Quo. DO C 15 March 1973. P. 3

¹⁰⁸ Council Directive proposal laying down a procedure for the provision of information in the field of technical standards and regulations. OJ C 253. 1 October 1980. P. 2

¹⁰⁹ 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. OJ L 109. 26 April 1983. P. 8.

- Creation of a Standing Committee formed of representatives of the Member States and chaired by a representative of the Commission, to follow up the objectives of this Directive.

Accordingly, on 13 November, 1984 the European Commission signed an Agreement on General Guidelines for Cooperation with the European standardisation organizations, the CEN¹¹⁰ and CENELEC¹¹¹.

This Directive was first amended¹¹² in 1998 so as to expand its scope of application to agricultural products and further strengthen the established information procedure. Subsequently, the Directive was amended in 1994 for the second time and for the same purpose¹¹³.

Meanwhile, the Council made headway in drawing up the European Standardisation Policy. At its meeting on 7 May 1985, the Council approved a Resolution¹¹⁴ on the New Approach to Technical Harmonisation and Standards, which included the Conclusions on Standardisation approved at a previous Council meeting held on 16 July 1984, laying down guidelines for the Community's technical harmonisation and standardisation policy.

The Council put forward and adopted the following principles in these documents:

- “- *agreement by the Member States to keep a constant check on the technical regulations which are applied - whether de jure or de facto - on their territory so as to withdraw those which are obsolete or unnecessary;*
- *agreement by the Member States to ensure the mutual recognition of the results of tests and the establishment, where necessary, of harmonized rules as regards the operation of certification bodies;*
- *agreement to early Community consultation at an appropriate level, in accordance with the objectives of Directive 189/83/EEC where major national regulatory initiatives or procedures might have adverse repercussions on the operation of the internal market;*
- *extension of the Community practice in matters of technical harmonisation of entrusting the task of defining the technical characteristics of products to standards, preferably European but if necessary national, where the conditions necessary for this purpose, particularly as regards health protection and safety, are fulfilled;*
- *a very rapid strengthening of the capacity to standardize, preferably at European level, with a view to facilitating on the one hand harmonisation of legislation by the Community and on the other industrial development, particularly in the field of new technologies....”*

The full text can be found in the many papers and documents published at the time¹¹⁵.

¹¹⁰ CEN. European Committee for Standardisation. <http://www.cen.eu/>, visited 28/10/2010.

¹¹¹ CENELEC. European Committee for Electrotechnical Standardization. <http://www.cenelec.eu/>, visited 28/10/2010.

¹¹² Council Directive 88/182/EEC of 22 March 1988 amending Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations. OJ L 81. 26 March 1988. 75

¹¹³ Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 materially amending for the second time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations. OJ L 100. 19 April 1994. P. 30

¹¹⁴ Council Resolution of 7 May 1985, on the new approach on harmonisation and technical standards. DO C 136. 4 June 1985. P. 1

¹¹⁵ Nicolas, F. Common standards for enterprises. Ed. Commission of the European Communities. Brussels 1994.

3.4.- Technical Standardisation after the Single Act of 1986.

The industrial crisis that hit Europe at the start of the 80's further reinforced the need to create an internal market in the Community, as this would strengthen the industry by removing the barriers to free movement of goods. Evidently, some of those barriers were technical.

Consequently the policy that the European Institutions had applied until then, which was mainly based on the harmonisation of national laws, in the light of the Treaty of Rome, was clearly incapable of attaining the objectives of achieving an internal market. So it became necessary to reform the Treaties in order to permit more efficient courses of actions.

As mentioned earlier, after the European Council had submitted several proposals backing the project to build the common market, at the meeting held in June 1985, the Commission presented a White Paper entitled: Achievement of the Internal Market¹¹⁶.

Among other issues, the document addressed the need to design a new strategy for removing the technical obstacles which were hindering the expansion of the internal market. On the matter of standardisation, it stated that neither the strategy based on the harmonisation of national laws, nor the strategy for the mutual recognition of conformity certificates seemed efficient enough, and therefore proposed the following solution:

- *a clear distinction needs to be done in future internal market initiatives between what is essential to harmonise and what may be left to mutual recognition of national regulation and standards...*
- *legislative harmonisation (Council Directives based on Article 100) will in future be restricted to laying down essential health and safety requirements which will be obligatory in all Member States.*
- *harmonisation industrial standards by elaboration of European standards will be promoted to maximum extent....*

The approval of the Single Act in 1986¹¹⁷ and its entry into force on 1st July 1987 were the pillars for the implementation of this new Community strategy.

However, the balance that had been struck between the Community actions to achieve the harmonisation of national laws and the national actions related to mutual recognition did not seem to suffice for the achievement of the internal market. In this scenario, the Community believed it ought to reinforce the development of European standards that could be adopted by the industry on a broad and voluntary basis, and become established and accepted before traditional national standards.

Therefore, so as to analyse whether it ought to reinforce its courses of actions to develop European Standards, in December 1990 the Commission published the Green Paper on the Development of European Standardisation¹¹⁸. As in previous cases, it was a consultation document that proposed a set of measures to further boost the European standardisation strategy and thus drive the creation of the internal market.

¹¹⁶ COM(85) 310. Communication of the Commission to the Council. White Paper on the achievement of the internal market. Brussels, 14 June 1985.

¹¹⁷ European Single Act. OJ L 169. 29 June 1987.

¹¹⁸ COM(90) 456. Green Paper on the development of European standardization: action for faster technological integration in Europe. Brussels, 10 December 1990. OJ C 20. 28 January 1991. P. 1

The objective of this new strategy clearly focused on promoting the development of European Standards. In this document, the Commission put forward the following proposals:

- “-European Industry is called upon to give European standardisation a much higher priority in its strategy for the internal market....*
- *Standardisation bodies are asked to take further steps to improve their efficiency and to consider restructuring the European standardisation system...*
 - *Other recommendations include ... greater direct participation of interested parties in European standardisation work....*
 - *The Commission also recommends measures by which European standardisation bodies might respond to their changing external environment, especially in Eastern Europe.*
 - *Governments are asked to step up their promotion and support of standardisation practices at national and at European level....”*

More than a year after the Green Paper had come out, the Commission published a document that included the conclusions of the consultation process¹¹⁹, which corroborated the interest of implementing the Commission's proposals. The Council adopted a Recommendation that fully supported the Commission's proposals and which, among other things:

- “- REITERATES the importance of a cohesive system of European standards, organized by and for the parties concerned...*
- *CONSIDERS that European standardisation, while organized on a voluntary basis, also serves the public interest*
 - *ENDORSES the desire to avoid the fragmentation of work on European standardisation...*
 - *STRESSES the urgent need for high-quality European standards ...*
 - *STRESSES the need to increase the effective availability of European standards at national level through their systematic transposition...*
 - *CONSIDERS that the use of European standards should be further encouraged as an instrument of economic and industrial integration..*
 - *INVITES the European standards organizations to strengthen their coordination ..*
 - *INVITES the Commission, where appropriate, to apply the principle of referring to European standards in future draft Community legislation.*
 - *Undertakes to continue to grant financial aid... to European standards organizations...”*

This document provided a comprehensive definition and boosted the new European standardisation strategy.

Meanwhile, the Council adopted a Resolution¹²⁰ on 18 June 1992 in which it accepted the Commission's proposals, inviting all the parties involved to act accordingly.

¹¹⁹ Communication of the European Commission. Standardisation in the European Economy. Continuation of the Green Paper of the Commission of 1990. OJ C 96. 15 April 1992. P. 2

¹²⁰ Council Resolution of 18 June 1992 on the role of European standardization in the European economy. OJ C 173. 9 July 1992. P. 1

3.5.- Overview of the European Union's Certification Policy.

The Standardisation Policy drawn up by the European Institutions established a clear difference between the binding standards enforced through Directives oriented to the harmonisation national laws, and all others, which still only applied on a voluntary basis.

Whenever the European Institutions issued a standard through a Directive, thereby making it compulsory, the Member States had to ensure that the standard became binding in their own countries, after transposing it into their national legislation.

Thus, as it became compulsory to demand compliance with a standard, what then arose was the need to verify such compliance, that is to say, the need for mechanisms which, after the pertinent tests had been conducted, could be used to assess the Conformity and guarantee that a given product or service met the requirements in order to be sold on the single market.

When a product or service is assessed for conformity to a standard, the process usually ends with the issue of a certificate, stating that such product or service conforms to the requirements in question. To demonstrate that such requirements have been met, the product or service carries a sign or mark, and in the European Union that is the CE marking.

However, since the Member States are responsible for demanding compliance with technical regulations and Certification of Conformity applies throughout the Community, it was necessary to determine how the different Member States were going to recognize the validity of the Conformity Certificates issued outside their countries.

This aspect of the Certification Policy of the European Union was a direct consequence of the policy of harmonising Technical Regulations in Member States, that is to say, the obligatory nature of complying with technical standards.

Following these preliminary considerations, we can analyse how the European Institutions implemented their Certification Policy.

3.6.- The Global Certification Approach of the European Union.

The basic principles underpinning the European Union's Certification Policy were included as part of the policy of New Approach to technical harmonisation and standardisation, approved by the Council in the aforesaid Resolution of 7 May 1985.

The need to comply with certain technical standards, as a result of the adoption of Directives that sought to harmonize national laws, entailed devising a mechanism both for carrying out the technical standard conformity tests and for certifying their compliance. As usual, in this Resolution, the Council invited the Commission to submit proposals as soon as possible.

However, the Commission took four years to submit its Certification and Testing proposals to the Council. In June 1989, the Commission issued a Communication¹²¹ called “A Global Approach to Certification and Testing. This document listed the three types of actions that justified the adoption of a certification policy:

¹²¹ COM(89) 209. A global approach to certification and testing quality measures for industrial products. Brussels, 15 June 1989. OJ C 267. 19 October 1989. p. 3

- the harmonisation of national laws
- the mutual recognition of national laws
- the approximation of structures from the voluntary certification point of view

In this sense, the Commission proposed the adoption of the following provisions, among others:

“a) the Council

- *is to adopt the modules for the various phases of the conformity assessment procedures, which are to be used in the technical harmonisation directives.*
- *is to encourage the Member States so as to harmonize to the greatest possible extent the criteria for the evaluation of quality systems and of certification, inspection and testing bodies...*

b) the Commission

- *... is to prepare a proposal for a directive on the use of the CE mark...*
- *will give mandates to CEN/CENELEC to supplement the standards on the evaluation of the competence of operators in the area of conformity.*
- *is to continue its action in cooperation with the groups concerned with a view to expediting the completion of a suitable infrastructure for certification and testing, within the organization of European standardisation”*

Over the following months, the Community Institutions started to adopt provisions in the sense proposed by the Commission.

The first one was the Resolution of the Council¹²², of 21 December 1989, in which it agreed, inter alia, that:

ADOPTS the following guiding principles for a European policy on conformity assessment:-

- *a consistent approach in Community legislation should be ensured by devising modules for the various phases of conformity assessment procedures and by laying down criteria for the use of those procedures, for the designation and notification of bodies under those procedures, and for use of the CE mark*

In the document, the Council called upon the Commission to submit its own proposals.

As for the organization of the conformity assessment procedures, it should be noted that before adopting the aforementioned Resolution, the Commission had sent the Council a proposal in this regard¹²³. The document suggested different methods for implementing the conformity assessment procedures. Following the Commission's proposal, the Council adopted a Decision¹²⁴ on 13 December 1990, which stated the following:

Sole Article

The procedures for conformity assessment which are to be used in the technical harmonisation directives relating to the marketing of industrial products will be chosen from among the modules listed in the Annex and in accordance with the criteria set out in this Decision and in

¹²² Council Resolution of 21 December 1989 on a global approach to conformity assessment. OJ C 10. 16 January 1990. P. 1

¹²³ COM(89) 209. Proposal for a Council Decision concerning the modules for the various phases of the conformity assessment procedures which are intended to be used in the technical harmonization directives. OJ C. 231, 8 September 1989. P. 3

¹²⁴ Council Decision of 13 December 1990 concerning the modules for the various phases of the conformity assessment procedures which are intended to be used in the technical harmonization directives. OJ L 380. 31 December 1990. P 13.

the general guidelines in the Annex. These procedures may only depart from the modules when the specific circumstances of a particular sector or directive so warrant. Such departures from the modules must be limited in extent and must be explicitly justified in the relevant directive. The Commission will report periodically on the functioning of this Decision, and on whether conformity assessment procedures are working satisfactorily or need to be modified.

Please refer to the Annex to the aforementioned document if you are interested in its contents.

As regards the use of CE marking, in June 1989 the Commission issued a Communication, COM(89) 209, on a Global Approach to certification and testing, in which it proposed its use to guarantee the compliance with compulsory Community provisions. Likewise, the Council Decision of 21 December 1989 stated that any party that complied with the requirements of the different conformity assessment procedures should be entitled to use the CE marking. Finally, the Council Decision of 13 December 1990, concerning the modules for the conformity assessment procedures, laid down the conditions for the use of CE marking in each case.

The last link in the chain consisted of deciding how the conformity trials and tests would be conducted, and how the Bodies responsible for issuing the conformity certificates would be chosen. The Commission, EFTA, CEN and CENELEC signed an Agreement¹²⁵ which led to the establishment of the European Organization for Conformity Assessment, the EOTC¹²⁶.

4.- STANDARDISATION AND CERTIFICATION IN TELECOMMUNICATIONS DURING THE PERIOD 1977 – 1986.

4.1.- The first telecommunications standardisation-related actions.

As explained in the previous Chapter, the Telecommunications Policy applied during the period 1977 – 1986 was based on a clear industrial approach.

The first references in Community documents about its interest in implementing coordinated standardisation actions appear in a Commission Communication¹²⁷ from 1979, concerning European Society faced with the challenge of new Information Technologies. This document stated that whenever new services were launched in Member States from 1983 onwards, the recommendations of the CEPT and CCITT should be adopted so as to guarantee their compatibility within the community framework.

In particular, the proposal put forward by the Commission in 1980¹²⁸ mentioned the creation of a Community market of telecommunications equipment and, in particular, of telematic terminals. The document itself recognized the difficulty of implementing these proposals due to the existence of national monopolies and State prerogatives for the definition of technical regulations and certification procedures applicable to their territories. This document includes one of the Commission's usual opinions:

“the reciprocal liberalisation of certification procedures is considered as an essential element in the creation of a common telecommunications market”

¹²⁵ Memorandum of Understanding EOTC. Brussels 25 April 1990

¹²⁶ EOTC Directory. First Edition, March 1994.

¹²⁷ COM(79) 650. La Société Européenne face aux nouvelles technologies de l'information. Une réponse communautaire. Bruxelles, 23 novembre 1979.

¹²⁸ COM(80) 422. Recommandations de la Commission concernant les Télécommunications. Bruxelles, 1 septembre 1980

As a result of all this, in November 1984, the Council adopted a Recommendation¹²⁹ concerning the implementation of harmonisation in the field of telecommunications, which stated that any new services that were implemented after 1985 should take into account the recommendations of the CEPT and CCITT. This document would serve as the basis for the harmonized development of the GSM mobile communications systems on which the CEPT had been working since 1982.

Finally, the Decision adopted by the Council¹³⁰ in November 1984 included the first proposal for the implementation of standardisation actions in this sector. This document included the objective of creating a community terminals and equipment market through the development of a standardisation policy and the application of the mutual recognition of terminals. Worth pointing out is the fact that this Decision was adopted at the same time that the Commission, CEN and CENELEC signed an agreement to foster the creation of European standards, as a consequence of the development of the aforementioned Directive 83/189/EC.

4.2.- The Council's Decision on Standardisation in the field of Information Technologies and Telecommunications, December 1986.

To complete the analysis of this first stage of the European Standardisation and Certification Policy, mention must be made of the Decision 87/95/EC that the Council adopted¹³¹ in December 1986 on standardisation in the field of Information Technologies and Telecommunications.

Directive 86/361/EC did adopt the standards issued by the CEPT as the basis for the conformity specifications, yet it did not stipulate any specific actions for promoting the development of new European Telecommunications Standards. Also worth mentioning is the fact that Directive 83/189/EC established the principle of the development of European standards as a basis for the New Approach of the Community's standardisation policy. In this context, it remained to be decided how to foster the development of future European standards in this sector.

However, despite the telecommunications Administrations' preference for the CEPT, it had to be admitted that the emergence of the new telematic services meant that the CEN and CENELEC had to participate as well, because information technology was one of their fields of activity. For this reason, the Council was forced to adopt a Decision on the standardisation in the fields of information technologies and telecommunications.

The most significant part of Decision 87/95 of the Council was as follows:

Article 2

In order to promote standardisation in Europe and the preparation and application of standards in the field of information technology and functional specifications in the field of telecommunications, the following measures, ...

(a) regular, at least annual, determination on the basis of international standards, draft international standards or equivalent documents, of the priority standardisation requirements with a view to the preparation of work programmes and the commissioning of such European standards and functional specifications as may be deemed necessary to ensure the exchange of information and data and systems interoperability;

¹²⁹ Council Recommendation 84/549 EEC of 12 November 1984 concerning the implementation of harmonization in the field of telecommunications. DO L. 298, 16 November 1984. P. 48

¹³⁰ Session 989. Council of Ministers. Agreement on the approval of the Programme of Telecommunications. Brussels, 17 September 1984.

¹³¹ Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications. OJ L 36. 7 February 1987. P. 31

(b) on the basis of international standardisation activities:

- the European standards institutions and specialized technical bodies in the information technology and telecommunications sector shall be invited to establish European standards, European prestandards or telecommunications functional specifications having recourse, if necessary, to the drafting of functional standards, to ensure the precision required by users for exchange of information and data and systems interoperability.

- the same bodies shall be invited to prepare technical specifications which may form the basis of European standards or European prestandards in the absence of, or as a contribution to the production of, agreed international standards for the exchange of information and data and systems interoperability;

(c) measures to facilitate the application of the standards and functional specifications, in particular by means of coordinating Member States' activities in:

- the verification of the conformity of products and services to the standards and functional specifications on the basis of test requirements specified;

- the certification of conformity to standards and functional specifications in accordance with properly harmonized procedures.

(d) promotion of the application of standards and functional specifications relating to information technology and telecommunications in public sector orders and technical regulations.

The importance of this Council Decision is undeniable. First of all, it reproduced many of the contents of Directive 83/189/EC and, secondly, it sought to put the spirit of the New Approach to standardisation and certification into the information technology and telecommunications sector. The fact that this Decision was not restricted solely and exclusively to telecommunications was by no means a coincidence. The Community Institutions were expanding the spectrum of their concerns both towards telecommunications and towards information technologies, in order to allow the CEPT and CEN/CENELEC to act freely, albeit each in their respective fields.

This manner of tackling the problem could be regarded as a premonition of the future creation of the ETSI as a European telecommunications standardisation body, which, as will be seen later on, relied on the work of the CEPT, while moving the CEN and CENELEC out of the picture. This Decision was a fine example of the praiseworthy subtlety with which the Community Institutions tend to weave their strategies and, in this case, cannot be criticized.

As expected, the Commission drafted a report on the development of the objectives of this Decision, which it published in 1995¹³²

4.3.- The start of Certification and the opening up of the terminal market.

Creating a common terminal market first entailed tackling the problems involved in the certification process required in each Member State. It should be remembered that, at the time, telecommunications services were operated as a monopoly and the telecommunications Administrations were responsible for purchasing the terminals that were then rented to subscribers. Any terminal equipment marketed by a Member State would thus require the certificate issued by the authorities, in accordance with a series of specific criteria.

¹³² COM(95) 39. Report from the Commission to the Council and the European Parliament on Standardization in the field of Information Technology and Telecommunications - 1992- 1993 Report. Brussels, 23 Mars 1995.

However, any approximation in matters concerning the certification processes of Member States required the implementation of widely accepted technical standards. In part, this problem had been addressed within the framework of the CEPT. In July 1984, the Commission and the CEPT had signed a memorandum of understanding, whereby the CEPT would draft a common set of standards and specifications for the certification of telecommunications equipment in the European Community.

Subsequently, in November 1985, the parties signed an agreement in Copenhagen whereby certain recommendations issued by the CEPT would be raised to the category of European Telecommunications Standards – NET, and the signatory countries agreed to use them. This agreement was to serve as the basis for the Community's telecommunications standardisation policy and led to the creation of the ETSI in 1988.

So to start tackling the problem posed by the mutual recognition terminal equipment certification, in July 1986 the Council adopted Directive 86/361/EC¹³³. This Directive laid the foundations base for mutual certification practices, establishing a timetable for achieving these goals.

Any procedure of this kind called for technical standards and conformity specifications that were common to and recognized by all the Member States, and this could only be achieved within the framework of the CEPT agreements, as described in the previous section. After this had been solved, the mutual certification process could be addressed.

The following contents of the Directive are worth highlighting:

Article 4

The Commission shall:

1. draw up each year, after consulting the Committee referred to in Article 5 and with due regard to the general programme of standardisation in the information technology sector:

- a list of international standards and international technical specifications in telecommunications to be harmonized,*
- a list of terminal equipment for which common conformity specifications should be drafted as a matter of priority, on the basis above all of the essential requirements,*
- a timetable for this work;*

2. request the CEPT to draw up the common conformity specifications in the form of NETs, within the specified time limits; in so doing the latter shall, when appropriate, consult other specialized standardisation organizations such as the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC).

And further on added:

Article 6

1. For the purposes of this Directive, a 'NET' shall be regarded as the equivalent of the common conformity specification. Reference to NETs shall be published in the Official Journal of the European Communities.

... ..

¹³³ Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment. OJ L 217. 5 August 1986. P. 21

3. The common conformity specifications shall be used in all Member States by the competent authorities for any verification demanded for type approval purposes of the relevant terminal equipment.

Article 7

... ..

4. Member States shall ensure that telecommunications administrations use common conformity specifications when purchasing terminal equipment covered by such specifications

In November 1990 and February 1993, the Official Journal of the European Communities published the list of NET Standards¹³⁴,¹³⁵ referred to in Directive 86/361/EC.

The analysis of the certification-related actions carried out during the first stage would not be complete without mentioning the certification laboratory programme, also known as the *Conformance Testing Services* – CTS programme¹³⁶.

In 1985 the Commission launched the CTS-1 programme, designed to guarantee the availability of laboratories capable of carrying out the tests required for certifying compliance with the telecommunications standards.

The purpose of these actions was to contribute, with community funds, to funding the creation of laboratories capable of certifying compliance with European standards in the information technology and telecommunications fields. Therefore, whenever a European standard was adopted, there would be at least two laboratories in different countries capable of carrying out the tests. The programme was further supported by the adoption of the aforementioned Decision 87/95/EC, which enabled the Commission to launch subsequent editions.

5.- CONCLUSIONS

This analysis of the application of the Standardisation and Certification Policy to the Telecommunications sector concludes the study of the preliminary stages of the European Union's Telecommunications Policy in the period 1977 – 1986.

The entry into force of the first reform of the Treaty, in July 1987, marked the start of the fundamental stage of the Telecommunications Policy, which would end with the implementation of free competition in 1998. This period will be analysed in the next four Chapters.

¹³⁴ Recommendation about the European Telecommunication Standards (NET). OJ C 210. 14 November 1990. P.2

¹³⁵ European Telecommunication Standards (NET) Application of the Directive 86/361. OJ C 53. 24 February 1993. P. 6.

¹³⁶ Standardization in information technology and telecommunications. Commission of the European Communities. November 1990

CHAPTER 5

**THE TELECOMMUNICATIONS
LIBERALISATION PROCESS.
PERIOD 1987 – 1998**



CHAPTER 5

THE TELECOMMUNICATIONS LIBERALISATION PROCESS. PERIOD 1987 – 1998

1.- INTRODUCTION

This Chapter begins the analysis of the most important stage in the evolution of the Telecommunications Policy in the European Union, corresponding to the period between 1987 and 1998.

After the Single Act came into force in July 1987, the European Community started the process for the progressive implementation of free competition in the telecommunications sector, which would reach its climax on 1st January 1998.

Even though a long time has passed, it is a very interesting period of time for anyone who wants to learn exactly how the European Union defined its Telecommunications Policy and to find the keys to many of the problems which are currently hard to understand.

Therefore, this period takes up four Chapters of this book, which will independently and thoroughly analyse the liberalisation process, the process of harmonising the laws of the Member States, the standardisation and certification strategy and, finally, the corrective measures applied to free competition, introduced during the said period.

This Chapter will provide an in-depth analysis of the liberalisation of telecommunications in the European Union, i.e., the way in which the telecommunications monopolies were dismantled and the introduction of free competition for the operation of services and infrastructures. This stage was led by the European Commission, which was determined to include telecommunications within the framework of the single market.

The Chapter starts with a look at the initial strategy proposed by the Commission in 1987, which led to the liberalisation of terminals, value added services and leased lines.

Secondly, it analyses the events that took place in 1993, since this was one of the crucial moments in the period in question. This was an eminently political stage that resulted in the removal of any obstacles liable to prevent the completion of the process.

The third and last part of the Chapter reviews the events from 1995 and until free competition came into force in 1998.

You should not worry if you cannot find information about some of the events that took place during this period of time, because they will most likely be explained in the next few Chapters, which will be structured in the same way as the analysis of the Liberalisation process that follows.

2.- THE STRATEGY OF 1987.

2.1.- Background and context

The approval of the Single Act in 1986 brought with it a series of amendments to the Treaty of Rome, which would be vital in the development of the community Telecommunications Policy.

The creation of the single market was one of the main objectives of the Community, as described in Article 8A (currently Art. 26), which consolidated its powers to progressively establish the single market and guarantee the free circulation of goods, services, people and capitals.

In addition, so as to avoid institutional blockage problems in the attainment of the objectives described in Article 8A (currently Art. 26), the Council implemented the qualified majority voting system, which was stipulated in Article 100A (currently Art. 114).

The Parliament went from being a mere consultation body to become a body which cooperated with the Council in the legislation activities, allowing it to automatically receive the proposals from the Commission, without having to wait for the Council to seek its opinion.

The result was that this reform strengthened the Commission's position, enabling it to modify its telecommunications strategy and focus it on the lifting of barriers liable to hinder the development of the single market, i.e., the monopolies in the sector.

In the mid 80's, the situation in the United States, which is described in Appendix I, was the outcome of the dismantlement of the AT&T Group.

Meanwhile in Great Britain, the passing of the Telecommunications Act in 1984 had led to the creation of OFTEL, forerunner of the current OFCOM, as the body responsible for supervising the application of telecommunications regulations, with the liberalisation of value added services and the start of the operation of the duopoly for the operation of voice telephony services.

Evidently, all other countries in the Community were not unaware of the aforesaid events.

1986 also saw the start of the GATT negotiations in Punta del Este, Uruguay, which addressed the need to open up the services markets, in particular, telecommunications services, to international trade.

Likewise, the Commission had reorganised its structures to carry on with the preparation of the single European market. This is when it reorganised the DG XIII with the former Directorate General XIII and the "Information Technology and Telecommunications" Task Force. The DG XIII was the forerunner of the current DG Information Society and Media.

It was within this context that the Commission began to prepare the telecommunications strategy, and this time it did so without liaising with the Council or its Senior Officials Group-Telecommunications (SOG-T) and its Analysis and Research Group (GAP).

2.2.- The Green Paper on Telecommunications, June 1987.

This situation led to the new telecommunications proposal presented by the Commission in June 1987, in the form of a consultation document titled: “Towards a dynamic European economy. Green Paper on the development of the common market for telecommunications services and equipment”¹³⁷.

The Commission drafted this document without the help of any external body, in particular without the Senior Officials Group-Telecommunications (SOG-T) that the Council had set up some years ago.

Many years after the publication of the Green Paper, its contents, in particular, Chapter X, continued to provide the keys to the Commission's activities during that period and it is surprising to see just how determined it was to carry them out and was aware of the fact that it had the legal means to do so, in accordance with the new European constitutional order approved by all the Member States in 1986. In my opinion, the Green Paper of 1987 remains one of the best elements of all the documents we are analysing and I am proud to say that I still have my original copy, which is one of my most prized professional possessions.

In spite of everything, the Commission knew that it would run into difficulties in the process that had been started, as shown in the text of the document.

Section 4.3 of Chapter 10 reads as follows:

"The proposals aims at progressively introducing full Community-wide competition to the terminal equipment market, and as far as possible and as justified at this stage to telecommunication services.

In pursuing the implementation of these proposals, and the lifting of existing restrictions, the Commission will take full account of the fact that the competition rules the Treaty apply to the Telecommunications Administrations, in particular to the extent that they engage in commercial activities. It may use, as appropriate, its mandate under article 90(3) of the Treaty to promote, synchronise and accelerate the on-going transformation." (underlined as in the original)

This paragraph probably went unnoticed to most readers. In the light of subsequent events, one can assume that the Commission was determined to start liberalising the sector and, evidently, was ready to use all tools within its reach to achieve it.

Table 5.1 summarises the proposals that the Commission made in the Green Paper, which would become its main lines of action in the telecommunications policy.

¹³⁷ COM(87) 290. Towards a Dynamic European Economy, Green Paper on the development of the common market for telecommunications services and equipment. Brussels, 30 June 1987.

Table 5.1 GREEN PAPER ON THE DEVELOPMENT OF THE COMMON MARKET FOR TELECOMMUNICATIONS SERVICES AND EQUIPMENT, 1987 ACTION PLAN	
A	Acceptance of continued exclusive or special rights of the Administrations regarding operation of the network infrastructure.
B	Acceptance of continued exclusive or special rights of the Administrations regarding certain basic services.
C	Unrestricted provision of all other services.
D	Strict requirements regarding standards for the infrastructure and services provided by the Administrations in order to create Community-wide interoperability.
E	Clear definition of requirements imposed by Administrations on providers of competitive services for use of the network. Development of the ONP.
F	Free, unrestricted provision of terminal equipment within and between Member States.
G	Separation of regulatory and operational activities of networks and services.
H	Strict continuous review of activities of Administrations, as required to prevent abuses.
I	Strict continuous review of activities of private service providers, as required to prevent abuse.
J	Application of the Community's Common Commercial Policy to Telecommunications. Adoption of common positions in the GATT negotiations.

2.3.- The consultation process of the Green Paper, June 1987.

The Commission organised a consultation of the sector's main economic players about the proposals set out in the Green Paper.

Surprisingly, the list of answers to the consultation published by the Commission includes organisations and institutions from very different backgrounds, although all treated on an equal footing, such as the SOG-T, the Government of the United States, User Associations, the European Space Agency and IBM, up to a total of 51 bodies¹³⁸.

At no time does the document say that the Parliament's opinion was sought and it was not until 1988 that it expressed its opinion when the Commission sent the Parliament its conclusions about the consultation process.

On the basis of these results, in February 1988 the Commission issued a Communication titled: "Towards a competitive community-wide telecommunications market in 1992 implementing the Green Paper on the development of the common market for telecommunications services and equipment; state of discussions and proposals by the Commission".¹³⁹ This document underscored the objectives of the Community's telecommunications policy and summarised the opinions gathered during the consultation process.

¹³⁸ XIII/41 (88). Reactions to the Green Paper. Analysis of reactions submitted to the CEC. Brussels, January 1988

¹³⁹ COM(88) 48. Towards a competitive community-wide; telecommunications market in 1992 implementing the green paper on the development of the common market for telecommunications services and equipment; state of discussions and proposals by the Commission. Brussels, 8 February 1988.

The conclusions of the said document categorically stated the following:

"The wide consultative process on the Green Paper during the last six months has allowed, according to the Commission's opinion, to identify a broad consensus on major regulatory initiatives in the sector, to define clear priorities and to develop a progressive approach which should lead to full market opening in 1992"

In this document, the Commission adopted the same lines of action that appeared in the Green Paper, without making a single change, and of all the measures that it proposed, most worth highlighting are those that refer the terminal and services markets.

The Commission proposed that the following specific measures be adopted with regard to the telecommunications terminal market:

Objective: Rapid full opening of the terminal equipment market to competition, before 31st December 1990

Procedure:

- The Commission will, before end-March 1988, issue a Directive under Article 90.3, regarding the liberalisation of the terminal equipment market.
- The Commission will rapidly propose a Directive on full mutual recognition of type approval.

The Commission also proposed that the following specific measures be adopted with regard to the telecommunications services market:

Objective: Opening to competition of the market for services other than voice telephony, before 31st December 1989.

Procedure:

- Presentation before mid 1998 of a proposal for a Directive, which would be adopted before the end of 1988.
- Reconsideration before 1st January 1992 of all other exclusive service provisions (monopolies).
- Presentation of Directives regarding the harmonisation of the Open Network Provision - ONP.

In the case of terminals, the Commission announced it would use the prerogatives set forth in Article 90.3 (currently art. 106.3) of the Treaty, whereas it proposed no such thing for services, so it seems that its initial intention was to draft a Directive following the usual procedures, by sending a proposal to the Council. Or simply the Commission did not wish to provide more clues about its real intentions and decided to wait for the Council's reaction.

2.4.- The Terminal liberalisation Directive, May 1988.

The Commission did not wait for the Council's response to the proposals outlined in the previous document to start implementing its telecommunications strategy and, as was expected, on 16th May 1988 it adopted a Directive based on Article 90.3 (currently art. 106.3) of the Treaty, on the liberalisation of the telecommunications terminal market.

Thus, in May 1988, the Commission adopted Directive 88/301 on competition in markets in telecommunications terminal equipment¹⁴⁰, which would eliminate the monopoly of operators in this line of business.

The Commission had already announced its determination to implement the Telecommunications strategy, regardless of the opinion of all other players and institutions, especially that of the Council.

As is well-known, France, with the support of Italy, Belgium, Germany and Greece, appealed against the Commission's Directive on the liberalisation of the terminal market to the Court of Justice of Luxembourg¹⁴¹ in March 1991, but the Court ended up admitting that the Commission was right¹⁴². Meanwhile, its entry into force had been delayed for almost three years.

2.5.- The Resolution of the Council, June 1988.

A year after its publication, on 30th June 1988, the Council announced a new Resolution that offered global support to the timetable proposed by the Commission for the development of the Green Paper¹⁴³.

The Council addressed the Commission as follows:

"GIVES ITS GENERAL SUPPORT:

to the objectives of the action programme set out in the communication of 9 February 1988, which relates to the opening of the common telecommunications market to competition up to 1992, having regard also to Articles 8A and 8C of the Treaty, introduced by the Single European Act, and to the strengthening of European competitiveness, while safeguarding the public service goals of telecommunications administrations.

"INVITES THE COMMISSION:

to propose, where required, the measures necessary for pursuing the achievement of these goals, to be taken in priority areas on the basis of the appropriate Community procedures, in particular for the creation of the common market for telecommunications services and equipment and taking appropriate account also of the external dimension of these measures;

Amazingly enough, neither the legal grounds nor specific text of the Resolution mentioned the Commission's recent Directive on the liberalisation of the terminal market, which had been adopted a month and a half before.

In the text quoted above, the Council clearly calls for caution in the Commission' future actions in this field. The Council had enough reasons to show its concern.

¹⁴⁰ Commission Directive 88/301/EEC, of 30 May 1988, on competition in the markets in telecommunications terminal equipment. OJ L 131, 27 May 1988. P. 73

¹⁴¹ Case C-202/88. French Republic v Commission of the European Communities. - Competition in the markets in telecommunications terminals equipment. Luxembourg, June 1988

¹⁴² 91/C 96/04. Judgment of the Court of 19 March 1991- French Republic v Commission of the European Communities. - Competition in the markets in telecommunications terminals equipment. - Case C-202/88 OJ C. 12 April 1991. P. 6

¹⁴³ Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992. OJ C 257. 30 June 1988. P.1

2.6.- The Resolution of the Parliament, December 1988.

The Parliament did not issue any opinion on the Green Paper until the end of 1988, after receiving the Report from the Commission with the results of the consultation process and after the Council had adopted the Resolution mentioned in the previous section.

In accordance with the Report drafted by the Transport Commission, the Resolution¹⁴⁴ adopted by the Parliament included a claim for the way in which the Commission was acting, as explained next:

"1.- Expresses its satisfaction at the Council Resolution of 30 June 1988, yet regrets and disapproves of the fact that the Commission has put forward its proposal so late that the Parliament has not had the slightest possibility of issuing an opinion in this respect; "

In addition, the report said:

"2.- Asks the Commission to submit, as soon as possible, a proposal for a Council Directive on the use of telecommunications networks by private service provision companies in the Community in which the following are regulated:

- *the principle of free competition for national and trans-frontier services.*
- *the right of Member States to grant certain Telecommunications Administrations special or exclusive rights for the offering and operation of network infrastructures, including the first terminal (main telephone line).*
- *the right of Member States to grant certain Telecommunications Administrations special or exclusive rights for voice transmission (telephones) and the provision of other basic services and prohibit cream-skimming*

During the same session, the Parliament had adopted another Resolution on the need to overcome the fragmentation in the telecommunications market¹⁴⁵.

The Parliament was clearly by no means willing to remove the States' rights to regulate the way in which basic telecommunications services and networks were operated in their countries and, in any case, it proposed leaving the decisions on any Commission proposal in the hands of the Council.

The European Parliament, which had previously wholeheartedly backed the idea of Community-wide actions in the field of telecommunications, was now being excluded by the Commission from the preparation of the 1987 strategy and it made it quite clear that it was not at all pleased, and rightly so.

2.7.- The Decision of the Commission, December 1988.

Perhaps due to the course of events and despite the unfavourable opinions of the Economic and Social Committee, the Parliament and, obviously, the Council which were, at times, contrary to its arguments, the Commission believed it was the time to speed up the process and announce its intentions.

¹⁴⁴European Parliament Resolution on posts and telecommunications. 14 December 1988. OJ 12. 16 January 1989. P. 69

¹⁴⁵European Parliament resolution on the need to overcome the fragmentation in telecommunications. 14 December 1988. OJ 12. 16 January 1989. P. 66

Judging by what happened, the appeal that France lodged against the Terminal Directive triggered so much tension that the Commission reconsidered its initial plans to submit to the Council a proposal for a Directive on the liberalisation of services and preferred to take a different course of action.

On 15th December 1988, six months after the publication of the aforementioned Council Resolution, the Commission issued a Press Release¹⁴⁶ announcing its intentions to adopt a new Directive, in accordance with Article 90.3 (currently art 106.3), regarding the liberalisation of telecommunications services (excluding voice telephony).

In the same Press Release, the Commission also announced its intentions to present a proposal for a Directive to the Council on the harmonisation of the telecommunications networks access conditions - ONP, as described in previous documents.

Further on, readers will see that the two Directives that were announced at the same time would be also published simultaneously.

In the Press Release, the Commission justified its actions and reminded readers of the following:

"Article 90 of the Treaty prohibits Member States from adopting measures contrary to competition and free trade".

"The Commission is the guardian of the Treaty and can adopt directives for that purpose".

As noted earlier, neither the Green Paper nor the document with the action proposal expressly mentioned that the Commission would be willing to use the prerogative in Article 90.3 (currently Art. 106.3) to proceed with the liberalisation of the services market, as in the case of the terminal market.

Due to the way that the Community Institutions are run, conflicts often arise between sovereignty and supranationality, and are usually solved with transnational agreements. In the case of telecommunications services, the decision to liberalise the sector was not the result of a specific agreement between the Commission and Council, but rather the application of more basic principles: The Treaty of Rome amended by the Single Act.

The Commission knew it had the legal backing and was aware that its actions met with the approval of the sector's economic players, and must have deemed it unnecessary, or even inappropriate, to count on any other form of Community institution support and it went ahead with its telecommunications strategy.

2.8.- European Council Agreement, December 1989

After issuing the Press Release mentioned in the previous section, the Commission started the process for the drafting of the harmonisation and liberalisation conditions that would regulate the future of the telecommunications sector in the European Community.

First of all, the Commission prepared a proposal for a Directive on the harmonisation of conditions of access to telecommunications networks – ONP, which was submitted to the Council for its consideration. The process following in drafting the Open Network Provision (ONP) Framework Directive is addressed in the next chapter.

¹⁴⁶ Press release n° P-147. "The Commission adopts two important decisions in the field of the telecommunications. Brussels, 15 December 1988.

Likewise, the Commission proceeded in accordance with Article 90.3 (currently Art. 106.3) of the Treaty to draft the text on the liberalisation of services.

Undeniably, these were two complementary aspects of the Telecommunications Policy that should not evolve separately and everyone seemed to agree on that point.

The process of drafting the text of ONP Framework Directive lasted the whole of 1989, until the Commission and Council finally reached a common position on its contents.

On 7th December 1989, during a session of the Council of Ministers the publication of both Harmonisation and Liberalisation Directives. was approved.

The text of the Press Release published by the Council after the meeting¹⁴⁷ read as follows:

"The Council, after discussing the basis of a draft global commitment of Presidency on the liberalisation of telecommunications services and the provision of an open telecommunications network, has reached a political agreement about a common position on the proposal for a Directive on open network provision in the Community (ONP). In doing so, the Council has taken a decisive step towards the establishment of an open telecommunications market.

With regard to the first of the matters mentioned, it has been recalled that the Commission has adopted a Directive under article 90.3 of the Treaty, on competition in the telecommunication services markets."

This meeting tends to be portrayed as the one where a "political agreement" was reached on how to tackle the telecommunications services liberalisation and harmonisation processes.

The text quoted above clearly shows that the Council chose to adopt the ONP Framework Directive and fully acknowledged that the Commission would adopt the Service Directive.

At that point in time, it seemed that the "political agreement" was restricted to agreeing that both Directives would be published at the same time, but this decision would later take on a great significance, since it clearly marked the limits of the role that each Institution would play in the future transformation of the sector: the Commission would be in charge of the Liberalisation process and the Council would be responsible for Harmonising the laws of the Member States.

Finally, both Directives appeared in a monographic issue of the Official Journal of the European Community on 27th July 1990, having been adopted on 28th June; the Council Directive¹⁴⁸ was published first, followed by the Commission Directive¹⁴⁹, but neither included any sort of reference to the other.

2.9.- The Commission's Service Directive 90/388 of June 1990.

This section includes a brief summary of Commission Directive 90/388 on competition in the telecommunications services markets, otherwise known as the "Service Directive".

¹⁴⁷ Press release 10479/89, Council of Telecommunications. "Accomplishment of the Internal Market of the Services of Telecommunication". Brussels, 7 December 1989

¹⁴⁸ Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision. OJ L 192. 24 July 1990. P. 1

¹⁴⁹ Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services. OJ L 192. 24 July 1990. P. 9

As explained later on, the Directive was the key for completing the liberalisation of the sector through successive amendments to its contents.

The text in this Directive included an unusually long explanation of the reasons, i.e., five pages of the Official Journal, where the Commission set forth the reasons for adopting these measures.

Despite the fact that the reasons expressed were almost identical to those included in previous documents, it is worth underscoring the reasons that the Commission gave for not deeming it appropriate for opening voice telephony services to competition, in whereas clause n°. 18.

At this point, the Commission pointed out that Article 90 (2) (currently Art. 106 (2)) of the Treaty allows the granting of exclusive rights whenever necessary to ensure the performance of the particular task assigned to the telecommunications organization, and added:

"This task consists of the provision and exploitation of a universal network, i.e. one having general geographical coverage, and being provided to any service provider or user upon request within a reasonable period of time".

"The financial resources for the development of the network still derive mainly from the operation of the telephone service. Consequently, the opening-up of voice telephony to competition could threaten the financial stability of the telecommunications organizations. "

"The voice telephony service, whether provided from the present telephone network or forming part of the ISDN service, is currently also the most important means of notifying and calling up emergency services in charge of public safety".

The Commission's argument should be borne in mind and compared with the ones that it used in 1992, during the presentation of the proposal for the liberalisation of voice telephony, where it went back on what it said here.

What follows is a short summary of the contents of the articles of the Directive.

Article 1 defined the terms that would be used in the Directive. This Article clearly specified that the Directive would not be applicable to telex, mobile radiotelephony, paging and satellite communications services.

Article 2 stated that Member States would withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony.

As regards packet-switched data services, Article 3 stated that Member States could prohibit economic operators from offering leased line capacity for simple resale to the public.

Article 4 said that Member States which maintained special or exclusive rights for the provision and operation of public telecommunications networks would take the necessary measures to make the conditions governing access to the networks, and in particular leased circuits, non-discriminatory.

Article 5 asked the Member States to publish the technical interface characteristics necessary for the use of networks before 31 December 1990.

Article 6 asked the Member States to lift existing restrictions on the processing of signals before their transmission via the public network.

Article 7 stated that, from 1 July 1991 the regulatory duties should be carried out by a body independent of the telecommunications organizations.

Article 8 gave telecommunications organizations' customers bound by a contract with more than one year to run to terminate the contract.

Article 9 asked Member States to inform the Commission on the application of this Directive.

Article 10 said that in 1992, the Commission would carry out an overall assessment of the situation in the telecommunications sector in relation to the aims of this Directive. Likewise, in 1994 the Commission would assess the effects of the measures referred to in Article 3.

Finally, Article 11 stated that the Directive was addressed to the Member States, as usual.

2.10.- The reactions to the publication of the Service Directive.

Following the publication of this Directive, various Member States - Spain, Italy and Belgium – lodged an appeal with the Court of Justice, as they disagreed with its contents¹⁵⁰. The Report for the Hearing prepared by the judge rapporteur in this case stated the following:

- The appeal lodged by Spain, with the support of France, applied for the annulment of the Directive in relation to Article 2 insofar as it affected special rights and also in relation to articles 8 and 9.
- The appeal lodged by Italy applied for the full annulment of articles 2, 4 and 8.
- The appeal lodged by Belgium applied for the annulment of the whole Directive.

The Court of Justice published its Judgment on 17th November 1992¹⁵¹, and the contents of points 35 and 36 should be highlighted:

*"35.- The Court has held that the mere fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not as such incompatible with Article 86 (see, in particular, the judgment in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 16).*

*36.- However, the Court has also held that the extension of the monopoly on the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, was prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86, where that extension resulted from a State measure, thus leading to the elimination of competition (judgment in Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 24). The same conclusion necessarily follows where the monopoly on establishment and operation extends to the market in telecommunications services".*

It should be remembered that Article 86 (currently Art. 102) referred to the control of a dominant position in the Community.

In its Judgment, the Court decided to:

- Annul any reference to the regulation of special rights.

¹⁵⁰C-271/90, C-281/90 and C-289/90. Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission of the European Communities. - Competition in the markets for telecommunications services. Luxembourg September – October 1990.

¹⁵¹Judgment of the Court of 17 November 1992. - Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission of the European Communities. - Competition in the markets for telecommunications services. - Joined cases C-271/90, C-281/90 and C-289/90. Luxembourg, 17 November 1992.

- Annul Article 8 (contracts conditions)
- Dismiss the rest of the appeal.

The Judgment of the European Court of Justice clearly cast no shadow of doubt on the Commission's course of action, giving it free rein to abolish the monopolies in the voice telephony services sector.

However, the text of the Judgment seems to infer that exclusive rights, i.e., monopolies, for the operation of telecommunications infrastructures, could be maintained, which would mean that it would be the Member States and not the Commission who had the powers over how such infrastructures were established and operated, partly due to the fact that they would not be covered by Article 7A (currently Art. 26) of the Treaty, on the free circulation of goods and services in the case of telecommunications equipment and services.

In my opinion, this part of the Judgment could have been vitally important for the subsequent development of the Community Telecommunications Policy if all the Member States had decided to maintain their powers over telecommunications infrastructure-related decisions. As will be seen later in the light of subsequent events in the liberalisation process, nobody lodged any further serious appeals or took advantage of the potential advantages derived from the judgment. Everyone preferred to let the Commission play the bad guy.

Last but not least, in September 1991 the Commission published a lengthy document with a broad set of Directives on the application of the rules of competition to the telecommunications sector¹⁵².

2.11.- Article 90 (currently Art. 106) of the Treaty.

Given its bearing on the development of telecommunications, it is worthwhile reproducing the contents of Article 90 (currently Art. 106) of the Treaty of Rome.

This Article is to be found in the following part of the Treaty of Rome:

Part Three: Community Policies,
Title I: Common Rules,
Chapter I: Rules on Competition,
Section One: Rules applying to undertakings.

Article 90 (currently art. 106) reads as follows:

“1.- In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2.- 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.

¹⁵²91/C 233/02. Guidelines on the applications of EEC competition rules in the telecommunications. OJ C 233, 6 September 1991. P.2

3.- The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

2.12.- Comments on the results of the 1987 strategy.

The introduction of free competition in the telecommunications services market was clearly an outcome of the agreement reached by the Member States when they signed the Single Act and its subsequent amendments, and not the result of a specific negotiation process.

Both in drafting the Green Paper and in its subsequent activities, the Commission showed that it was perfectly acquainted with the scope of its prerogatives and was prepared to exercise them in order to ensure the liberalisation of the sector and, in short, the introduction of telecommunications in the single market and in the new economic framework that would arise from the signing of the GATT.

Throughout this process, the Commission took an energetic approach that led it to ignore all the other Community Institutions more than it should have done, and to pay far more attention than necessary to the sector's economic players.

The Council and the Member States made it quite clear in their actions that they wished to protect and maintain their powers with regard to telecommunications matters and, in particular, regarding services.

Despite being treated so inconsiderately by the Commission, the Parliament shows that it was powerless to take part in processes as important as the liberalisation of telecommunications.

Finally, the Court of Justice backed the Commission in its proposals for the liberalisation of telecommunications services, and allowed it to extend this decision to voice telephony services. Likewise, the Court left the Infrastructure-related decisions in the hands of the Member States.

The development and putting into practice of the 1987 strategy thus represented a major success for the Commission in its role as the guardian of the Treaties.

Had the Commission not been involved, it most likely would have been impossible to have abolished the telecommunications monopolies and, in particular, the services monopolies, in such a short period of time.

3.- THE DECISIONS OF 1993.

3.1.- Background and context

In Article 10 of the Service Directive, the Commission undertook to carry out a global reassessment of the situation of the telecommunications service sector in 1992, and it did so.

After the publication of the Green Paper in 1987 and before starting with the said reassessment of the sector, other events had occurred which will be summarised in this section.

During 1991, Great Britain reviewed the voice telephony duopoly and made the decision to fully liberalise the sector¹⁵³.

¹⁵³ Competition and Choice: Telecommunications Policy for the 1990s. HMSO, London 1991

In view of the situation of the regional operating companies (RBOC's) in the United States, there was a likelihood of a future review of the situation reached as a result of the dismantling of Bell System in 1982 and the possible lifting of the operating restrictions still in place.

On the world trade scene, the negotiations of the Uruguay Round of the GATT were at an advanced stage and were oriented to including telecommunications services in the world services trade.

Finally, the economic agents with interests in the telecommunications sector had increased, both in number and specific weight, since the Commission's consultation in 1988 and were obviously lobbying far stronger for the full liberalisation of the sector.

As regards the structure of the European Community, the agreement that would lead to the Treaty on European Union was signed on 7th February 1992 in Maastricht, and came into force after 3rd November 1993.

Article 189 B (currently Art. 294) of this new reform would bestow upon the Parliament co-decision powers in legislative processes and further extended the Commission's powers

In this context, the Commission began preparing the 1993 telecommunications strategy, which is described in the next few sections.

3.2.- The review of the sector's situation.

Throughout 1991, the Commission ordered two studies on the evolution of the telecommunications sector up to 2010. The first study was of a technical-strategic nature and was titled "Telecommunications Issues and Options. 1992-2010"¹⁵⁴. The second study was of a technical-economic nature and was titled "Performance of the Telecommunications Sector up to 2010 under Different Regulatory and Market Options"¹⁵⁵.

Although these studies are not analysed in in-depth here, it must be mentioned that the Commission used them to justify some of the proposals in its report. The decisions taken on the basis of the contents of these studies were so important that it is worth bearing them in mind and seeing later on just how right they were in their conclusions.

However, other aspects that did not appear in any reference documentation also had a major bearing on the drafting of the Commission's Report.

One of the keys to everything that happened at the time lay in infrastructures and not so much in voice telephony services, which were both run as a monopoly in many Member States.

The liberalisation of infrastructures had widespread appeal:

- The companies that provided value-added services companies, in particular data communication services, and the new paging and mobile telephony services were not very comfortable having to use the infrastructures supplied by the telecommunications administrations, who very often were their direct competitors.

¹⁵⁴ Arthur D. Little. XIII/328/92. Telecommunications. Issues and Options. 1992-2010. Report commissioned by the Commission. October 1991

¹⁵⁵ Analysys. Performance of the Telecommunications Sector up to 2010 under Different Regulatory and Market Options. Report commissioned by the Commission. November 1991

- The companies interested in operating new services over cable TV networks were keen to use these infrastructures to provide the subscriber loop.
- The supply of infrastructure for deploying satellite-based point-to-point lines was mature enough for there to be an interest in offering such services independently from the traditional monopolies.
- The owners of communications infrastructures, electricity utilities, services and railroad companies were interested in establishing their own networks, also independently of the telecommunications operators.
- And the Commission itself, determined to promote trans-European networks, doubted the feasibility of its projects because the only interlocutors in many countries continued to be the telecommunications authorities, which were in a very difficult situation as a result of the Commission's own decisions.

Yet it did not seem possible to liberalise infrastructures without first liberalising voice telephony services. Therefore the voice telephony sector had to be liberalised.

3.3.- The Commission's Review, October 1992.

As scheduled, in October 1992 the Commission published¹⁵⁶ a review of the situation in the telecommunications sector, under the mandate included in article 10 of its Service Directive and article 8 of the ONP Framework Directive. The document was divided into two very different parts.

The first part of the document was very similar to other reviews that the Commission had published in previous years, and ran through all the actions that had been carried out since the publication of the 1984 telecommunications strategy. The document was not brilliant, yet it was correct.

The second part outlined the four options that the Commission asked the sector to consider as to the path that should be followed and which would serve as the basis for the future telecommunications policy.

Surprisingly, many of the arguments used by the Commission to present the options proposed were very poor.

The way in which the proposals were phrased seems to indicate that conflicting opinion existed within the Commission as to how the telecommunications-related actions should be carried out. These matters will be addressed later on.

The Commission analysed the four options as follows.

“Option 1: Freezing of the liberalisation process (which was started by the Green Paper and the Commission Directive 90/388), and maintain in effect the status quo.

Option 2: Introducing extensive regulation of both tariffs and investments at the Community level in order to overcome the bottlenecks and in particular the surcharge on intra-Community tariffs.

Option 3: The liberalisation of all voice telephony, i.e., international (inside and outside the Community) and national calls.

¹⁵⁶ SEC(92) 1048. 1992 Review of the Situation in the Telecommunications Services Sector. Brussels, 21 October 1992.

Option 4: An intermediate option of opening to competition voice telephony between Member States”.

In the next few paragraphs of the document, the Commission described the contents of these alternatives. In our opinion, the pages on which the Commission outlined the advantages and disadvantages of the proposed options were undeniably of the poorest quality of any Community telecommunications policy documents. They were simply dreadful!

The text clearly shows that the Commission was not interested in option 1 at all, nor was it not very keen on option 2.

As for options 3 and 4, the matter was more subtle. The Commission proposed them in equal terms, thereby underscoring the strong internal disagreement between one part that upheld the idea of full liberalisation and another faction that only wanted to liberalise telephone services and transnational infrastructures between Member States.

However, the arguments in favour of option 4 were more coherent than those in option 3, (one could swear that they were written by a completely different person). The Commission’s document stated its preference for option 4:

“Option 4 is fully compatible with existing policy and law since it is a continuation of the policy adopted by the Council and confirmed by the European Court of Justice”.

Further on, it added the following:

“..The Commission ... considers that Option 4 seems better suited than others to the fundamental objectives of the Community in this policy area”

Yet the document provided a clear warning about the true intentions of the Commission. The arguments in favour of option 1 included a warning that is valid for all other options, except for option 3:

“Option 1 does not necessarily guarantee legal security because it could be attacked before the Court. Commission Directive 90/388 considered the exclusive rights for telephony incompatible with the Treaty and that its maintenance could only be justified on an exceptional basis under article 90 (2). If the Commission would consider that the conditions for this exception are not fulfilled for certain telephony services, its maintenance would therefore not be legally justified”. (underlined by the author)

The solution chosen by the Commission to settle its disagreements was to launch a consultation about all the options.

The commitment it had made in Directive 90/388 was simply to “carry out a global reassessment of the situation of the telecommunications service sector in relation to the objectives established by this Directive” and nowhere did it mention the consultation process.

The Commission, which tended to make its own decisions energetically and coherently, this time preferred to ascertain the opinion of the sector's key players before submitting its proposals to the Council and Parliament. In our opinion, by doing so it guaranteed that the most pro-liberalisation option, i.e., option 3, would succeed.

The Commission gave a 3-month deadline, until 31st January 1993, for the submission of opinions.

3.4.- The Council Resolution of November 1992.

At the meeting held on 19th November 1992, the Council issued a draft Resolution, which was finally adopted on 19th December¹⁵⁷, acknowledging receipt of the Commission's Review.

Some aspects of this Resolution are highly significant because they highlight how the Council reacted to the Commission's initiative to organise a consultation of the sector's players, ignoring the usual procedure, which would have involved making a proposal to the Council so that it could make the final decision.

The Council had the following to say about this:

"Whereas the Commission has presented to the Council a communication in which it assesses the situation of the telecommunications sector... that the Commission has sought the opinion of the Member States about the aforementioned communication and the proposals contained therein..."

The text clearly shows that the Council did not refer to, nor of course seem to accept, any sort of consultation of any parties other than the governments of the Member States.

The Council went on to say:

"EMPHASISES:

that a political agreement that fully involves the Council and the European Parliament will constitute the best support for the application of the future Community telecommunications policy."

Furthermore, so as to reinforce its participation in the decision-making process, it called on the Commission to do several things, including the following:

"CALL ON THE COMMISSION:

to liaise closely with the Member States in this regard, in particular with the national regulatory officials by setting up a high-level ad hoc committee"

Finally, it tried to make clear its wishes to continue with the process:

"WELCOMES:

the Commission's intention to present a report at the next meeting of the Council of Telecommunications Ministers, and indicates that the Council will then determine how the work should continue".

3.5.- The European Parliament Resolution of April 1993.

Despite the fact that the European Parliament had not been formally asked to express its opinion, it finally gave its opinion on the Commission's document. In this regard, on 23rd April 1993, six months

¹⁵⁷ Press release n° 10085/92. Session n° 1620 Council of Ministers. Telecommunications Council Resolution on the evaluation of the Telecommunications Sector on the Community. Brussels, 19 November 1992.

after the publication of the document and almost three months after the end of the consultation rounds, the Parliament adopted a Resolution that would be published on 31st May 1993¹⁵⁸.

Finally, on 12th February 1993, the Parliament adopted two Resolutions, the first one on the service sector in the internal market and secondly, on the role of the public sector in the completion of the internal market¹⁵⁹.

In the document on the service sector, the Parliament expressed its opinion about the liberalisation of the services market:

"4. Supports the Commission's intention to fulfil its special duties in the framework of competition policy regarding the service sector, and more actively so the more decisive influence the State has as an economic operator in shaping the marketplace.

"5. Asks the Commission to continue with its policy of opening the market and liberalising the public services sector, taking into account the special importance of applying the principle of subsidiarity so as to take account of the differences that exist in the traditional structures of the Member States."

In the document on the Public Sector, the Parliament was even clearer about the liberalisation of sectors run as monopolies:

"Calls on the Commission, within the framework of the competition policy, to make special efforts to defend the principle of freedom of access to the public service sectors following compliance of criteria of economic accessibility for all EU citizens, quality of the service and internalisation of environmental costs."

These texts offer no doubt that this time the Parliament favoured the liberalisation of services.

In this context, with the foregoing declarations, the Parliament adopted its Resolution on the Commission's Review on the consultation process.

The text in the Resolution depicts the Parliament's position on the proposed options, and it stated as follows:

"Calls on the Commission to:

- a) to increase its checks on, and assess the impact of, the implementation by all the Member States of existing Directives, in particular Directive 90/388/EEC on telecommunications services, so as to prevent distortion of competition as a result of varying degrees of observance, and to take any necessary enforcement action as appropriate.*
- b) to submit as early as possible a more detailed study in the form of a Green Paper of the implications of liberalization in the provision of telecommunications infrastructures, including private infrastructure for corporate networks and third party infrastructure.*
- c) to prepare, in the light of such a study, the necessary measures to secure an opening up to competition of intra-Community vocal telephony (Option 4 in the Commission Communication) before the end of 1997.*

¹⁵⁸ European Parliament Resolution of 20 April 1993 on the Commission's 1992 review of the situation in the telecommunications services sector. OJ C 150. 31 May 1993. P. 39.

¹⁵⁹ European Parliament Resolution of 12 February 1993 on the service sector in the internal market. European Parliament Resolution of 12 February 1993 on the role of the public sector in the completion of the internal market. OJ C 72. 15 March 1993. P. 159.

d) to carry out a rigorous analysis of all the results of the above-mentioned liberalization of intra-Community vocal telephony and, if these turn out to be fully satisfactory and greater convergence is arrived at in the situation of the telecommunications sectors in the various Member States, to adopt appropriate measures to liberalize all vocal telephony (Option 3) before the year 2000."

Even though it called for caution, the Parliament also agreed with the "official" position maintained by the Commission, and it went further by once more expressing its criticism of the attitude of the Member States and, in particular, of the Council.

This Resolution had little time to have any effect on the Commission's conclusions, because only eight days after it was adopted, the Commission published a document with the conclusions of the consultation process.

3.6.- The Commission's Communication to the Council and Parliament on the consultation, April 1993.

On 28th April 1993, the Commission issued a Communication¹⁶⁰ to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector.

In this lengthy, 50-plus page document, the Commission, proposed the future lines of the Community's Telecommunications Policy, after having explained how the consultation was carried out and summarised the opinions received. One might say that this document was as important as the Green Paper of 1987.

In the first pages of the document, the Commission wrote:

"While the Commission, in its Communication, expressed an initial preference for Option 4, this did not prejudice the outcome of the consultation. Indeed, the oral and written comments received by the Commission have helped it to refine and re-focus on the areas in which further action is most appropriate and urgent".

After presenting its assessment of the results of the consultation, the Commission added:

"There is general acceptance that, beyond the first phase of consolidation of the current regulatory framework, the longer term trend towards full liberalisation of public voice telephony, represented by Option 3, is inevitable and necessary as a result of technological and market developments. Full liberalisation before the end of the decade was generally held to be a realistic timescale."

The Commission was happy to announce that option 3 had been victorious in the consultation process, thus settling any internal disagreements on this matter.

One might be surprised to see how quickly the Commission accepted the fact that its official proposal had not been chosen in the consultation process, unless one interpreted this fact as evidence that it had decided to seek the opinion of the sector's economic players to settle its own internal differences. Should this have been the case, then the Commission managed to get the sector to say what it considered inappropriate to say itself. This is a very good example of how clever the Commission can be at times.

¹⁶⁰ COM(93) 159. Communication to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector. Brussels 28 April 1993.

In the last chapter of the document, the Commission outlined a series of proposals that it referred to as the “Key Factors” for the development of the future regulatory environment and which we believe to be the essence of the 1993 Telecommunications strategy.

In this case, the Commission said:

"On the basis of the consultations, the Commission considers the following lines of action as the best way of moving forward towards a regulatory environment for the future"

Table 5.2 shows summarises the lines of action proposed by the Commission.

Table 5.2 THE COMMISSION'S PROPOSALS, 1993 ACTION PLAN	
A	Consolidation of the current regulatory framework.
B	Common definition of the Universal Service principles.
C	Development of a framework for interconnection agreements.
D	Definition of principles for access charges.
E	Independence of Telecommunications Organisations.
F	Ensuring Social and Regional Cohesion
G	Preparing the Environment for Trans-European Networks.
H	Working Out a Balanced Approach to Infrastructure Provision.
I	Ensuring a Balanced International Environment.
J	Developing the Balance Between National and Community Regulation.

In short, the Commission established its future master lines of action of the Telecommunications Policy in this document.

The document included the schedule of actions that would lead to the full liberalisation of public voice telephony services before 1st January 1998.

In an annex to its Communication, the Commission included a draft Resolution of the Council which, if adopted, would lead to the full recognition of the Commission's proposals regarding the new guidelines on Community telecommunications policy, including the full liberalisation of telecommunications services.

In the text of this draft Resolution, the Commission proposed that the Council accept the results of the consultation, recognise as key factors in the development of future regulatory policy those proposed by the Commission, and note the timetable proposed by the Commission for the implementation of such measures.

3.7.- The Council Resolution on the review of the situation in the telecommunications sector, June 1993.

On 10th May 1993, during the first meeting after the publication of the Commission's Communication on the consultation process, the Council acknowledged having received the document.

In the press release¹⁶¹ published after the meeting, the Council did not express any opinion about the document's contents and called on the Permanent Representatives Committee – COREPER, to study the dossier diligently so that an agreement could be reached at the next meeting of the Telecommunications Council, scheduled for 16th June.

Less than two months after receiving the Commission's proposal, at the meeting held on 16th June 1993 the Council adopted a draft Resolution that established the timetable for the liberalisation of public voice telephony services¹⁶². The final text of the Resolution was adopted at a subsequent meeting held on 22nd July¹⁶³.

The final text approved by the Council was almost identical to the Commission's proposal, apart from certain aspects to do with the timing of actions relative to the harmonisation policy - ONP - as explained later on.

In relation to the timetable, the Council said:

"GIVES ITS SUPPORT to the Commission's intention

- *to publish, before 1 January 1994, a Green Paper on mobile/personal communications.*
- *to publish, before 1 January 1995, a Green Paper on the future policy for telecommunications infrastructure and cable TV networks.*
- *to prepare, before 1 January 1996 the necessary amendments to the Community regulatory framework in order to achieve liberalization of all public voice telephony services by 1 January 1998. In order to allow Member States with less developed networks, i.e. Spain, Ireland, Greece and Portugal, to achieve the necessary structural adjustments, in particular of tariffs, these Member States are granted an additional transition period of up to five years. ..."*

However, the rest of the contents in the Resolution are not so well known, which is quite surprising since they are not as spectacular but they had a true political meaning.

In this document, the Council accepted the results of the consultation process and the lines of action or key factors for the development of the future telecommunications policy proposed by the Commission.

This Resolution seemed to settle the long-standing disagreements between the Council and Commission about telecommunications policy issues, at least with regard to the elimination of exclusive rights and full liberalisation of services. The Commission's skilful ploy of getting way the sector's economic players to support its own positions had been successful.

¹⁶¹ Press release n° 6381/93. Council of Ministers. Telecommunications. Telecommunication Services. Brussels, 10 May 1993

¹⁶² Press release n° 7280/93. Council of Ministers. Telecommunications. Review of the situation of the Telecommunications Sector Brussels, 16 June 1993

¹⁶³ Council Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market. OJ C 213, 6 August 1993. 1993, P. 1.1.

However, one outstanding issue in the European Union's Telecommunications Policy was the matter of the exclusive rights for deploying and operating telecommunications infrastructures.

In this document, the Council talked about infrastructures in the same terms as suggested by the Commission:

"CONSIDERS as major goals for the Community's telecommunications policy in the longer term:

.....

- (4) the working out of a future policy for telecommunications infrastructure, on the basis of the result of a broad consultation process following the publication of the Green Paper on infrastructure."*

Yet at the end of the text of the Resolution, the Council included a section that was not in the Commission's proposal and which read as follows:

"REAFFIRMS

the necessity that conditions governing the liberalization of all public voice telephony services by 1 January 1998, as well as the definition of a future Community policy on infrastructure, should be the result of a political agreement building on the compromise of December 1989, and notes the Commission support for this approach".

It should not be forgotten that the Council Meeting held on 7th December 1989 had addressed the problems regarding the completion of the internal telecommunications market so as to try to achieve a balance between liberalisation and harmonisation actions, and reached a political consensus on a common position for the proposal of the ONP Framework Directive, and reminded that the Commission would publish its Service Directive and that both Directives would be published at the same time. The text shows that the Council again called for negotiations to be initiated and its evolution will be analysed in detail.

3.8.- Comments on the actions of 1993.

As in the case of the actions of 1987, the actions of 1993 were clearly spearheaded by the Commission.

This time, one must admit, the Commission paid more attention to the other Community Institutions and did not have to make such a huge effort as on previous occasions.

Through the Council, the Member States accepted the evidence of the liberalisation of telecommunications services, concerning themselves more with preparing their companies and other national structures to face up to the new and irreversible situation, rather than confronting the Commission.

The Parliament avoided another embarrassing situation by adopting a Resolution in favour of the Commission, but just in time to be mentioned in the review of the consultation process.

This time, only the Economic and Social Committee expressed its disagreement with the procedure followed.

The fact is that the actions of 1993 marked the last stage of the road to the full liberalisation of telecommunications services.

One of the issues outstanding at the time was the launch of the harmonisation process required to reach the equilibrium that would govern the new situation, in accordance with the ONP Framework Directive. What remained to be seen was whether the Commission, which counted on the economic players' wholehearted support for its liberalisation actions, would also count on their support in the unpleasant task harmonising the conditions in which they operated. In this regard, some were starting to voice the opinion that the Commission ought to drop all its attempts to harmonise telecommunications services, and let the sector do that itself¹⁶⁴.

At the end of 1993¹⁶⁵ the Commission presented its traditional Review of the situation of the telecommunications sector, which included a good summary of the progress in the programme of 1993

This was the state of affairs during the second half of 1993, when two new events began to emerge: the creation of the Information Society and the Liberalisation of Infrastructures.

4.- THE 1995 STRATEGY.

4.1.- Background and context

The middle of 1993, after the approval of the Resolution of the Council which established the timetable for the liberalisation of voice telephony, marked a major turning point in the European Union's Telecommunications Policy.

In the United States, the new Clinton Administration adopted a firm stance in favour of Information Technologies as the driving force of development, starting with the announcement at the beginning of 1993¹⁶⁶ and followed by the publication of the document on the creation of a National Information Infrastructure (NII)¹⁶⁷. The idea, which Vice-President Gore attributed to himself, actually went back a long way and was based on an interesting piece of work published in 1991 by the Department of Commerce's *National Telecommunications and Information Administration* (NTIA), on the situation of Infrastructures in the country¹⁶⁸; and in the end, this all came to light.

Yet the highlight of this stage, which contributed to precipitate events in the telecommunications sector, was the fact that European and North American operators began to forge international alliances.

In May 1993¹⁶⁹ BT and MCI had begun talks that led to the cross-holding agreement announced a few months later. These circumstances would contribute to prompt the agreement between France Telecom and Deutsche Telekom, announced in December 1993, and their subsequent approach to the US operator Sprint. The European consortium Unisource, which Telefónica would join at a later stage, had already been established.

However, negotiations between American and European operators could only succeed if the FCC authorised such consortiums to operate in the United States and in these cases the US Administration demanded reciprocity. Given the degree of liberalisation in the telecommunications sector of Great Britain, the BT-MCI alliance met the requirements for obtaining such authorisation, but the FCC refused to authorise the French and German companies until their markets had been fully liberalised.

¹⁶⁴ Austin, MT. Europe's ONP Bargain. What's in it for the user. Telecommunications Policy, March 1994, pp. 97-113

¹⁶⁵ DGXIII/A/1. Status Report on European Telecommunication Policy. Update: January 1994.

¹⁶⁶ Building the Electronic Superhighway. The New York Times, 24 January 1993

¹⁶⁷ The National Information Infrastructure. Washington, 15 September 1993

¹⁶⁸ NTIA special publication 91-26. The NTIA Infrastructure Report: Telecommunications in the Age of Information. Washington, October 1991

¹⁶⁹ Phone Warrior. Contenders AT&T and British Telecom are slugging it out. Business Week, 27 March 1995. pp 48-51.

So these circumstances were decisive in speeding up the full liberalisation of telecommunications markets in Europe, with the help of the Commission.

All was well while this situation lasted, yet shortly after nothing was left.

At the same time, in March 1994 Buenos Aires hosted the World Telecommunication Development Conference, organised by the ITU¹⁷⁰. In his speech, Al Gore, Vice-President of the United States, launched the idea of creating a Global Information Infrastructure, identical to the US NII initiative¹⁷¹.

In addition, the General Agreement on Tariffs and Trade (GATT) was signed in April 1994 as a result of the Round of Uruguay. Here it was decided, with respect to telecommunications, to organise negotiations for the progressive liberalisation of the transport network and telecommunications services market, within the framework of the General Agreement on Trade in Services (GATS)¹⁷². These negotiations should start in May 1994 and end before 30th April 1996.

In July 1994, the G7 Economic Summit meeting was held at Naples¹⁷³ and a proposal was made to hold a ministerial meeting in Europe on Information Infrastructures. The proposal was apparently made by President Clinton, and the European Commission gladly accepted the commitment to organise it for the end of February 1995.

All this took place while Europe was in the midst of a deep economic crisis, as a consequence of the investment recession that followed the fall of the Berlin Wall.

4.2.- The Strategy of the European Union.

In July 1993, the Commission had received from the Council a mandate to publish the following documents:

- a Green Paper on mobile and personal communications, before 1st January 1994,
- a Green Paper on the future telecommunications infrastructures and cable television network policy, before 1st January 1995, and,
- before 1st January 1996, the modifications required to the regulatory framework, so as to complete the full liberalisation of all public voice telephony services before 1st January 1998.

The Commission was going to carry out this task within the general framework of the world events summarised in the previous section, in which it was fully involved. It was an important task, both in terms of quantity and quality, and had to be completed within two years.

An *ex post* analysis clearly shows that the European Commission was determined both to carry out the mandate that it had managed to win itself from the Council and also to attain the results that it had already set itself, i.e., none other than the full liberalisation of the telecommunications market.

The state of affairs within the European Union when it took on this task may be summarised as follows:

¹⁷⁰ ITU. Report of the World Telecommunications Development. World Telecommunication Development Conference. Buenos Aires 21-23 March 1994.

¹⁷¹ Gore, A. VP Remarks. International Telecommunication Union. World Telecommunication Development Conference. Buenos Aires 21-23 March 1994

¹⁷² WTO. Service trade http://www.wto.org/english/tratop_e/serv_e/serv_e.htm, visited 28/10/2010.

¹⁷³ Summit Communiqué. 1994 Naples G-7 Economic Summit Meeting. Naples, July 8-10, 1994

The Codecision procedure, under which the European Parliament shares legislative power with the Council whenever a legal measure on the internal market is to be adopted, had come into force on 1st November 1993 in accordance with a complex procedure set forth in Article 189 B (currently Art. 251) of the Treaty.

Differences between the Institutions had already started to emerge during the process of approving the Directive applying ONP to Voice Telephony, which prompted a conflict between the Community Institutions, as described below.

Furthermore, the Council was by no means unanimous in its opinion on how to achieve the full liberalisation of telecommunications, as had been the case in the past and would be the case once more.

Thus there was a need to quickly devise solid arguments to support the decisions required to achieve the full liberalisation of the sector as soon as possible.

This seems to be why the level of the Community institutional game: Commission – Green Paper – Sector Consultation – Council – Parliament, was raised from its usual level and up to Europe's highest authorities.

Therefore, the European Council was called upon to give its expert opinion. This strategy led to the following procedure: Commission – White Paper – Expert Group – European Council.

Yet the key argument used to support this choice of procedure was to link telecommunications to the European Union's growth, competitiveness and employment objectives. To carry out this task, the “hard core” in the Community Institutions didn't hesitate to resort to the extensive “democratic deficit” in the Treaties of the European Union, albeit always within the legal framework.

The next sections offer a comprehensive analysis of how the aforementioned events unfolded.

4.3.- The White Paper on Growth, Competitiveness and Employment, December 1993.

In June 1993, with Europe in the midst of a serious economic crisis, the European Council of Copenhagen asked the Commission to prepare a White Paper on the “long-term strategy for the promotion of growth, competitiveness and employment” in Europe¹⁷⁴.

Following this request, the Commission, then under President Delors, presented to the European Council at its December 1993 meeting in Brussels, the well-known “White Paper on Growth, Competitiveness and Employment. The challenges and courses for entering into the 21st century”¹⁷⁵, which became known as the Delors White Paper. This document introduced the concept of the Information Society in Europe.

Worth recalling is the fact that it was the last year in office for both the Commission and its President and maybe they thought it a good idea to leave behind a legacy that would allow their successors to get off to a good start in the 21st century.

¹⁷⁴ Presidency Conclusions. European Council of Copenhagen 21-22 June 1993. European Community Bulletin n° 6 June 1993, P.7

¹⁷⁵ COM(93) 700. Growth, Competitiveness and Employment. The challenges and courses for entering into the 21st century. White Paper. Brussels, 5 December 1993.

The document in question started by claiming that “there is no miracle cure” for the economic crisis, then said that one of the keys to development lay in the creation of the Information Society, and then went on to say:

“The European dimension would give the information society the best possible chances of taking off. The Commission is therefore proposing, in the context of a partnership between the public sector and the private sector, to accelerate the establishment of "information highways" (broadband networks) and develop the corresponding services and applications”

The chapter on the Information Society stated the following:

In the first instance, it will be their responsibility to address the "societal" implications as a whole, avoiding exclusion phenomena, maximizing the impact on employment, adapting education and training systems, and taking due account of the cultural and ethical implications for the general public, including aspects relating to the protection of privacy.

The third task of the public authorities is to create the conditions whereby European companies develop their strategies in an open internal and international competitive environment, and can continue to ensure that crucial technologies are mastered and developed in Europe.

As for how to proceed, the White Paper had the following to say:

It is proposed that a Task Force on European Information Infrastructures be established with a direct mandate from the European Council. This very high level Task Force would follow guidelines set by the European Council and would have the task of establishing priorities, deciding on procedures and setting schedules. It would be required to report to the European Council within three months after first consulting all the parties concerned."

It would consist of one member of the Commission, several members of the Governments of the Member States, representatives of the European Parliament and high-level representatives of industry, operators, users and financial institutions.

The Task Force should be set up before the end of 1993.

At the same time, the European Council should instruct the Council to speed up the work already being done aimed at setting up information infrastructures"

The European Council accepted the White Paper's proposal¹⁷⁶ and at the beginning of 1994, the expert group chaired by Vice-President Martin Bangemann, then in charge of Industrial Policy (DG III) and Telecommunications Policy (DG XIII) got to work.

With this move, both the Council and European Parliament were temporarily left out of the picture in terms of the definition of the new Telecommunications Policy.

4.4.- The Europe and the Global Information Society Report, May 1994.

On 26th May 1994, the report titled “Europe and the Global Information Society. Recommendations to the European Council”¹⁷⁷, which had been drafted by the expert group chaired by Commissioner Bangemann, following the mandate from the European Council, was published.

¹⁷⁶ Presidency Conclusions. European Council of Brussels 10-11 December 1993. Bulletin of the European Communities. N° 12 December 1993. P.7

¹⁷⁷ Europe and the Global Information Society. Recommendations to the European Council. Brussels, 26 May 1994

Strangely enough, the group did not include any representatives of the Member States or the European Parliament, contrary to the instructions of the European Council.

The Bangemann group completed the mission with which it had been entrusted. However, rather than “determining the priorities and defining the modes of action”, the group drafted a highly ideological document in favour of the privatisation of the sector, clearly marking the role to be played by each agent in the telecommunications sector, as follows.

First of all, in calling it “Europe and the Global Information Society”, the expert group was hinting at Vice President Al Gore, who had announced the creation of the Global Information Infrastructure in Buenos Aires weeks before the presentation of the Bangemann Report. The United States had globalised its Information Infrastructure and Europe was keen to globalise its Information Society in the same way.

The first page of the Report summarised the contents of the text:

"This Report urges the European Union to put its faith in market mechanisms as the motive power to carry us into the Information Age.

This means that actions must be taken at the European level and by Member States to strike down entrenched positions which put Europe at a competitive disadvantage:

- it means fostering an entrepreneurial mentality to enable the emergence of new dynamic sectors of the economy*
- it means developing a common regulatory approach to bring forth a competitive, Europe-wide, market for information services*
- it does NOT mean more public money, financial assistance, subsidies, dirigisme, or protectionism. (the underlined text appears in italics in the original document)*

In addition to its specific recommendations, the Group proposes an Action Plan of concrete initiatives based on a partnership between the private and public sectors to carry Europe forward into the information society."

The text was short and clear and left no doubt about the opinions of the authors, including the Commission chairing the group and which was in favour of the full liberalisation of the sector.

There follows a short description of the most important aspects in the contents of the text.

The text had the following to say about the role of Telecommunications Operators - TOs:

TOs relieved of political constraints, such as:

- * subsidising public functions*
- * external R&D activities*
- * contributions to land planning and management objectives*
- * the burden to carry alone the responsibilities of universal service."*

As for the role of member States, it had to say the following:

The Group recommends Member States to accelerate the ongoing process of liberalisation of the telecom sector by:

- * *opening up to competition infrastructures and services still in the monopoly area*
- * *removing non-commercial political burdens and budgetary constraints imposed on telecommunications operators*
- * *setting clear timetables and deadlines for implementation of practical measures to achieve these goals*

As regards the role of the private sector:

“The Group believes the creation of the information society in Europe should be entrusted to the private sector and to market forces.

Private capital will be available to fund new telecoms services and infrastructures providing that the different elements of this Report's Action Plan are implemented ...

As for the role of the European Institutions responsible for telecommunications policy:

“A proper regulatory framework designed to achieve:

- * *market regulation to enable and to protect competition;*
- * *a predictable environment to make possible strategic planning and investment”.*

The Group recommends the establishment at the European level of an authority whose terms of reference will require a prompt attention.

The European standardisation process should be reviewed in order to increase its speed and responsiveness to markets.

Another of this report's proposals was the establishment of an “Authority” that would be responsible for the enforcement of the telecommunications regulatory framework in the European Union.

Finally, the group proposed launching a set of ten applications with a demonstration function to promote their use. These applications would establish the basis for the construction of the Information Society in Europe.

As scheduled, the Report was presented to the European Council in Corfu on 24th-25th June 1994 and finally accepted with some minor changes¹⁷⁸.

As for the mandate to the Community Institutions to complete the telecommunications regulatory framework, the European Council of Corfu invited the Council and European Parliament to adopt, before the end of the year, measures in the areas in which proposals already existed, and proposed that the Commission create a programme to cover the remaining measures required for completing the regulatory framework.

The Commission had got the European Council to tell it what it wanted to be told and it quickly got on with complying with its mandate, turning the contents of the Bangemann Report into the doctrine that had to be followed. Once again, it got its way.

¹⁷⁸Conclusion of the Corfu European Council, 24-25 June 1994. Bulletin of the European Union n° 6, June 1994. P. 7

4.5.- The Communication: “Europe’s way to the Information Society, July 1994

Following the publication of the Bangemann Report, on 19th July 1994 the Commission approved a Communication titled: “Europe's way to the Information Society. Action Plan”¹⁷⁹.

The introduction of this document went through the events described in the previous sections. When talking about the Bangemann Report and the conclusions of the Corfu Council, it said the following:

The Commission fully supports these conclusions. It welcomes the European Council's invitations (a) to the Council and the European Parliament to adopt before the end of this year measures already proposed by the Commission and (b) to itself to establish a work programme for the remaining measures needed at the Community level.

Further on, it added:

“This Communication presents an overview of the Commission's work programme on the information society.

The Commission's response covers four areas:

- the regulatory and legal framework, for which new proposals will be made, in particular regarding telecommunications infrastructure and services, on the protection of intellectual property rights and of privacy, on media concentration, as well as the updating of the "rules of the game" for the free movement of TV broadcast in the Community;*
- networks, basic services, applications, and content, where there is a need to bring the parties concerned together in order to stimulate the development of applications in the areas proposed by the High Level Group and endorsed by the European Council;*
- social, societal and cultural aspects, including the linguistic and cultural dimensions of the information society stressed by the European Council; and*
- promotion of the information society in order to increase public awareness and support.*

The Commission invites the Council and the European Parliament, as well as the Social and Economic Committee and the Committee of Regions, to debate the issues and give political backing to the development of this action plan.

Among other issues, the document addressed the regulatory and legal framework and, in particular, the Liberalisation of Infrastructures.

The Commission stated the following:

The Bangemann group's report recommends that Member States accelerate the on- going liberalisation of the telecom sector. It is now appropriate to seek agreement on the principle of infrastructure liberalisation in the telecommunications sector, together with clear dates for its implementation. These efforts would complement the agreement on full service liberalisation according to Council Resolution of July 1993. A Communication will be presented in September on the approach proposed.

¹⁷⁹ COM(94) 347. Europe's Way to the Information Society - An Action Plan. Brussels, 19 July 1994

The second step will be for the Commission to publish a Green Paper on infrastructure by the end of the year. This will be open to a broad consultation process on the conditions for general liberalisation of infrastructure for the provision of public telecom services.

What the Commission was proposing posed a slight formal problem (the solution to which is explained below), namely on how to propose to the Council the “agreement on the start of the liberalisation of infrastructures in the telecommunications sector”, in other words, the definition of the timetable.

The Commission was determined to speed up the process as much as possible because more than a year had passed since the last Council Resolution mentioned above, and which had been devoted to legitimising its position through the intervention of higher authorities.

In relation to the telecommunications infrastructures, in its July 1993 Resolution the Council had backed the Commission's intention to publish a Green Paper before 1st January 1995.

So if the Commission published the Green Paper directly, it would be forced to submit it to consultation before presenting its proposals to the Council. It would have too rude to have submitted a specific liberalisation timetable to public consultation before it had been accepted by the Council. Yet before it could publish the Green Paper on Infrastructures, the Commission needed the Council to first legitimise the basic principles set forth in the Bangemann Report, and had to find the way to do so.

It did not seem right to prepare a specific Communication to the Council to address the Infrastructure Liberalisation timetable without taking into account the Green Paper. In any case, the Commission did prepare the Communication, titled “Part One of the Green Paper on the Liberalisation of Telecommunications Infrastructures and Cable television networks. Principles and Timetable”. Subsequently it would publish Part Two and the real contents of the Green Paper on Telecommunications Infrastructures.

It must be added that the Commission's document also included the Bangemann group's proposal for the establishment at European level of an “Authority”, mentioning the need for an in-depth analysis of its powers. In this regard, the Commission stated that a specific proposal would have to be submitted during 1996.

In addition, the Commission's last proposal, entitled “Promotion of the Information Society” would lead to the creation of an Information Society “information and promotion” office which, surprisingly, was not under the responsibility of the department of Vice President Bangemann. The office was known by its initials, ISPO, which stood for Information Society Project Office¹⁸⁰.

Finally, complying with the Council's request, in April 1994 the Commission had published the Green Paper on personal and mobile communications¹⁸¹, and after the pertinent consultation process, it announced the results in November 1994¹⁸².

¹⁸⁰ Communication of Mr Bangemann to the Commission. The Structures of Coordination and Consultation for the Society of the Information. Brussels, February 1995.

¹⁸¹ COM (94) 145. Towards the personal communications environment. Green Paper on a common approach in the field of mobile and personal communications in the European Union. Brussels, 27 April 1994

¹⁸² COM (94) 492. Communication to the European Parliament and the Council of the consultation on the Green paper on mobile and personal communications. Proposal for a Council Resolution on the further development mobile and personal communications in the European Union. Brussels, 23 November 1994

4.6.- The Council's Agreement on the Information Society, September 1994.

On 28th September 1994, the German presidency called a joint Council of Telecommunications/Industry Ministers¹⁸³, for the purposes of analysing the document drafted by the Commission, which was titled “Europe’s way to the Information Society - An action Plan”.

It was the first time since July 1993 that the ministers met to deal with the matters regarding the liberalisation of the telecommunications sector. Meanwhile they had held two other meetings, in December 1993 and May 1994, to deal with other matters^{184 185}.

The Commission's proposal aimed to convince the Council to agree to speed up the liberalisation process, as suggested by the Bangemann Group, so that the results could be presented at the Essen Summit, scheduled for the first week of December, at the end of the German presidency.

As explained in the previous sections, so many things had happened behind the Council’s back over the last fourteen months that they were bound to surface during the meeting. And surface they did.

In the debate that followed, the ministers took sides, some siding with the Commission and arguing for the immediate establishment of a timetable for a quick liberalisation, while others preferred to wait for the complete publication of the Green Paper before making a decision in that respect. Judging by the words of its spokesman, the Commission was not too happy about this.

The original version of the text on the press release is an interesting document, since the Commission’s Spokesman produced a crude and ill-mannered account of the meeting, which was published the day after the Council meeting¹⁸⁶.

“Le Conseil a adopté des conclusions soulignant l’importance des changements structurels à venir.....

“La pomme de la discorde était une phrase relative à la libéralisation des infrastructures. Personne n’a contesté qu’il faut cette libéralisation, mais les ministres ont mis quatre heures pour mettre noir sur blanc l’annonce que déjà le prochain Conseil du 17 novembre pourrait “décider sur les principes de la libéralisation et établir un calendrier claire”.

.....

“L’Espagne menait la fronde des délégations estimant qu’il est prématuré de fixer des calendriers précis. Bien qu’appuyée par le Portugal, la Grèce et la Belgique, l’Espagne se sentait souvent seule et se planait d’être traité comme un accusé ou comme élève retardé. Il est vrai que son argumentation principale semblait formaliste. Puisque la Commission avait promis un Livre Vert avant la fin de l’année, il convenait d’attendre avant de décider sur la libéralisation.”

Similarly, in the agreement adopted in May 1994, the Council referred to this as follows:

“Takes note that the Commission will present, before 1 November 1994, Part One of the Green Paper on the Liberalisation of telecommunications Infrastructures, which should allow the Council to examine and, if possible, approve the principles of the liberalisation of

¹⁸³ Press release. Council 94/197 of Ministers Telecommunications. Agreement of the Council about the document of the Commission: Europe's way to the Information Society. Brussels, 28 September 1994

¹⁸⁴ Press release. Council 93/224 of Ministers of Telecommunications. Brussels, 7 December 1993

¹⁸⁵ Press release. Council 94/99 of Ministers of Telecommunications. Brussels, 30 May 1994

¹⁸⁶ Communiqué de Presse du Porte parole de la Commission. Réunion du Conseil du 28/9/94. RAPID Réf. BIO/94/241/1. Bruxelles, 29 Septembre 1994

infrastructures and draw up a precise timetable. Part Two of the Green Paper will be presented before 1 January 1995”.

During the meeting, the Council congratulated itself on the G7 ministerial meeting to be held on 25-26 February in Brussels, and invited the Commission to deal with the preparations.

4.7.- The European Parliament's Resolution on the Information Society, November 1994

On 30th November 1994, the European Parliament adopted a Resolution on the Commission's document on the Information Society¹⁸⁷, in accordance with a report issued by its Economic, Financial and Industrial Policy Committee.

The contents of the document were in tune with the discourse of the Information Society and, in our opinion, were in line with the Commission's opinions. Point 34 talks about infrastructures, as follows:

“ 34.- Supports the objective of infrastructure liberalization whilst stressing that this must be based on a broad consensus and take into account the general interest, the public service role performed by telecommunications and the length of time required to implement the necessary changes”

Also worth highlighting is the fact, that in another section of the Resolution, the Parliament expressed the following:

“16.- Considers that Community-wide rules will have to be defined for the following:

- . licensing.*
- . interconnections*
- . access to network services*
- . guarantee of universal service*
- . charging*
- . security of operation and protection of networks*
- . protection and remuneration of intellectual property*
- . cryptography*
- . protection of private and personal information*
- . consumer protection*

17.-and calls for the formulation at Community level of uniform rules for the control of concentrations with regard to both infrastructures and basic services and applications...

18.- Warns ... against the substantial risks (inconsistency, delay, extra cost and inefficiency) that handling these matters nationally ... would entail and therefore advocates the creation of a European regulatory authority with, along the lines of the Federal Communication Committee, exclusive responsibility for ensuring compliance with the rules referred to above;

Coming from the European Parliament, this statement is quite a surprising one, not so much because of the logic of its proposals but rather because how easily it appeared to be relinquishing a parcel of sovereignty with imposing any sort of conditions or demanding anything in return; all the more so

¹⁸⁷ A4-0073/94. Resolution of the European Parliament about the Commission Communication: Europe's way to the Information Society. Strasbourg, 30 November 1994. OJ C 363. 19 December 1994. P. 11.

when the Parliament, using its Codecision powers, had embarked on a comitology crusade, a common practice in which issues that ought to be broached by the Institutions were dealt with in Committees¹⁸⁸.

Apparently the Parliament was ill-advised in that respect, because it does not seem to know that the FCC of the United States does not have exclusive powers, shares its tasks with the Utilities Commissions of the States of the Union, and is subject to the American system of institutional equilibrium (moreover, the FCC is not a Committee, but rather a Commission).

As for the G-7 meeting, and, far from questioning the reasons for holding the meeting, the European Parliament adopted a very clear position:

“29.- Considers that the European Parliament should be officially represented at the coming G7 conference on the information society”.

With this Resolution, the Parliament seemed to be taking sides with the Commission in its method of implementing the new Telecommunications Policy.

4.8.- Part One of the Green Paper on the liberalisation of infrastructures, October 1994.

As announced, the Commission published Part One of the Green Paper on the Liberalisation of telecommunications infrastructures and cable television networks on 25th October¹⁸⁹.

In this document, the Commission again ran through the well-known arguments on the importance and need to quickly remove any obstacles to the implementation of free competition in telecommunications infrastructures, as required to achieve the objectives of building the Information Society in Europe.

The Commission proposed dividing the liberalisation timetable into two stages, as follows:

“The first stage would therefore involve the immediate lifting of the remaining restrictions on the use of own or third party infrastructures already authorised in the Member States....”

“The second stage involves licensing providers of new infrastructures for liberalised services and the full use of such new, and existing, infrastructures for the provision of public voice telephony service, once liberalised....”

However, the keys to this document appeared in Section VII.- Proposed framework for action, which provided a detailed, but somewhat incomplete, description of the Commission's intentions. The document reads as follows:

“...The two-stage process envisaged therefore would lead to the immediate removal of restrictions on the use of own or third party infrastructure authorised in Member States in the following areas:

1.- For the delivery of satellite communications services

2.- For the provisions of all terrestrial communication services already liberalised (including use of cable television infrastructure for this purpose)

¹⁸⁸ Duverger, M. Europe des Hommes: Une Métamorphose Inachevée Ed Odile Jacob. Paris 1994

¹⁸⁹ COM(94) 440. Green Paper on the liberalisation of telecommunications infrastructure and cable television networks: Part One - Principles and timetable. Brussels, 25 October 1994

This concerns voice and data services for corporate networks and closed user groups, as well as all the others telecommunications services, other than the provision of voice telephony services to the general public.

3.- To provide links, including microwave links, within the mobile network, for the provision of mobile communications services.

.....

“Based on this approach, it is considered that, in order to implement objectives 1 to 3 set out above, the necessary amendments to Directive 90/388 can be prepared now to lift existing restrictions.”

“As regards the liberalisation of infrastructure for the voice telephony service for the general public after 1 January 1998, additional safeguards relating to the availability and use of infrastructure...will be required. They will be addressed in the second part of the Green Paper.”

So the Commission was announcing that, in order to carry out its action plan, it was prepared to make use of the prerogatives enshrined in Article 90 (currently Art. 106) of the Treaty and on the basis of making amendments to its Directive 90/388. In fact, it had already started to do so.

On 13th October 1994, between the previous Council meeting and the publication of part one of the Green Paper, the Commission had adopted the first amendment to Directive 90/388, “in particular with regard to satellite communications” and had quickly published it in the Official Journal on 19th October 1994¹⁹⁰, a week before the publication of part one of the Green Paper, and which come into force twenty days after its publication.

Clearly, the Commission was not prepared to submit to the consideration of the Council, and much less so to the Parliament, anything that had to do with fundamental decisions in the infrastructure liberalisation process, other than to keep up appearances.

The plan was finally and openly announced in the document that presented the conclusions of the consultation on the Green Paper on Infrastructures.

4.9.- The Council Resolution on Part One of the Green Paper on Infrastructures, November 1994

The Council of Telecommunications Ministers held a meeting to examine part one of the Green Paper on Infrastructures in Brussels on 17 November 1994.

In the Resolution approved during the meeting, the Council approved the presentation of part one of the Green Paper, titled “Principles and Timetable”. Likewise, it acknowledged the Commission's intentions of publishing part two part before the end of 1994, and of launching a public consultation, and asked the Commission to report on the outcome of the consultation both to the Council and the Parliament¹⁹¹.

¹⁹⁰ 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. Brussels, 13 October 1994. OJ L 268, 19 October 1994, P. 15

¹⁹¹ Council Resolution on Part One of the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks. 22 December 1994. OJ C 379. 31 December 1994.

Once again, the Council pointed out that any decisions adopted with respect to telecommunications infrastructures should comply with the commitment made in December 1989. This commitment established the need to achieve a balance between the liberalisation decisions and the actions for the harmonisation of the sector.

However, that political agreement also led to the tasks being distributed between the Commission and Council, which led to the adoption of two basic Directives: The Commission's Services Directive 90/38 and the Council's ONP Framework Directive 90/387.

The sentence being referred to could be interpreted as meaning that the Council acknowledged the Commission's intention to resort to amending Directive 90/388 and, in short, accepting the inevitable.

In this regard, the communiqué read out by the Commission's spokesman at the end of the meeting said that¹⁹².

“The Commission has submitted (to the Council) a declaration indicating that it will continue assuming its obligations in the field of its powers, wherever it considers there to be any obstacles to competition identified in the green paper. Commissioner Van Miert indicated to the Council that such decisions will be made after consulting the Council and, in this respect, recalled that is the project to liberalize cable TV for the services already liberalized is almost ready.”

Not long after, on 21st December, the Commission approved another amendment to Directive 90/388, regarding the lifting of restrictions on the use of cable television networks for the provision of telecommunications services after 1st January 1996¹⁹³. The Commission had started quite an uncommon consultation process with the publication of the draft version of the Official Journal¹⁹⁴. This occurred weeks after the completion of the consultation process on part two of the Green Paper.

The fact that the Commission was once again resorting to Article 90 (currently Art. 106) to deal with an issue that was being negotiated with the Council, on the very eve of a consultation process, was yet another instance of its high-handed attitude, and of its distrust of the rest of the Institutions to carry out something about which everyone seem to agree. The contents of the Commission's Programme for 1995, which was presented to the Parliament in February 1995, left no doubt about this¹⁹⁵.

4.10.- Part Two of the Green Paper on Infrastructures, January 1995

Finally, on 25th January 1995, the Commission issued a Communication with Part Two of the Green Paper on Infrastructures¹⁹⁶. This document should have appeared at the end of December 1994, but it had to wait until the new Commission presided by J. Santer, and which the Parliament took longer than expected to approve, took office.

The document was more than 140 pages long and, apart from the specific aspects of telecommunications infrastructures, it broached many other matters that had already appeared in the document that the Commission published in 1993¹⁹⁷.

¹⁹² Press release. Spokesman of the European. European Council of 18 November 1994. RAPID Ref. BIO/94/300. Brussels, 19 November 1994

¹⁹³ Press release of the meeting of the Commission of 20 December 1994. RAPID. Ref. IP/94/1262. Brussels, 21 December 1994

¹⁹⁴ Proposed amendment to Directive 90/388. OJ C 76. 28 March 1995. P. 8 OJ C 76, 28 March 1995. P 8

¹⁹⁵ COM(95) 26. Commission's work programme for 1995. Brussels 15 February 1995

¹⁹⁶ COM(94) 682. Green paper on the liberalisation of telecommunications infrastructure and cable television networks - Part II - A common approach to the provision of infrastructure for telecommunications in the European Union. Brussels, 25 January 1995

¹⁹⁷ COM(93) 159. Communication to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector. Brussels 28 April 1993.

Table 5.3 summarises the lines of action proposed in the document, which could be called the “Telecommunications Strategy of 1995”.

Table 5.3 GREEN PAPER ON INFRASTRUCTURES ACTION PROPOSALS	
A	Removal of special and exclusive rights over the use of infrastructure for the provision of telecommunications services.
B	Safeguarding and developing the Universal Service
C	Interconnection and interoperability.
D	Licensing.
E	Ensuring fair competition.
F	Access and rights of way.
G	Action in neighbouring fields (data protection, audiovisual, ...).
H	Social and societal impact.
I	Global approach to infrastructure and ensuring fair access to third country markets
J	Future evolution of the regulatory environment. Towards the Information Society.

One of the key aspects about which the sector's players were consulted had to do with the scope of the Universal Service Obligations, its estimated cost and the financing formulas. It must be remembered that the Commission and Council had already started to address these issues in 1993^{198, 199}.

In our opinion, the Universal Service issues were complex, given the contradictions involved: re-establishing the balance that was lost when the monopolies were broken up, at the expense of imposing upon the new operators obligations that had to be compatible with the rules of free competition.

Added to this was the fact that the Telecommunications Administrations had been weakened by the Commission's courses of action. The Bangemann Group had declared that the Telecommunications Operators wished to be freed from “*contributing towards territorial planning and management objectives and having to shoulder, alone, responsibility for the universal service*”.

Meanwhile the Parliament cleverly proposed that the problems of financing the Universal Service could be solved by using public funds²⁰⁰.

The document was submitted to a consultation which barely lasted two months, so as to ascertain the opinions of the sector's players without further ado.

¹⁹⁸ COM(93) 543. Developing universal service for telecommunications in a competitive environment. Brussels, 15 November 1993

¹⁹⁹ Presidency conclusions. Essen European Council 9-10 December 1994. Bulletin of the European Union n° 12. December 1994. P. 7

²⁰⁰ A4-0111/95. Report on the Green Paper on the liberalisation of telecommunications infrastructure. Part II. Economic and Monetary Affairs Committee European Parliament. 15 May 1995

4.11.- The European Parliament's Reactions to the Green Paper on Infrastructures, April 1995.

The European Parliament expressed its opinion on Part one of the Green Paper on Infrastructures in a Resolution approved on 7th April 1995²⁰¹.

Much of the document matched the text of the Resolution of 30th December 1994 regarding the Commission's Communication on the Information Society and, broadly speaking, it expressed a favourable opinion about the implementation of the Commission's proposals for the liberalisation of the sector before 1998.

On the matter of the potential consequences of this process, the Parliament expressed its concern about the impact on employment and the consequences in the less developed regions. However, what it did do, for the first time, was to state a slight difference of opinion, as follows:

“ 8.- Expresses its concern at the resolution of the Council of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures and questions the nature and validity of such an instrument, which can under no circumstances be considered as binding on the other Community institutions; asks the Commission and Council to give a commitment that Parliament will henceforth be given the opportunity to comment on any draft Council resolution concerning matters of EU competence, before its adoption by Council”

In our opinion, the Parliament reacted late, too weakly and in a highly contradictory way. On the one hand, its attitude was still very permissive and in line with the actions of the Commission; yet on the other hand, the Parliament demanded to play a more active role and, in particular, to exercise its codecision power in any Council Resolutions liable to have a bearing on the telecommunications sector.

The Commission took no notice of the Parliament's opinions, except for those that backed its actions. As to be expected, the Commission interpreted this Resolution in its own interest and simply described it as *“strongly supportive of the principles of liberalisation”*²⁰².

In its document, the Parliament called on the Commission to submit to the Council and Parliament a proposal for the creation of a “European Telecommunications Authority”, as stated in its Resolution of November 1994.

As for Part Two of the Green Paper, the Committee on Economic and Monetary Affairs and Industrial Policy drafted its report in line with the previous ones, and it was adopted by the Parliament on 19th May 1995.

One point of the document must be underscored as an example of the Parliament's contradictory attitude. When talking about the Universal Service, the Parliament said:

“5.- Considers that the market forces alone will not provide the necessary coverage of the whole of the Union, nor will they promote the socially most beneficial services, and calls for public investments be made to achieve the critical mass in new technologies and applications;

The European Parliament was probably quite right to say so, but perhaps should have said so much earlier, when there was still time to react, or simply when this could have been imposed as a condition for one the Commission's actions during the liberalisation process.

²⁰¹ A4-0063/95. Resolution of the European Parliament about Part One of the Green Paper on the liberalisation of telecommunications infrastructure. Strasbourg, 7 April 1995

²⁰² COM(95) 158. The consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks. Brussels, 3 May 1995

4.12.- The G-7 Ministerial Meeting, February 1995.

On 24th-25th February, Brussels was the venue for the G-7 Ministerial meeting organised by the European Commission to address the Information Society issues. The President of the European Parliament was also invited to the meeting. This meeting was held as a result of the decision taken in the G-7 economic summit of Naples from 8th-10th July 1994.

At first sight, one might be surprised that the Commission allowed the world's seven most developed States to interfere with European Union internal affairs as important as the definition of its future telecommunications policy. The explanation is simple: Telecommunications Policy had ceased to be an internal affair of the European Union a long time ago.

Of all the documents produced at the meeting, two deserve special attention: the speech by the Vice-President of the United States Al Gore and the presentation of Commissioner Van Miert.

In his speech, Vice President Gore established a link between the past and the future, between the ITU's World Telecommunications Development Conference held in March 1994 in Buenos Aires and the end of the Negotiations for the General Agreement on Trade in Services (GATS) in April 1996. Remember that it was in Buenos Aires where Al Gore first mentioned the Global Information Infrastructure (GII) concept.

Referring to bilateral relations with the United States, the Vice President made clear that, after the legal reform underway at the time, the telecommunications market would be open to companies from countries whose respective markets had also been opened up.

At the end of his speech, Vice President Gore returned the kind words expressed by the Bangemann Group some months before:

"Our purpose in meeting here together is to advance our common goal of a Global Information Infrastructure that bring to all countries the benefits of a Global Information Society"
(underlined by the author)

Similarly, Commissioner Van Miert reported to the G7 Ministers on the situation of the development of the European Union's telecommunications policy as the sector moved towards full liberalisation, making it quite clear that the Commission would honour its commitment²⁰³.

One of the decisions made at this meeting was to launch an Action Plan consisting of the execution of a set of application projects.

4.13.- The Commission's Communication on the Green Paper on Infrastructures, May 1995

On 3rd May 1995, the Commission presented a Communication titled "Consultation process in the Green Paper on Telecommunications infrastructures and cable television networks"²⁰⁴.

As in previous cases, the Commission summarised the results of the consultation process and presented its own conclusions.

²⁰³ Van Miert K. Talk of the Commissioner Van Miert. G7 Ministerial meeting. Brussels, 25 February 1995

²⁰⁴ COM(95) 158 The consultation on the Green paper on the liberalisation of telecommunications infrastructure and cable television networks. Brussels, 3 May 1995

The Commission's document stated that it had found the generalised consensus for most actions proposed in its Green Paper. Likewise, it mentioned that it had found different opinions on the following issues:

- The path to be followed in liberalising infrastructures.
- Method for estimating the cost and financing the Universal Service.
- Criteria for the application of the ONP.
- Method for estimating interconnection costs.
- Licensing criteria, in particular, for Trans-European services and infrastructures.
- Criteria for share scant resources, such as numbering, frequencies and rights of way.

Possibly, the first point of this list included the opinion of the Joint Committee on Telecommunications, formed by the representatives of "employees and employers" of the telecommunications operators. It was a very harsh opinion, in which the Commission was asked to refrain from any advance liberalisation of infrastructures, before solving the problems raised in the Green Paper, especially as regards the social aspects which had not been included within the liberalisation framework, in accordance with the spirit of the Council Resolution of 17th November 1994²⁰⁵.

The Commission's proposal for completing the opening of the telecommunications sector to competition was clearly reflected on this document and constitutes the real Telecommunications Programme of 1995.

In accordance with its interpretation of the consultation's results, the Commission's document proposed an action plan based on the following criteria.

As regards Liberalisation, the document:

- Considered the liberalisation of mobile and personal communications, cable TV networks and infrastructures.
- Indicated that the liberalisation process would be carried out by the Commission under the prerogative set forth in Article 90 (currently Art. 106) of the Treaty.
- Established that the procedure chosen would be the implementation of subsequent amendments to its Services Directive 90/388.

On the issue of Harmonisation, the document:

- Deemed it necessary to adapt the ONP to the new circumstances and to solve the Universal Service problems.
- This task was left to the Council and Parliament.
- Established that the proposed procedure was the amendment of the ONP Framework Directive and adoption of new Directives, whenever applicable.

And, as regards the rest of issues, the document:

- Considered that the other issues included in the previous Programmes, such as: employment, social and societal aspects, intellectual property, data protection, audiovisual policy, do not form part of the telecommunications objectives.

²⁰⁵ Comité Paritaire des Télécommunications. Avis sur le Libre Vert sur la libéralisation des infrastructures de télécommunications et des réseaux de télévision par câble. Bruxelles. le 14 mars, 1995

- Made it clear that the tasks should be solved in coordination with those in charge of other Community Policies.
- Made it clear that the procedure chosen was to forget all about these matters and leave them outside the scope of the European Union's Telecommunications Policy.

Table 5.4 shows the timetable for the harmonisation and liberalisation-related actions proposed in the document.

TABLE 5.4		
PROPOSED TIMETABLE OF ACTIONS UNTIL 1998		
Date	Liberalisation	Harmonisation
Before 31 July 1995	Draft amendment of Commission Directive 90/388/EC with regard to mobile and personal communications	Common position on proposal for a Parliament and Council Directive for ONP Voice Telephony
	Draft amendment of Commission Directive 90/388/EC with regard to the full liberalisation of Telecommunications Infrastructures and services, from 1 January 1998	
Before 1 January 1996	Adoption of the amended Commission Directive 90/388/EC on cable television networks	Adoption of the proposal for a European Parliament and Council Directive for ONP Voice Telephony
	Adoption of amendment of Commission Directive 90/388/EC with regard to mobile and personal communications	Proposed amendment to Council Directives 90/387/EC (ONP Framework) and 92/44/EC (ONP on Leased Lines)
	Adoption of the amended Commission Directive 90/388/EC on the liberalisation of Telecommunications Infrastructures and services, before 1 January 1998	Proposal to the European Parliament and Council of a Directive on the application of the ONP principles to telecommunications network and public services
	Whenever required, proposal for the implementation of the measures required to support the fulfilment of the principles of the Treaty (Art. 85 and 86, currently 105 and 106), in particular, in relation to interconnection and access	Adoption of the foregoing licensing proposals
		Proposal for a Council Decision on the coordination of licenses in the European Union, on satellite PCS services
		Communication to the European Parliament and Council on the development of a liberalised telecommunications environment, in particular, on the universal service
		Communication to the European Parliament and Council on the information and service guides
Before 1 January 1997	Adoption of any measure required to ensure compliance with the principles of the Treaty, in particular, articles 85 and 86 (currently Art. 105 and 106)	Adoption of the aforesaid measures by the European Parliament and Council
Before 1 January 1998	Complete the implementation of the aforesaid liberalisation measures in the Member States, in accordance with the timetable adopted	Complete the implementation of the aforesaid harmonisation measures in the Member States, in accordance with the timetable adopted

Neither the document in question nor the Green Paper on Infrastructures included any direct reference to the creation of a Telecommunications Regulation Authority in the European Union, as shown in other texts of the Commission. *However, one fact that draws attention is that, among the liberalisation-related actions, the Commission proposed the implementation of the “appropriate measures to give effect to the principles set out in the Treaty (art. 85 and 86), in particular with regard to interconnection and access”.*

It probably thought it could justify the creation of such an Authority on the grounds of the need for a body capable of guaranteeing compliance with competition principles in the telecommunications sector. If so, the new body might be the European Regulatory Authority of Competition in Telecommunications, rather than just being a European Telecommunications Regulatory Authority, which is quite different.

4.14.- The Telecommunications Council Meeting, June 1995.

On 13th June 1995, the Council of Telecommunications Ministers held a meeting to analyse the Commission's Communication on the consultation process on the Green Paper on Telecommunications.

The Council adopted a fairly lengthy Resolution on this matter²⁰⁶, in which it acknowledged the presentation of the document and welcomed the consensus that the Commission found during the consultation process. In this case, the Commission had not presented any formal proposal for a Resolution to the Council.

The text of the Resolution adopted by the Council gave a long description of the elements deemed vital for the drafting of the future regulatory framework:

- Generalisation of competition in the whole sector
- Maintaining and developing the universal service
- Establishing interconnection regulations
- Ensuring effective access to markets, even of other countries

The Council also agreed that implementing the aforementioned key elements within the European Union involved adopting legislative measures, in particular as regards:

- Liberalisation of all telecommunications services and infrastructures
- Adaptation of the ONP measures to the competition framework
- Maintenance and development of a minimum supply of services throughout the Union and definition of common principles for the financing of the universal service
- Drafting of a common framework for the interconnection of networks and services
- Approximation of general authorisation and licensing systems in the Member States

In this regard, the Council reminded that all actions to be carried out should be inspired by the commitments of December 1989.

As expected, the Council did not make any comments on the timetable of actions announced by the Commission in its Consultation document and referred to those that it had already approved itself. In

²⁰⁶ Press Release 7840/95. Press release 7840/95. Session 1854. Council of Ministers of Telecommunications. Luxembourg 13 June 1995.

this respect, it asked the Commission, in accordance with the timetable set out in the Council Resolutions of 22 July 1993 and 22 December 1994, to present:

“to the Council and the European Parliament before 1 January 1996 all legislative provisions intended to establish the European regulatory framework for telecommunications accompanying the full liberalization of this sector”.

The word “all” is the only reference in this Resolution to the Commission's intention to make extensive use of Article 90 (currently Art. 106) to complete the liberalisation process.

Finally, at the same meeting, Vice President Brittan had reported that the basic principles for the start of the GATS negotiations within the framework of the World Trade Organisation had to be established before the end of July, so the Council authorised the use of the principles defined in this Resolution and the timetables defined at the Councils of July 1993 and December 1994.

Another issue addressed by the Council had to do with the request received from the Commission on its decision to adopt an amendment to Directive 90/388, on the use of cable TV networks for the provision of telecommunications services.

In the text with the Conclusions adopted about this matter, the Council hinted that it disapproved of the course of action that the Commission had taken to do something that the two agreed on. Furthermore, since the Commission had publicly asked for the opinion of the Member States, the Council invited the Commission to take into account the answers received before continuing with the text approval procedure.

At the same meeting, the Council adopted a Resolution with regard to mobile and personal communications, based on the proposal received from the Commission in November²⁰⁷.

Finally, albeit with Portugal voting against it, the Council agreed on the common position on the new proposal for a Directive for the application of ONP to voice telephony, which will be analysed later on.

4.15.- The Directive on the Liberalisation of satellite communications, October 1994.

At the end of 1994, the Commission had started to extend the range of liberalised services, adding satellite communications, choosing to do so by amending the contents of the Services and Terminals Directives.

Even though all this took place before the events referred to in this chapter and does not, strictly speaking, form part of the 1995 telecommunications strategy, the fact is that it marked the start of a string of amendments to these Directives for the purposes of achieving full competition in the European Union before 1998.

On 13th October 1994, under the powers set forth in Article 90 (currently Art. 106) of the Treaty, the Commission adopted Directive 94/46²⁰⁸ amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications.

²⁰⁷ COM(94) 492. Communication to the European Parliament and the Council of the consultation on the Green paper on mobile and personal communications. Proposal for a Council Resolution on the further development mobile and personal communications in the European Union. Brussels, 23 November 1994

²⁰⁸ Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications. OJ L 268, 19 October 1994. P. 15

The Service Directive specified that it did not apply to satellite communications. Likewise, the Terminals Directive only applied to terminal equipment, regardless of the network to which they were connected, but not to satellite communications earth station equipment.

However, as a result of its 1987 Telecommunications strategy, the Commission had started to analyse the development of the common satellite communications service and equipment market by publishing a Green Paper in November 1990²⁰⁹, a few months after the adoption of the Service Directive. In this document, the Commission analysed the state of satellite communications regulations and broached the need to draw up a programme for the development of the market of this type of communications.

As on similar occasions, it organised a consultation and then issued a report with its conclusions. In its meeting on 4th November 1991, the Council²¹⁰ analysed the Commission's proposal and, during the meetings held on 18th-19th December 1991²¹¹, it approved a Resolution in which it consented to the general objectives proposed by the Commission, inviting it to present proposals on specific measures to open up the market in the telecommunications sector to competition.

Once it had received the Council's approval, the Commission drafted and approved a draft Directive that would not followed the ordinary procedure, but instead involve making amendments to its own services and terminals Directives. Since the Commission had already received authorisation from the Council, it merely consulted the Parliament on this document and the Economic and Social Committee, which approved the Commission's proposal. After this, the Commission was able to publish its Directive.

The new Directive amended the Terminal Directive as follows:

Article 1 Directive 88/301/EEC is hereby amended as follows: (a) The last sentence of the first indent is replaced by the following: 'Terminal equipment also means satellite earth station equipment'.

This amendment resulted in the earth station equipment telecommunications market being opened to competition.

As regards the Service Directive, restrictions on its application were amended as follows:

Article 2 Directive 90/388/EEC is hereby amended as follows: 1. Article 1 is amended as follows: (b) Paragraph 2 is replaced by the following: '2. This Directive shall not apply to the telex service or to terrestrial mobile radiocommunications.'

Evidently, Article 2 of the Directive clearly expressed that its application excluded the voice telephony service.

These amendments allowed the Commission to start applying free competition to services other than those originally envisaged, and directly, using the powers bestowed upon it in Article 90 (currently Art. 106) of the Treaty. This course of action was to be the procedure that it followed in the implementing full competition in the sector, as explained next.

²⁰⁹ COM(90) 490. Green paper on a common approach in the field of satellite communications in the European community. Brussels 20 November 1990

²¹⁰ Press release n° 8944/91. Council of Ministers Telecommunications. Brussels 4 November 1991.

²¹¹ Press release n° 10391/91. Council of Ministers Telecommunications. Brussels 18 -19 December 1991

4.16.- The Directive on the liberalisation of cable TV network infrastructures, October 1995.

One of the first regulations adopted to achieve the objectives of the 1995 strategy was the Directive which opened up the cable television networks to competition for the provision of liberalised services.

On 28th March 1995, before presenting the document with the conclusions on the consultation of the Green Paper on Infrastructures, the Commission published in the Official Journal the announcement of its draft Directive on the use of cable TV networks for the provision of telecommunications services²¹². The idea was to amend the Commission Directive 90/388/EC, using the prerogative of Article 90 (currently art. 106) of the Treaty. The essence of this proposal for a Directive was to bring forward to 1st January 1995 the date for the liberalisation of cable TV infrastructures for all services already subject to free competition.

The Council acknowledged this announcement at its meeting in June 1995, and invited the Commission to take account of any proposals that it received from the Member States.

In relation to this proposal for a Directive, the European Parliament issued an opinion²¹³ in which it opposed the Commission's intentions, even though it initially agreed with these terms.

At the end of this unusual consultation period, on 18th October 1995 the Commission adopted its Directive 95/51, the essential parts of which were almost identical to those of its proposal²¹⁴. The amendments made to Directive 90/388/EC basically affected the content of Article 4, adding the following text:

Article 1 Directive 90/388/EEC is hereby amended as follows:

... ..

2. In Article 4, the following is inserted after the second paragraph: ' Member States shall:

abolish all restrictions on the supply of transmission capacity by cable TV networks and allow the use of cable networks for the provision of telecommunications services, other than voice telephony;

- ensure that interconnection of cable TV networks with the public telecommunications network is authorized for such purpose, in particular interconnection with leased lines, and that the restrictions on the direct interconnection of cable TV networks by cable TV operators are abolished.'

This Directive clearly began to apply the contents of the 1995 Telecommunications strategy, as envisaged.

Yet not everyone agreed, in particular the governments of Spain and Portugal, who lodged an appeal before the Court of Justice months later. Portugal requested the application of a transition period for enforcing the Directive and it protested against the obligation to apply it before 1st January 1996.

²¹² 95/C 76/06. Announcement of a proposal of a Directive amending the Commission Directive 90/388 with regard to the abolition of the restrictions on the use of cable television networks. OJ 78. 28 May 1995. P. 8.

²¹³ Resolution of the European Parliament about the proposal of a Commission Directive amending the Commission Directive 90/388 with regard to the abolition of the restrictions on the use of cable television networks. OJ C 166, 3 July 1995.

²¹⁴ 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. OJ L 256. 26 October 1995. P. 49

After free competition had entered into force, the Commission adopted a new Directive²¹⁵ with regard to cable TV, establishing that operators with a dominant position in the telephony market would have to separate any activities in the cable sector into independent legal entities.

4.17.- The Directive for the liberalisation of mobile communications services, January 1996.

In our opinion, the way that the European Institutions and the Member States have approached mobile communications has been exemplary and is surely one of the keys to the success of GSM.

Mobile communications had been explicitly excluded from the scope of application of Directive 90/388. Meanwhile, the Commission was in the midst of the analysis process, with the publication of a Green Paper and the conclusions of the sector consultation process mentioned above. In the document, the Commission proposed to the Council the following:

“Before 1 January 1996:

- Fully apply the Treaty competition rules and, if necessary, amend Directive 90/388/CEE to remove all of the sector's exclusive and special rights”

At its June 1995 meeting, the Council of Ministers examined the Commission's proposal and initially agreed with its contents. As in previous cases, the Council stated the following in its Resolution²¹⁶:

“INVITES the Commission to propose to the European Parliament and the Council measures which will contribute to the achievement of the priority objectives and principal additional action referred to above”

Once again, the Council was expressing the opinion that it should be the democratic and representative bodies that ought to make the decisions on this matter, an opinion that was clearly not shared by the Commission, which was quite willing to resort, once more, to the prerogatives set forth in Article 90 (currently Art. 106) of the Treaty to open up the mobile communications market to competition by amending the Services Directive.

Therefore, barely two months later, in August 1995, the Commission published its draft Directive²¹⁷ and officially consulted the Parliament, which adopted a Resolution in this respect. But there is little point in going into these documents in detail, because they fully supported the Commission's proposals.

Finally, on 16th January 1996 the Official Journal published Commission Directive 96/2 amending Directive 90/388/EEC with regard to mobile and personal communications²¹⁸ thus achieving the foreseen objectives of opening up mobile communications to free competition

Since this was an amendment of the Service Directive, the new text reworded art 1.2, which now reads as follows:

Article 1 (2) is replaced by the following: ‘2. This Directive shall not apply to telex.’

²¹⁵ Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities. OJ L 175. 10 July 1999. P. 39

²¹⁶ Council Resolution of 29 June 1995 on the new development of the personal and mobile communications in the European Union. OJ C 188, 22 July 1995. P. 2

²¹⁷ Draft Commission Directive amending Commission Directive 90/388/EEC with regard to mobile and personal communications. OJ C 197. 1 August 1995

²¹⁸ Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications. OJ L 20. 26 January 1996.

However, the Directive added other provisions such as:

- Prohibiting member States to limit the number of licenses if frequencies are available
- Authorising mobile communications operators to implement their own infrastructures.
- Guaranteeing the interconnection of mobile networks with public telecommunications networks.

4.18.- The Directive on the liberalisation of infrastructures and implementation of full competition, March 1996.

Finally, on 13th March 1996, the Commission adopted Directive 96/19²¹⁹ amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets; services and infrastructures.

This was be the last step in the legislative process, so all the telecommunications services markets, including voice telephony and telex, were now open to competition. Likewise, all exclusive rights linked to infrastructures were abolished.

As usual in the cases mentioned in the previous sections, the Commission published a Draft Directive²²⁰ in October 1995 and submitted it to a public consultation.

Similarly, the Council had addressed this issue during its first meeting following the publication of the Commission's proposal²²¹, which took place during the Spanish presidency. The Council was already familiar with the decisions that the Commission intended to adopt, because the two Institutions had reached a political agreement months before on the liberalisation of voice telephony and infrastructures, after 1st January 1998, with the aforementioned exceptions.

However, not all of its members were of the same opinion, so the Council asked the Commission to take into account any proposals that it might receive from the Member States. Likewise, in the light of the proposals presented by the Commission in this Directive, and which clearly referred to harmonisation matters, the Council asked the Commission to respect its powers and those of the Parliament.

The text in the Directive adopted by the Commission read as follows:

*Article 1 Directive 90/388/EEC is amended as follows:2. Article 2 is replaced by the following:
'Article 2*

1. Member States shall withdraw all those measures which grant:

(a) exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such services; or

²¹⁹ Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets. OJ L 74, 22 March 1996. P. 13

²²⁰ Notice by the Commission concerning a draft Directive amending Commission Directive 90/388/EEC regarding the implementation of full competition in telecommunications markets. OJ C 263, 10 October 1995. P. 6

²²¹ Press release n° 12025/95. Council of Telecommunications Brussels 27 November 1995

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

(c) special rights which designate, otherwise than according to objective, proportional and non-discriminatory several competing undertakings to provide such telecommunications services or to establish or provide such networks.

This Directive not only removed special and exclusive rights, but also adopted a series of measures with regard to licensing, interconnection, universal service, numbering and rights of way, all matters specific to the harmonisation of telecommunications. In spite of this, and in what was to be the last Directive in which it used the prerogatives of Article 90 (currently art. 106), the Commission could not resist the temptation to broach matters for which the Council and Parliament were the responsible for regulating.

In the long list of legal reasons that precedes the text of the Directive, the Commission made great efforts to point out that, in all the aforementioned issues (licenses, interconnection, universal service, numbering and rights of way), there might be reminiscences of the monopoly era liable to affect the development of full competition. In this regard, it was true that they would be affected by Article 90(1) of the Treaty, which prohibits Member States from adopting or maintain measures that are contrary to the rules of the Treaty.

Yet what is debatable is whether the Commission had to become involved in these matters in accordance with the prerogative described in section 3 of the Article 90. Obviously, the Commission decided that it had to, and did.

In our opinion, by including in the text of its Directive measures that affected the Harmonisation policy and development of the ONP, the Commission was expressing its great distrust of the Parliament's and Council's ability to solve these matters properly within the framework of their powers. In other words, right up to the last second, the Commission was determined to supervise even the slightest detail of the new rules that were going to govern the telecommunications market from then on.

One of the measures adopted by the Commission referred to Universal Service, and while the scope of this service was still being debated, the Commission settled the question convincingly.

Article 1 included the following definitions:

'- "public telecommunications network" means a telecommunications network used inter alia for the provision of public telecommunications services;

- "public telecommunications service" means a telecommunications service available to the public`.

Article 3 established the following:

Article 3 is replaced by the following: 'Article 3As regards voice telephony and the provision of public telecommunications networks, Member States shall, no later than 1 January 1997, notify to the Commission, before implementation, any licensing or declaration procedure which is aimed at compliance with:

- essential requirements, or

- trade regulations relating to conditions of permanence, availability and quality of the service, or

- financial obligations with regard to universal service, according to the principles set out in Article 4c.

.....

The whole of these conditions shall form a set of public-service specifications and shall be objective, non-discriminatory, proportionate and transparent.

.....

As regards packet- or circuit-switched data services, Member States shall abolish the adopted set of public-service specifications. They may replace these by the declaration procedures or general authorizations referred to in Article 2.'

And Article 4 mentioned that:

Article 4c Without prejudice to the harmonization by the European Parliament and the Council in the framework of ONP, any national scheme which is necessary to share the net cost of the provision of universal service obligations entrusted to the telecommunications organizations, with other organizations whether it consists of a system of supplementary charges or a universal service fund, shall:

(a) apply only to undertakings providing public telecommunications networks”

Even though the text in this last paragraph is not very clear, it is understandable if it is explained.

The proposal for a Directive presented by the Commission included the following sentence:

"the universal service obligations....shall:

a) apply only to undertakings providing voice telephony services or public telecommunications networks.”

The Commission's intentions left no doubt as to the scope of the universal service obligations.

The European Parliament did not like this limitation and so proposed an alternative wording in its Resolution:

"the universal service obligations....shall:

a) apply to all undertakings providing telecommunications services or networks.

The text proposed by the Parliament not only did not limit the universal service obligations to voice telephony services, but neither did it require that the network being used to provide such services should be ambiguously defined as a "public telecommunications network".

The Commission ended up agreeing to change its original proposal, though its contents would be practically the same. In short, the Commission made the decision to limit the universal obligations service alone, so as to prevent the Council from establishing the scope of such obligations in one of the telecommunications harmonisation Directives, as part of the efforts to develop the ONP.

4.19.- The separation of Telecommunications business and Television businesses.

Due to the digitalisation of networks, the liberalisation of infrastructures and the possibility of providing different types of services with these infrastructures, in 1999 the Commission was forced to adopt a new Directive²²² that once again amended Directive 90/388, in order to separate the telecommunications and television business, and did so as follows:

“Each Member State shall ensure that no telecommunications organisation operates its cable TV network using the same legal entity as it uses for its public telecommunications network, when such organisation:

- (a) is controlled by that Member State or benefits from special rights; and*
- (b) is dominant in a substantial part of the common market in the provision of public telecommunications networks and public voice telephony services; and*
- (c) operates a cable TV network established under special or exclusive right in the same geographic area.”*

This Directive marked the end of the liberalisation process on the eve of the start of the review of sector's regulatory framework, which will be explained later on.

4.20.- The Commission's use of Article 90 (currently Art. 106) of the Treaty.

As explained throughout this document, the Commission resorted to Article 90 (currently Art. 106) of the Treaty as a way to complete the liberalisation of the telecommunications market.

The Commission used this extraordinary procedure in May 1988 to open the terminals market to competition and in 1990 to start opening up the services market.

Later on, the Commission's words and actions made it quite clear that it intended to continue using this procedure whenever it deemed it necessary. In this regard, the previous sections have already shown that the Commission acted in line with its proposals and completed the liberalisation process by making use of these special prerogatives.

In our opinion, with these actions, the Commission shouldered the responsibility for creating dangerous parallel circuits in order to legitimise its decisions. The Economic and Social Committee said the same thing in its February 1995 Opinion on the Green Paper on Infrastructures, stating that such practices set *“a dangerous precedent that may well call into question Europe's decision-making procedures”*²²³.

Similarly, even though using Article 90 is lawful according to the provisions of the Treaty, what is doubtful is whether the Commission was entitled to apply this legal provision so arbitrarily.

So it is worth pointing out how this extraordinary privilege might be used in the future, beyond the field of Telecommunications. The wording of Article 90 seems to imply that it could be applied to any

²²² Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities. OJ L 175. 10 July 1999

²²³ Opinion of the European Economic and Social Committee: Europe's Way to the Information Society and Part I of the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks. Brussels, 23 February 1995. OJ C 110. 2 May 1995. P. 11.

public services and other general interest activities managed by the States that might be of some economic interest. If this were so, the Commission could use Article 90 as a tool for dismantling, on its own, what remains of the Public Sector, and that would be a very serious matter indeed.

In this regard, the European Parliament has issued a harsh warning to the Commission about its use of Article 90. In its Resolution on the Commission's Work Programme for 1995²²⁴, the Parliament referred to Public Services in the following terms²²⁵

“I.- that the Commission only consider the application of Article 90(3) of the Treaty in exceptional cases and after having requested the opinion of the Parliament, and waive its use in any other matters that can be addressed in a Directive”

The Resolutions adopted by the Parliament with regard to the string of proposed amendments to Directive 90/388 also explicitly referred to the use of Article 90 as follows:

“2.- Points out, however, even if the procedure set forth in art. 90(3) is justified as a means of avoid regulatory obstacles to competition, is not, however, intended to replace the legislative instruments provided for by the EC Treaty, and in particular art. 100A, to determine the rules of operation of an economic sector of the Union.”

In spite of everything, the Parliament finally accepted the Commission's use of the prerogative.

4.21.- Comments on the actions carried out after 1995.

The contents of the previous sections all show that it was the Commission alone which proposed and executed the 1995 strategy, and to a much larger extent than in previous cases.

During this period, the publication of the different Commission Directives that amended Directive 90/388, almost brought to an end the legislative developments that would lead to the implementation of full competition after 1st January 1998.

One outstanding issue was the proposal to create a European Telecommunications Regulatory Authority and, in this regard, the Commission had received the results of a study commissioned from a consultancy²²⁶. We now know that the Commission did not see this wish come true, and by express wish of the Member States.

As envisaged, the Commission left the Council and Parliament to deal with the legislative tasks regarding the harmonisation of national laws for the provision of telecommunications services, through the re-adaptation of the ONP Framework Directive.

5.- CONCLUSIONS

This Chapter has analysed how the European Union's telecommunications equipment, services and infrastructures market were liberalised.

The next Chapters will continue with the analysis of the other aspects that marked the period 1987 – 1998.

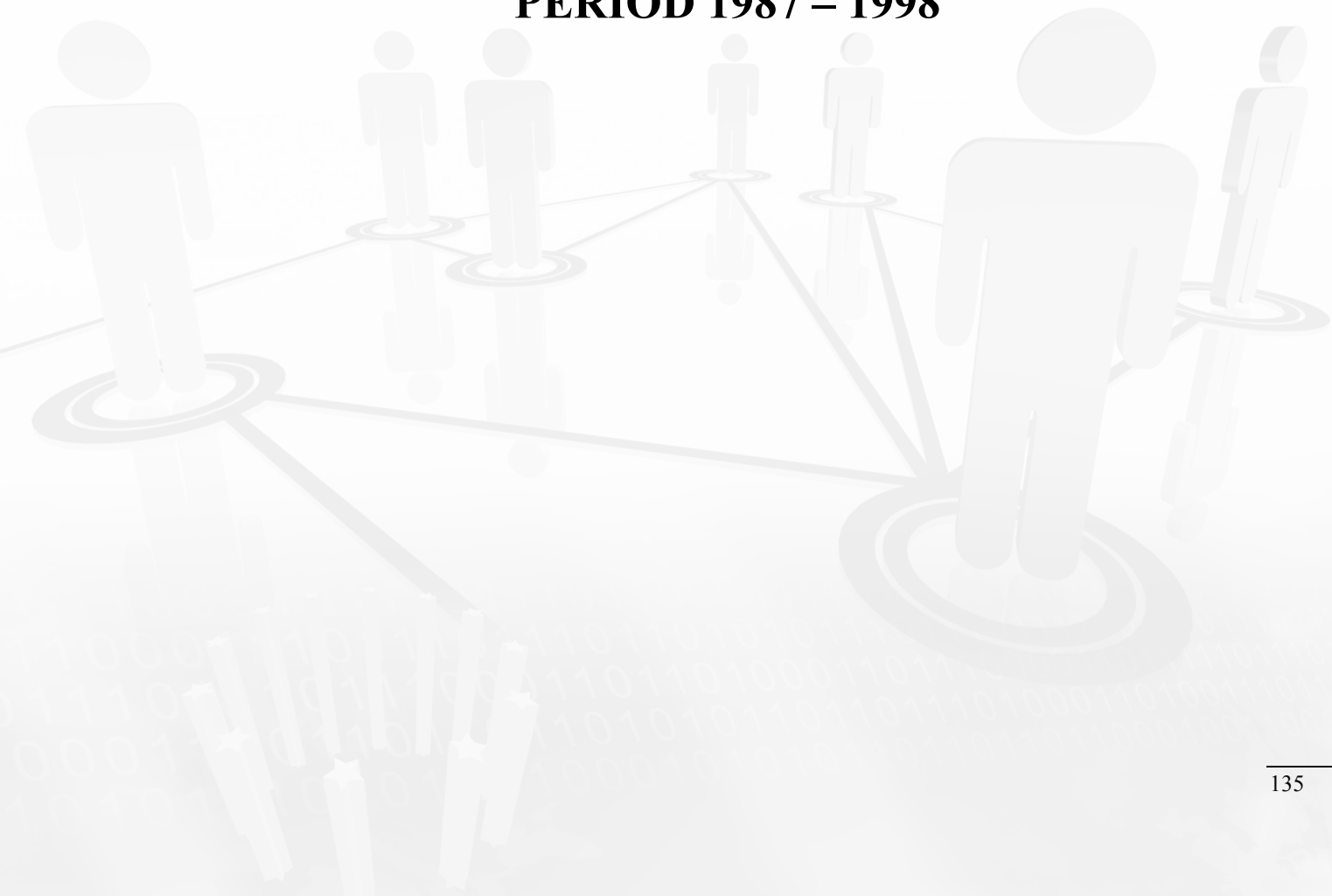
²²⁴ COM(95)26. COM(95)26. Commission's work programme for 1995. 15 February 1995.

²²⁵ Resolution of the European Parliament on the Commission's work programme for 1995. Bulletin of the European Union. Supplement 1/95. 1995

²²⁶ NERA. Issues associated with the creation of an European Regulatory Authority for telecommunications. Study commissioned by the European Commission. 1997

CHAPTER 6

THE HARMONISATION OF THE MEMBER STATES' LAWS WITHIN THE FIRST REGULATORY TELECOMMUNICATIONS FRAMEWORK. PERIOD 1987 – 1998



CHAPTER 6

THE HARMONISATION OF THE MEMBER STATES' LAWS WITHIN THE FIRST REGULATORY TELECOMMUNICATIONS FRAMEWORK. PERIOD 1987 – 1998

1.- INTRODUCTION

This Chapter analyses the process of harmonising the European Union's Member States' laws during the period 1987 – 1998.

As the Liberalisation process (described in Chapter 5) drew closer to its end, it was necessary to adopt a series of regulatory measures to allow the correct provision of the services subject to free competition and their coordination with those that were still being operated as a monopoly. This Chapter will thus provide additional information, depicting the events that occurred within the same time frame as the Liberalisation of the Telecommunications sector.

In accordance with the Treaty's provisions, the actions to harmonise the laws of Member States were the responsibility of the Council and, after the coming into force of the Treaty of Maastricht, the Council and Parliament would be responsible for such actions. Therefore, these actions were implemented in accordance with the ordinary procedures of the European Union, as opposed to what happened during the liberalisation process, which involved the application of extraordinary procedures, as described in the previous Chapter.

First it analyses the initial approach to the Harmonisation process, as conceived in the strategy presented by the Commission in 1987.

Secondly, it gives a detailed description of the first stage of the development of the Open Network Provision (ONP) Directive, which would be used to regulate the Harmonisation process.

Thirdly, it analyses how the events of 1993 impacted the Harmonisation process.

Finally, this chapter includes an in-depth review of the final stage of the Harmonisation process which led to the adoption of all regulations required to open up the market to free competition in 1998.

2.- HARMONISATION IN THE 1987 STRATEGY.

2.1.- Approach

As a consequence of the approval of the Single European Act in 1986, the Commission started to create a Telecommunications strategy that was published in 1987.

In the Green Paper on the development of the common market for telecommunications services and equipment, the Commission laid the foundations for opening up the telecommunications sector to free competition, focusing its efforts on the liberalisation of the terminal market and value-added services market, addressing voice services and infrastructures at a later stage. Likewise, the 1987 strategy started the process to harmonise telecommunications prior to their liberalisation.

When the Green Paper was published in 1987, telecommunications services were operated as a monopoly by the National Telecommunications Administrations of the Member States, who had a major influence on all European Institution decisions related to the telecommunications sector through the Council.

At first, the Harmonisation process was developed by the organisational structures that were still in place, as a result of the strategy agreed between the Commission and the Council in 1984, i.e., the Senior Officials Group on Telecommunications (SOG-T) and its Analysis and Forecasting Group (GAP). The GAP established the basis for the telecommunications harmonisation process in Europe.

The GAP's members were present both in the National Telecommunications Administrations and the Operators, as well as including representatives of Industry and Users alike. The GAP was chaired by a representative of the Telecommunications Administrations and the Commission appointed both the Vice-Chairman and Secretary of the Group.

When the Commission announced the presentation of a proposal for a Directive to the Council in 1988, for the regulation of the development of Open Network Provision – ONP, it brought the GAP's activities to a halt. Subsequently, it would dispense with their collaboration in the harmonisation process. This period ended with the approval of Directive 90/387/EC, of 28th June 1990, also known as the ONP Framework Directive, and the definition of new criteria for the collaboration between Member States and the Commission.

The ONP Committee was set up to develop the Framework Directive. Only the Commission and Telecommunications Administrations of the Member States were represented on the Committee. The Commission was in charge of the presidency and secretariat, providing assistance and support to its own activities, ultimately responsible for the development of the ONP.

Finally, so as to leave room for all parties interested in the harmonisation process, the ONP Network Provision Consultation and Coordination Platform - also known as ONP-CCP - was created, with the presence of operators, industry players and users, which would be responsible for channelling the contacts with the telecommunications sector, as described in the ONP Framework Directive. The Commission had managed to gain control over the process and instruments required for the implementation activities.

2.2.- The Open Network Provision principle in the Green Paper of June 1987.

As already known, in June 1987 the Commission published the Green Paper on the development of the common market for telecommunications services and equipment²²⁷.

Section 4.2.3 of the Green Paper talks about the harmonisation process in the following terms:

"If a series of contentious cases and lengthy conflict... is to be avoided, the Community will have to develop common principles regarding the general conditions for the provision of the network infrastructure by the Telecommunications Administrations to users and competitive service providers, in particular for trans-frontier provision".

"The transition towards a Community-wide competitive services could therefore be substantially accelerated by Community Directives on Open Network Provision".

"These directives would have to include clear access conditions by Telecommunications Administrations for trans-frontier service providers for use of the network, regarding at least three "layers":

- *technical interfaces.*
- *tariff principles, in particular separate tariffing ("unbundling") of "bearer" and "value-added" capabilities.*
- *restrictions of use that may be inevitable, for the time being, such as implied by reservation of certain services, e.g. voice telephony".*

As described in the previous Chapter, one of the ten *Proposed Positions* put forward in this document, specifically describes the ONP's role as follows:

"Proposed Position E

Clear definition by Community Directive of general requirements imposed by Telecommunications Administrations on providers of competitive services for use of the network, including definitions regarding network infrastructure provision.

This must include clear interconnect and access obligations by Telecommunications Administrations for trans-frontier service providers in order to prevent Treaty infringements.

Consensus must be achieved on standards, frequencies and tariff principles, in order to agree on the general conditions imposed for service provision in the competitive sector. Details of this Directive on Open Network Provision (ONP) should be prepared in consultation with the Member States, the Telecommunications Administrations and the other parties concerned, in the framework of the Senior Officials Group on Telecommunications (SOG-T)."

This point is vital in order to understand the origin of the ONP. In accordance with this text, the Telecommunications Administrations would be responsible for imposing the technical and economic conditions on new value-added service providers through the ONP regulations.

Within this context, it is understandable why, at first, the Commission asked the SOG-T to draft the proposals that would create a Directive for the regulation of the application of the ONP principle. The

²²⁷ COM(87) 290. Towards a Dynamic European Economy, Green Paper on the development of the common market for telecommunications services and equipment. Brussels, 30 June 1987.

SOG-T entrusted this task to its Analysis and Forecasting Group (GAP) as explained in the Commission's Green Paper.

Later on, this Chapter describes how, when the Commission took control over the development of ONP, it clearly dispensed with the services of the SOG-T and its Analysis and Forecasting Group – GAP.

2.3.- The Activities of the Analysis and Forecasting Group.

The SOG-T's Analysis and Forecasting Group – GAP met during the second half of 1987 to draft the basic principles of the ONP, in accordance with the proposal of the Green Paper. The GAP drafted a document²²⁸ dated 20th January 1988, which outlined its preliminary activities and of which the following paragraphs are worth highlighting.

In this document, the GAP defines the ONP concept as follows:

"Open Network Provision is a concept that was developed with the aim of creating within the European Union (EU) a mechanism by which the network infrastructure, in the form of a number of switched services and non-switched transport services could be offered by PTOs to users and competitive Service Providers. ONP is intended to maximize the utilization of the network and to stimulate new market opportunities in the range of non-reserved services.

ONP is the mechanism:

- *to stimulate the development of non-reserved services, provided both by the PTOs and by competitive Service Providers.*
- *to promote fair competition between PTOs and Service Providers in the market of non reserved services.*

ONP has been elaborated in such a way that erosion of the position of the PTOs in the overall market place is avoided".

The last paragraph clearly points to the intended future objectives of ONP.

As regards ONP's contents, the GAP established three different categories:

- Technical Interfaces.
- Conditions for Use.
- Tariff Principles.

The purpose of including Technical Interfaces as one of the basic issues of the ONP's contents was to introduce, through a consensus, the use of European Telecommunications Standards within the Community's telecommunications networks.

The Conditions for Use described the commitments that affected network operators and the operators of services regulated by ONP, such as date of delivery of lines, duration of contracts, quality of the service and maintenance, among others. Likewise, these conditions mentioned the commitments with certain network users, such as capacity reselling conditions, shared use conditions, third-party use conditions, etc.

²²⁸ GAP. (SOG-T). GAP Report on Open Network provision (ONP) in the Community. Brussels, 20 January 1988.

Finally, Tariff Principles were focused on helping private telecommunications operators add a true value to the basic services offered by the Telecommunications Administrations. The method proposed for such actions involved tariffs being calculated in line with actual costs, so as to reduce the reselling incentives of basic services.

As regards the development of ONP, the GAP proposed the definition of its application to these fields:

- Access to dedicated lines (leased lines).
- Access to Public Packet Switching Networks.
- Access to ISDN.

Similarly, the GAP proposed to the Commission that this process be carried out in close collaboration with the Committees of the CEPT and the recently created European Telecommunications Standard Institute – ETSI. Moreover, the GAP regarded it as vital that Telecommunications Administrations, Users, Private Service Operators and the Industry take part in this process.

What can be gathered from the document is that the Analysis and Forecasting Group was trying to protect the position of Telecommunications Administrations vis-à-vis new operators. The GAP continued its work until the start of 1989, while the Commission built up solid arguments for taking control of the situation.

2.4.- Report on the start-up of the Green Paper, February 1998 and the Council Resolution, June 1988.

The outcome of the Green Paper consultation prompted the Commission to send a Communication to the Council on 8th February, 1988, titled "Towards a competitive community-wide telecommunications market. Implementing the Green Paper"²²⁹, which proposed an action programme that included all the proposals set out in the Green Paper. In this document, the Commission adopted the same lines of action described in the Green Paper, with no sort of amendments.

The Commission underscored the main objectives of ONP and mentioned that:

"The GAP has started to define the general approach to the concept".

During this time, the Commission waited for the Council to invite it to continue with its initiatives.

On 30th June, 1988, the Council published a Resolution in which it gave its general support to the programme proposed by the Commission for the development of the Green Paper²³⁰.

The Council's Resolution addressed the Commission as follows:

"GIVES ITS GENERAL SUPPORT:

To the objectives of the action programme set out in the communication of 9 February..... while safeguarding the public service goals of telecommunications administrations

And, addressing ONP, it stated the following :

²²⁹ COM(88) 48. Towards a competitive community-wide telecommunications market in 1992. Implementing the green paper on the development of the common market for telecommunications services and equipment; state of discussions and proposals by the Commission. Brussels 8 February 1988.

²³⁰ Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992. OJ C 257. 4 October 1988. P. 1

Rapid definition, by Council directives, of technical conditions, usage conditions and tariff principles for Open Network Provision,, is of crucial importance and closely linked with the creation of an open common market for non-reserved telecommunications services."

2.5.- The Commission's Communication on progress in the definition of ONP, December 1988.

From then on, the Commission would again take the initiative and on 13th December 1988 it sent the Council a Communication²³¹ called "Progress in the definition of Open Network Provision", which reawakened the process for the definition of ONP, as described next.

The analysis of this Communication is very interesting and highly illustrative. Judging by its contents, it seems that the Commission was trying to take on an unprecedented role, as depicted on the following paragraphs.

In this document, the Commission said that:

"Open Network Provision is therefore central to the implementation (of the Green Paper on) the development of the Common Market for Telecommunications Services."

The section where the Commission went over the evolution of the ONP concept after the publication of the Green Paper stated the following:

"In order to ensure rapid progress with the development of ONP, the SOG-T assigned the task of making proposals for the definition and development of and the development of principles for ONP to its sub-group GAP".

In line with the proposals in COM(88) 48, the GAP work was to concentrate on those issues which are most critical to the providers of value-added services in an open market environment.

The resultant GAP report was adopted by SOG-T on April 13th, 1988. It established a reference framework for Open Network Provision"

However, there was a chronological problem that must be highlighted. The date of publication of Communication COM(88) 48, which described how the contents of the Green Paper were put into practice, was 8th February 1988, while the GAP had dated its report 20th January 1988. The GAP's activities could never have been a consequence of the Commission's proposal, since they were carried out on their *own initiative* when the Green Paper was published. To cover up for this minor slip, the Commission dated the GAP report 13th April 1988, the day it was approved by the SOG-T, so the sequence of events is coherent, although not very convincing.

In this document, the Commission outlined the GAP's proposals on the possible future contents of ONP, but gave its own opinion about all the operating proposals regarding the ONP development process. Likewise, the Commission did not address the proposal of integrating the CEPT in the ONP definition process.

Similarly, the Commission asked the GAP to continue working on defining the scope of application of ONP in the following areas: Public packet switching network services and ISDN. The Commission did

²³¹ COM(88) 718. Telecommunications: progress on the definition of open network provision (ONP) - Short status report. Brussels 13 December 1988.

not ask the GAP to study the application of ONP to Leased lines, mentioning that it would draft a specific Directive itself, as appointed by the Council.

Even though the GAP was not asked to do so by the Commission, it did draft its own Proposal on the Application of ONP to Dedicated Lines (leased lines)²³², also presenting its Proposal for the Application of ONP to Public Data Networks²³³; The GAP did not have enough time to present its Proposal for the Application of ONP to ISDN lines that the Commission asked for, because it would soon be replaced by the ONP Committee.

If one interprets the contents of this document, the Commission clearly intended to control the ONP definition process. The Commission made no attempt to hide its discomfort with the presence and participation of the GAP in this process, which it considered its own.

With the backing of the new ONP Committee, the Commission entrusted a consulting firm with the task of preparing a study on the application of ONP to ISDN. From then on, the Commission was to entrust similar studies on the application of ONP to external consultancies.

On 15th December 1988, two days after the presentation of the said document, the Commission issued a Press Release²³⁴ in which it announced its intentions to proceed with the preparation of a proposal for a Council Directive on ONP, as well as announcing that it would adopt a Commission Directive to open Value Added Services up to competition.

Days later, just after Christmas, on 5th January 1989, the Commission would present the first proposal for a Directive on ONP²³⁵ and a second proposal on 1st August²³⁶.

By then, the Commission had already got its own way.

2.6.- The Council's "Political Agreement", December 1989.

As it had announced at the end of 1988, the Commission had adopted, though not published, a Directive on the liberalisation of services, in accordance with Article 90.3 (currently art. 106.3) of the Treaty. Likewise, the Commission had presented to the Council a proposal for a Directive on the harmonisation of conditions of access to telecommunications networks and the definition of ONP.

Two legislative instruments that would deal with two complementary aspects of the telecommunications sector: liberalisation and harmonisation. Finally, the Commission and Council reached an agreement on how to carry out this process, including their respective roles. This information is also mentioned in the previous Chapter.

On 7th December 1989, during a session of the Council of Ministers, the publication of both Directives was approved. The text of the Press Release²³⁷ published by the Council after the meeting reads as follows:

²³² GAP (SOG-T). Proposal of the GAP regarding the Open Network Provision (ONP) on leased lines in the Community. Brussels 1 January 1990.

²³³ GAP (SOG-T). Proposal of the GAP regarding the Open Network provision (ONP) on public data networks of the Community. Brussels 24 January 1990.

²³⁴ Press release of the Commission P-147. The Commission adopts two important decisions on telecommunications. Brussels 15 December 1988.

²³⁵ COM(88) 825. Proposal for a Council Directive on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP). Brussels 5 January 1989. OJ C 39. 16 February 1989. P. 8.

²³⁶ COM(89) 325. Revised proposal for a Council Directive on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP). Brussels, 1 August 1989. OJ C 236. 14 September 1989. P. 5

²³⁷ Press release n° 10479/89. Council of Ministers Telecommunications. Development of the internal market of the telecommunications services. Brussels 7 December 1989.

"The Council, after discussing the basis of a draft global commitment of Presidency on the liberalisation of telecommunications services and the provision of an open telecommunications network, has reached a political agreement about a common position on the proposal for a Directive on open network provision in the Community (ONP). In doing so, the Council has taken a decisive step towards the establishment of an open telecommunications market.

With regard to the first of the matters mentioned, it has been recalled that the Commission has adopted a Directive under article 90.3 of the Treaty, on competition in the telecommunication services markets."

This meeting is usually presented as the one where a "political agreement" was reached on how to achieve the liberalisation and harmonisation of telecommunications services.

The fact is that this decision was very important since it clearly marked the limits for the role of each Institution during the transformation of the sector: The Commission would be in charge of the Liberalisation process and, whenever it deemed it necessary, apply Article 90.3 (currently art. 106.3) of the Treaty, while the Council would be in charge of the Harmonisation of the laws of Member States within the ONP framework.

Finally, the two Directives appeared in a single issue of the Official Journal of the European Community on 27th July 1990, dated as having been adopted on 28th June, yet neither made any reference to the other, which is quite surprising.

2.7.- The ONP Framework Council Directive 90/387, June 1990.

In accordance with the Commission's proposals, on 28th June 1990, the Council adopted Directive 90/387/EEC on the establishment of the internal market for telecommunications services through the implementation of open network provision²³⁸, otherwise known as the ONP Framework Directive.

The same day, the Commission adopted Directive 90/388/EC on the competition in the markets for telecommunications services, known as the Service Directive²³⁹.

This section summarises the highlights of the ONP Framework Directive.

Article 1 clearly defined the objectives of the Directive, in the following terms:

Article 1

1. This Directive concerns the harmonization of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services

Article 2 defined the terms used in the document.

10. 'open network provision conditions' means the conditions, harmonized according to the provisions of this Directive, which concern the open and efficient access to public

²³⁸ Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision. OJ L 192. 24 July 1990. P. 1.

²³⁹ Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services. OJ L 192. 24 July 1990. P. 10.

telecommunications networks and, where applicable, public telecommunications services and the efficient use of those networks and services.

Article 3 mentioned the conditions to be met by Open Network Provision. It also established that:

2. *Open network provision conditions must not restrict access to public telecommunications networks or public telecommunications services, except for reasons based on essential requirements, within the framework of Community law,*
3. *Open network provision conditions may not allow for any additional restrictions on the use of the public telecommunications networks and/or public telecommunications services except the restrictions which may be derived from the exercise of special or exclusive rights granted by Member States and which are compatible with Community law.*

Article 4 established the stages for the definition of the conditions of Open Network Provision and the work programme. This Article refers to Annexes 1, 2, and 3 of the Directive.

Article 5 referred to the standardisation process in the following terms:

1. *Reference to European standards drawn up as a basis for harmonized technical interfaces and/or service features for open network provision according to Article 4 (4) (c) shall be published in the Official Journal of the European Communities as suitable for open network provision.*

Article 6 established that specific directives would be adopted for the application of the open network provision conditions, drafted in accordance with the standard procedures.

Article 7, albeit not very clearly, referred to the mutual recognition of licenses by Member States for the provision of telecommunications services. Its text included the following sentence:

The Council, acting in accordance with Article 100a of the Treaty, taking Article 8c of the Treaty into consideration, shall, where required, adopt measures for harmonizing declaration and/or licensing procedures for the provision of services via public telecommunications networks, with a view to establishing conditions in which there would be mutual recognition of declaration and/or licensing procedures.

Article 8 read as follows:

During 1992 the Council, on the basis of a report which the Commission shall submit to the European Parliament and the Council, shall review progress on harmonization and any restrictions on access to telecommunications networks and services still remaining, the effects of those restrictions on the operation of the internal telecommunications market, and measures which could be taken to remove those restrictions, in conformity with Community law, taking account of technological development and in accordance with the procedure provided for under Article 100b of the Treaty

Articles 9 and 10 mentioned the creation and running of an Advisory Committee for the development of ONP:

Article 9

1. The Commission shall be assisted by a committee of an advisory nature composed of the representatives of the Member States and chaired by the representative of the Commission.

The committee shall, in particular, consult the representatives of the telecommunications organizations, the users, the consumers, the manufacturers and the service providers. It shall lay down its rules of procedure.

Articles 11 and 12 referred to the actions to be taken by the Member States for the application of the Directive, establishing 11th January 1991 as the deadline for the transposition by Member States.

The text in the Directive included three Annexes with the following titles:

Annex I: Areas for which open network provision conditions may be drawn up.

Annex II: Reference framework for drawing up proposals on open network provision conditions.

Annex III: Guidelines for implementation of the framework Directive up to 31 December 1992.

2.8.- The development of the ONP Framework Directive.

Article 4 of the ONP Framework Directive indicated the path for the application of the Open Network Provision concepts.

Firstly, the sectors of application of the ONP concepts were established, as shown in Annex 1 of the Directive. The sectors included the following:

- Leased lines.
- Data transmission services through packet switching networks and circuits.
- Integrated Services Digital Network, ISDN.
- Voice telephony services.
- Telex services.
- Mobile services.

and, subsequently:

- New network services and access to the new network intelligence functions.
- Access to the broadband network.

Secondly, the Commission was ordered to draft an annual work programme with the activities to be carried out in collaboration with the ONP Committee created in article 9 of the Directive.

Thirdly, the method for tackling the application of ONP principles to each sector was mentioned, as described next.

- Specific sector analysis.

- Drafting of a study by an independent organisation.
- Discussion by the ONP Committee.
- Drafting of a proposal by the Commission.
- Further consultation of the ONP Committee.
- Drafting of a proposal for the adoption of a measure by the Council.

Annex 3 established a work calendar until 31st December 1992, which basically involved the following:

- Adoption of Directives on Leased Lines and Voice Telephony.
- Adoption by the Council, before 1st July 1991, of a Recommendation on the application of ONP principles to packet and circuit switched data transmission services.
- Adoption by the Council, before 1st July 1992, of a recommendation on the application of the ONP principles to ISDN.
- Study during 1992, with a view to the adoption of a Directive on the application of ONP to packet and circuit switched data transmission services.
- Subsequent study of a proposal for a Directive on the application of ONP to ISDN.

Finally, article 7 of the ONP Framework Directive gave the Council the authority to adopt measures for the harmonisation of procedures for authorising the provision of services over public telecommunications networks, in other words, it permitted the adoption of measures for regulating the licensing of new telecommunications operators.

2.9.- The Work Programme of the ONP Committee for 1991, 1992 and 1993.

In December 1990, the Commission published the ONP Work Programme for 1991, in accordance with the indications of the Directive²⁴⁰. This programme provided further information about the contents of Annex 3 of the ONP Framework Directive and mentioned the method required to start the activities for the development of the actions.

During 1991, the actions were carried out, which mainly involved the following:

- The publication of a proposal for a Council Directive on Leased Lines.
- The publication of a proposal for a Council Recommendation on the application of ONP to packet-switched data transmission networks.
- The preparation of a draft proposal on a Council Recommendation for the application of ONP to ISDN.
- The drafting of an Analysis Report on the application of ONP to Voice Telephony.
- The drafting of a proposal for a Directive on the establishment of a single European license for telecommunications operators, in accordance with the information included in Article 7 of the ONP Framework Directive.

²⁴⁰ ONPCOM 90-24 bis. Open Network Provision. Work Programme for 1991 for the development of ONP conditions. Brussels, 19 December 1990

Subsequently, in December 1991, the ONP Work Programme for 1992 was published, as indicated in the Directive²⁴¹.

This document included the state of progress of the work carried out during 1991. Likewise, the document described the status of the studies requested by the Commission and which were scheduled for completion in 1992, as well as the studies that it planned to commission that year.

The main activities carried out during 1992 were as follows:

- Adoption of a Council Directive on the application of ONP to Leased Lines²⁴².
- Adoption of the Council Recommendation on the harmonised provision of a minimum set of packet-switched data transmission services, in accordance with the principles of open network provision²⁴³.
- Adoption of a Council Resolution on the provision of harmonized integrated services digital network access arrangements and a minimum set of ISDN offerings in accordance with open network provision principles²⁴⁴.
- Publication of a Proposal for a Directive on the application of ONP to Voice Telephony. This Directive would not be adopted until December 1995²⁴⁵.
- Drafting of a Proposal for a Directive on the Single Community License.

Also worth pointing out is that, during 1992, the Commission started the status review process, as indicated in article 8 of the ONP Framework Directive, as well as its review of the sector liberalisation process, in accordance with the article 10 of the Service Directive. The consequences of the conclusions of this review would not start to be felt until 1994.

The next sections take a brief look at the development and contents of the Directive on the application of ONP to Leased Lines and Voice Telephony and the Recommendations on ONP in Data Networks and ISDN.

Finally, in December 1992, the ONP Work Programme for 1993 was published²⁴⁶.

This document included all information about the state of progress of the work carried out during 1992, the status of the studies requested by the Commission and which were scheduled for completion in 1993, as well as the studies that it planned to commission that year.

The main activities carried out during 1993 were the following:

- Analysis of the level of application by Member States of the ONP regulations already adopted (leased lines, Packet networks and ISDN), which were scheduled to enter into force before June 1993.
- Analysis of the essential telecommunications requirements and their relation with ONP.

²⁴¹ ONPCOM 91-77. Open Network Provision. Work Programme for 1992. Commission of the European Communities. DG XIII. Brussels, 10 December, 1991

²⁴² Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines. OJ L 165. 19 June 1992. P 27

²⁴³ Council Recommendation 92/382/EEC: of 5 June 1992 on the harmonized provision of a minimum set of packet-switched data services (PSDS) in accordance with open network provision (ONP) principles. OJ L 200. 18 July 1992. P. 1

²⁴⁴ Council Recommendation 92/383/EEC of 5 June 1992 on the provision of harmonized integrated services digital network (ISDN) access arrangements and a minimum set of ISDN offerings in accordance with open network provision (ONP) principles. OJ L 200. 18 July 1992. P. 10

²⁴⁵ Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony. OJ L 321. 30 December 1995. P. 6.

²⁴⁶ ONPCOM 92-55 ONP. 1993 Work Programme. Commission of the European Communities. DG XIII. Brussels, 3 December, 1992

- Analysis of the consequences of the liberalisation revision process and its consequences on the harmonisation process and ONP.
- Evolution of ONP in relation to the Green Paper on mobile telecommunications.
- Drafting and publication of the list of ONP reference standards.

2.10.- Comments on the development of ONP during the 1987 strategy.

The ONP concept was formulated and started to be developed was started during the period in which the 1987 strategy was executed. As already explained in the previous sections, this process was clearly marked by the stabilisation of the instruments that would be involved in shaping Telecommunications Policy in the Community.

In June 1987, the sector was controlled by the so-called *Telecommunications Administrations*, acting as telecommunications operators in each of the Member States under a monopolistic regime. The harmonisation process seemed inevitable due to the application of Community Law. To an extent, it was a sort of mechanism for regulating “fair play” between the operators when they began competing with one another to provide value added services, mostly of a trans-frontier nature.

One could say that, instead of being a mechanism to allow the Telecommunications Administrations to control access by new operators to the telecommunications services market, ONP became an instrument that the Commission used to try to prevent the Telecommunications Administrations from controlling access by new operators to the market for such services.

Throughout this period, the ONP name and acronym remained unchanged, although its contents did change.

3.- DEVELOPMENT OF THE ONP FRAMEWORK DIRECTIVE.

As stated above, when the ONP Framework Directive had been adopted, the Commission proceeded to apply it to certain services, as indicated in Annex I of the Directive.

This section provides an in-depth analysis both of the drafting process and the contents of the regulations adopted to apply ONP to the following services:

- Leased lines.
- Data transmission services through Packet Switching Networks
- Integrated Services Digital Network, ISDN.
- Voice telephony services.

3.1.- Directive on the application of ONP to Leased Lines, June 1992.

The first type of services to which ONP conditions were applied were Leased Lines, through the adoption of a Directive²⁴⁷ in June 1992.

The reason for this decision was the strategic interest of leased lines vis-à-vis the development of two types of networks and services:

- Private voice or data networks.
- Value Added Services, in particular, packet-switched data transmission services.

In other words, networks and services that, under Community regulations, could be managed and offered by entities other than the Telecommunications Organisations, for both for private use and operation as a competitive service.

Furthermore, the Directive laid down the conditions under which the use of telecommunications lines could be leased for the establishment of such networks and services, both in the different States and throughout the Community.

The fact is that the characteristics and requirements in either case matched in many aspects, although there were some substantial differences, as explained next.

On the one hand, in the case of the use of leased lines for the establishment of Private Networks, the interest in applying the ONP philosophy lay mainly in the establishment of conditions regarding the availability of such lines, including the definition of their technical characteristics, quality and, evidently, the tariff criteria. Clearly, the Directive broadly addressed these aspects.

On the other hand, the use of leased lines to provide Value-Added Services also brought into play certain competition-related issues. The aim was to define the method for ensuring equal opportunities for all players in the operation of such services, both for the Telecommunications Organisations, which owned the lines, and the third party companies that leased them. The Directive did not solve this issue properly, because it did not even address it directly.

Part of the Directive on Leased Lines was drafted at the same time as the DG XIII consolidated its position and its Telecommunications Policy vis-à-vis the Member States and their Telecommunications Administrations.

The first document on the application of ONP to leased lines was drafted and presented by the Analysis and Forecasting Group – GAP of the SOG-T in January 1989²⁴⁸, quite a long time before the ONP Framework Directive was adopted in June 1990. After the pertinent consultation procedure, this document served as the basis for the Commission to draft a proposal for a Directive published in February 1991.

After making a few, yet major amendments to the proposal, the Council adopted Directive 92/44/EC in June 1992, ordering Member States to adopt the measures necessary to comply with it before June 1993.

It is worth spotlighting some of the aspects that were included in the Commission's proposal for the Directive, but which were not included in the text that was finally adopted by the Council. Doing so

²⁴⁷ Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines. OJ L 165. 19 June 1992. P. 27

²⁴⁸ GAP (SOG-T). Proposal of the GAP regarding the Open Network Provision (ONP) on the leased lines in the Community. Brussels 11 January 1990.

will illustrate the aforementioned discrepancies regarding the method of ensuring free competition and equal opportunities in the use of telecommunications lines.

In the proposal for a Directive drafted by the Commission in February 1991²⁴⁹ the problem involved in regulating competition was addressed as explained below.

Firstly, article 2 defined "Equivalent Transmission Capacity" and "Competitive Services", as follows:

"Equivalent Transmission Capacity: the transmission capacity equivalent to the leased lines that a telecommunications organisation uses for the provision of competitive services, and that it does not supply to other users".

"Competitive Services: any services for which special or exclusive rights have not or cannot be granted, pursuant to the Community law"

Secondly, article 3 included the following paragraph:

" Member States shall ensure that information... concerning the equivalent transmission capacity that the telecommunications organisations use for the provision of their competitive services. Member States shall make this information available to the Commission, if asked to do so".

None of these references were included in the Directive adopted by the Council, so one supposes that it decided that the problem of regulating competition in the provision of liberalised services between Telecommunications Bodies and its future competitors would be addressed later on.

3.2.- Comments on the ONP Directive on Leased Lines

This section summarises the highlights of Directive 92/44²⁵⁰, on the application of open network provision to leased lines, which was finally approved in June 1992.

Article 1 of the Directive article defined the scope of application in the following terms:

Article 1

Scope This Directive concerns the harmonization of conditions for open and efficient access to and use of the leased lines provided to users on public telecommunications networks, and the availability throughout the Community of a minimum set of leased lines with harmonized technical characteristics

The next articles indicated the type of information that would have to be offered to users, mentioning the characteristics and conditions for use of the said lines, indicating that tariffs would have to be set in line with costs.

Article 6 said that:

²⁴⁹ COM(91) 30. Proposal for a Council Directive on the application of open network provision to leased lines. Brussels 14 February 1991. OJ C 58. 7 March 1991. P. 10

²⁵⁰ Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines. OJ L 165. 19 June 1992. P. 27

Article 6

Access conditions, usage conditions and essential requirements 1. Without prejudice to Articles 2 and 3 of Directive 90/388/EEC, Member States shall ensure that when access to and usage of leased lines is restricted, these restrictions are aimed only at ensuring compliance with the essential requirements, compatible with Community law, and are imposed by the national regulatory authorities through regulatory means.

No technical restrictions shall be introduced or maintained for the intercommunication of leased lines and public telecommunications networks

As regards the type of lines, the Directive established that the Member States had to ensure that telecommunications organisations supplied the following:

- Ordinary quality broadband voice lines.
- Special quality voice lines.
- Digital 64 Kbit/s lines.
- Non-structured digital 2.048 Kbit/s lines.
- Structured digital 2.048 Kbit/s lines.

This Directive led to the first practical application of the ONP concept to a telecommunications service. In accordance with the document's provisions, the Member States had to transpose the contents of this Directive into their own legislation before 5th June, 1993.

Later on, following the Directive's instructions, the Commission published different additional texts on the application of this Directive²⁵¹. With the advent of full competition the Directive had to be amended, as is explained later on in this Chapter.

3.3.- The Council's Recommendation on the application of ONP to packet switching data transmission services.

The second sector where the ONP principles were to be applied was the packet switching data transmission services sector.

In this case, the situation was completely different to leased lines, as explained next.

Packet switching data transmission services had been operated as a monopoly since they were launched at the start of the 80's, and had then started to be regarded as Value Added Services and, as a consequence, could be operated on a competitive basis.

In our opinion, the Commission sought two goals in applying ONP principles to these services.

On the one hand, it was trying to harmonise, throughout Europe, a set of basic characteristics of services that already existed, but which presented important differences in each of the Member States. Thus, it was a considerable *ex post* effort, although it was not effective enough.

On the other hand, it wanted any new services that appeared in the Member States, as a result of the market being opened up to competition, to have a guaranteed minimum set of specifications so as to

²⁵¹ Telecommunications: open network provision for leased lines. OJ C 277, 15 October 1993. P. 4

make them compatible with those already installed, which used protocol X-25²⁵², in the interests of future users.

It was decided to apply the ONP conditions to these services via a Council Recommendation, which is not binding, leaving it up to Member States to make the final decision about applying them.

The GAP conducted a preliminary analysis on the application of ONP to public data networks, and presented its report in January 1990²⁵³, before the date on which the ONP Framework Directive was adopted.

Meanwhile, in December 1990, in line with the provisions of Article 5 and Annex 1 of the Framework Directive, the Commission published a list of basic technical standards applicable to Public Packet Switching Networks and the Digital Services Integrated Network²⁵⁴.

Later on, in June 1991, the Commission presented a proposal for a Recommendation on the harmonized provision of a minimum set of packet switching data services in accordance with open network provision principles²⁵⁵.

Based on this proposal, which it hardly amended, the Council published a Recommendation with the same title²⁵⁶, a year later, at the same time as the publication of the Leased Lines Directive.

As is well-known, the cooperation of the European Parliament or an opinion from the Economic and Social Committee are mandatory when a Directive is being drafted, yet are not required when it is a Recommendation that is being drafted.

Essentially, in its Recommendation the Council recommended that the Member States adopt the measures necessary to ensure the provision of a minimum set of packet switching data transmission services, with a series of harmonised technical specifications which were described in the document. It also recommended that the Commission deal with adapting the contents of such services to technical advances, and asked Member States to adopt measures to ensure that the information about the characteristics of these services was published.

3.4.- Comments about the Recommendation on ONP in packet switching data transmission services

Certain comments should be made about the application of ONP to Packet Switching Data Transmission Services.

First it is worth looking at the definition. Until the publication of the ONP Framework Directive, the term “Data Networks” was used and after then, the term “Data Transmission Services”, which had more to do with the real situation, was used.

²⁵² Alabau, A., Riera, J.. *Teleinformática y Redes de ordenadores*. Ed. Marcombo. Barcelona. 1984

²⁵³ GAP (SOG-T). Proposal of the GAP regarding the Open Network provision (ONP) on public data networks of the Community. Brussels 24 January 1990.

²⁵⁴ List of standards on Packet switching public data networks and ISDN. OJ C 327, 29 Dec GAP (SOG-T). Proposal of the GAP regarding the Open Network provision (ONP) on public data networks of the Community. Brussels 24 January 1990 - December 1990. P. 19

²⁵⁵ COM(91) 208 Proposal for a Council Recommendation on the harmonized provision of a minimum set of packet-switched data services in accordance with open network provision (ONP) principles final. Brussels, 7 June 1991.

²⁵⁶ Council Recommendation 92/382 of 5 June 1992 on the application of open network provision to public packet switched data services. OJ L 200. 18 July 1991. P. 1

Under Directive 90/388/EC, Data transmission services were subject to the rules of free competition, making it possible to offer services other than those usually provided by traditional telecommunications organisations.

This sparked a controversy as to whether or not ONP conditions should be applied to the services offered on a competitive basis²⁵⁷. The objective of harmonising these services through the establishment of ONP conditions was perfectly compatible with this situation.

Yet a certain part of the sector was firmly opposed to any harmonising measure, which it regarded as another regulatory action and, therefore, a threat to free competition.

Under these circumstances, the Commission chose to publish the ONP conditions for the packet switching data transmission services, as a Recommendation, instead of a Directive, as in the case of Leased lines.

Given the voluntary nature of a Recommendation, it would be up to the Administrations of the Member States to demand compliance with such requirements when they granted licenses to operate such services.

3.5.- The Council's Recommendation on the application of ONP to the Integrated Services Digital Network

The situation of the Integrated Services Digital Network was also completely different to the other cases. It should be noted that community literature always refers to ISDN in the singular form.

In our opinion, this is not a mere coincidence, but rather the expression of the firm intentions to develop the Integrated Services Digital Network as a European telecommunications infrastructure, as stated by the Council.

Given that ISDN had only been implemented relatively recently, the Commission decided to unify its characteristics in the Member States as soon as possible. This was a clear case in which ONP conditions ought to be adopted so as to avoid differences from arising in a newly implemented service, in line with the spirit of the telecommunications strategies of the 80's, analysed in Chapter 3.

The solution was to talk about Euro-ISDN and hope that the solutions implemented by Member States would migrate, as soon as possible, towards this harmonised European Network.

Despite its importance, the situation was highly complex, partly due to the slowness in drafting European standards on Euro-ISDN and the different degree of implementation in the Member States.

In these circumstances for defining the ONP conditions in ISDN, it would have been very hard to have adopted a Directive, so it was preferred to publish a Council Recommendation.

Therefore, two mechanisms were used: first, the Council adopted a Recommendation that established the ONP conditions applicable to ISDN, which will be explained later on and, at the same time, the Council approved a Resolution that invited all parties involved to take part in the process of creating the Euro-ISDN²⁵⁸.

²⁵⁷ Wheeler J.M. Key issues in Europe's Open Network Provision. The case of German VANS providers. Telecommunication Policy. January-February 1992, P. 80

²⁵⁸ Council Resolution of 5 June 1992 on the development of the integrated services digital network (ISDN) in the Community as a European-wide telecommunications infrastructure for 1993 and beyond. OJ C 158. 25 June 1992. P 1

Ever since it had started drawing up its Telecommunications Policy, the European Union had viewed the implementation of ISDN in Europe as a crucial moment for the creation of a European Communications Network, and since 1986 the Council had adopted many Recommendations and Resolutions in this regard.

The fact is that the activities of the Member States' Telecommunications Organisations, the lack of European ISDN standards and the offers of the different telecommunications equipment manufacturers, had had a negative bearing on the initial plan of creating an effective Euro-ISDN.

Following the adoption of an ONP Framework Directive, the Commission, which no longer had to rely on the SOG-T's Analysis and Forecasting Group (GAP), began to examine this matter²⁵⁹ with the support of the ONP Committee and asked a consultancy to prepare a report on the application of ONP to the ISDN²⁶⁰.

After examining the report, in December 1991 the Commission sent the Council a proposal for a Recommendation on this matter²⁶¹.

At the same time as the publication of the other ONP-related documents, in June 1992, the Council published a Recommendation on the provision of harmonised ISDN access arrangements and a minimum set of ISDN offerings, in accordance with Open Network Provision principles²⁶².

On the same day, the Council adopted a new Resolution, inviting Member States to foster the introduction of Euro-ISDN, taking into account the application of the ONP principles recommended.

The document recommended that Member States ensure that their Telecommunications Organisations offered ISDN with harmonised access arrangements, further recommending that the Commission make the amendments required to adapt Annex I to technical progress and demand, and that Member States implement the measures required to publish all information on ISDN.

3.6.- Comments about the ONP Recommendation on the Integrated Digital Services Network

An analysis of these documents suggests that the position of the Community Institutions with regard to ISDN was not a comfortable one.

Unlike what happened with Packet Switching Data Transmission Services, in the case of ISDN, the documents always referred to a *Network* and its performance was also referred to as *Functions*.

These terms were not used by chance, and it is in that context that one should read the contents of some of the recitals of the Recommendation:

"Whereas ISDN is a means to support both services provided under special or exclusive rights and services for which no such rights may be maintained;

²⁵⁹ ONP COM(90) 23. Analysis report on the application of ONP to ISDN. Brussels, 19 December 1990

²⁶⁰ ETCO. Application of the Open Network Provision concept to the ISDN. European Telecommunications Consultancy Organization, 1991

²⁶¹ COM(91) 508 final. Proposal for a Council Recommendation on the Provision of Harmonized ISDN Access Arrangements and a Minimum Set of ISDN Functionalities in Accordance with Open Network Provision (ONP) Principles. Brussels, 13 December 1991.

²⁶² Council Recommendation of 5 June 1992 on the application of open network provision to ISDN on the provision of harmonized integrated services digital network (ISDN) access arrangements and a minimum set of ISDN offerings in accordance with open network provision (ONP) principles. OJ L 200. 18 July 1992. P. 10.

Whereas ISDN provides for the opportunity to offer voice telephony in an efficient way; whereas, therefore, the provision of voice telephony service by means of ISDN should meet the relevant requirements of ONP applied to voice telephony;

Whereas ISDN may be used to provide packet-switched data services (PSDS); whereas, therefore, the provision of data services by means of ISDN should in principle meet the relevant requirements of ONP applied to PSDS;

Whereas, pursuant to the principle of non-discrimination, access to ISDN should be available and provided on request without discrimination to all users; whereas therefore, the terms and conditions which apply to telecommunication organizations using ISDN for the provision of services for which no special or exclusive rights may be maintained should be equivalent to the terms and conditions which apply to other users;

This goes to show that the document regarded ISDN as a Network which could be used to provide different types of services, some on a monopoly basis and others in a competitive environment.

In the case of ISDN, the contents of article 4 of Commission Directive 90/388/EC, on competition in markets for telecommunications services, fully applies:

Article 4

Member States which maintain special or exclusive rights for the provision and operation of public telecommunications networks shall take the necessary measures to make the conditions governing access to the networks objective and non-discriminatory and publish them

However, the text of the Recommendation made no mention of the relations between the owner of the ISDN and the undertakings entitled to provide services on it on a competitive basis.

In this regard, it must be said that the Recommendation did not address aspects regarding the possibility of special network access arrangements similar to those mentioned in article 9 of the proposal for the Directive on voice telephony.

However, as mentioned in one of the recitals, since the network would be used to provide voice telephony services, then if a Directive was adopted to establish the ONP conditions to that service, it was to be expected that its contents would apply.

The documents published showed that the priority was to foster the creation of an Integrated Services Digital Network in Europe by the parties with the technical and economic capacity to do so, instead of imposing any kind of drawbacks that might hinder its creation.

In these circumstances, the Council Recommendation was mainly addressed to the Telecommunications Organisations, which had the technical and economic capacity to create an ISDN in Europe.

In this sense, the European Community wished to maintain a balance between the achievement of a European network of unified characteristics and the application of the principle of free competition in the operation of the services provided over the said network. Strangely enough, this would be implemented later on.

However, technological developments and the emergence of more robust technical solutions meant that ISDN became less and less important.

3.7.- The Directive ON the application of ONP to Voice Telephony.

The case of the application of ONP conditions to voice telephony is also worth highlighting.

Firstly, it was a traditional service run as a monopoly in almost all the Member States.

In this regard, when it began drafting the Directive, everyone knew that the Commission intended to abolish all or part of the voice telephony service monopolies.

Another thorny problem that had to be tackled was the issue of establishing conditions for the provision of value-added services in voice telephony services by third party undertakings, and whether or not they needed to access the network facilities in order to provide such services on an equal footing with the Telecommunications Organisations that owned the facilities.

Finally, the network on which this service could be offered was not the only network available, in particular after the appearance of ISDN services.

This, therefore, was the context in which the Commission began drafting a Directive to regulate the provision of voice telephony services.

3.8.- Comments on the Directive of ONP in Voice Telephony.

Annex I of the Framework Directive mentioned Voice Telephony as one of the sectors where the ONP principles would be implemented.

To fulfil this mandate, the Commission ordered a consulting firm to carry out a Study on the application of ONP to Voice Telephony²⁶³ and then invited the interested parties to debate and comment on the issue.

On the basis of the contents of the report and comments received, the Commission prepared a proposal for a Council Directive²⁶⁴, and unveiled it in August 1992.

In its proposal, the Commission stated that the basic objectives of the Directive were as follows:

"- the need to establish the rights of public telephone network users in their relations with telecommunication organisations;"

"- the need to open up access to the public telephone network infrastructure to service providers and other telecommunications operators (for example, mobile operators) on an equal and non-discriminatory basis;"

"- the need to meet the demands of the single market, in particular the European-wide offering of voice telephony services and the planning and coordination of pan-European numbering."

On 10th March 1993 the European Parliament approved a Resolution²⁶⁵ with thirty seven amendments to the proposal for the Directive, most of which were rejected by the Commission.

²⁶³ NERA Study of the applications of the ONP concept to voice telephony services. Brussels, July 1991

²⁶⁴ COM(92) 247 - Proposal for a Council Directive on the application of open network provision (ONP) to voice telephony. Brussels, 27 August 1992. OJ C 263. 12 October 1992. P. 20.

²⁶⁵ A3 0064/93. Report of the European Parliament on the proposal for a Council Directive on the application of open network provision (ONP) to voice telephony. Strasbourg 10 March 1993.

And on 7th May 1993 the Commission itself drafted a document²⁶⁶ which included a new proposal for a Directive, including some amendments to the original text.

Subsequently, the Commission and Council approved a Common position on the contents of the Directive²⁶⁷. The text was dated 30th June 1993 and sent to the Parliament for its second reading. The Parliament's Economic and Monetary Affairs Committee analysed the document and issued a report that re-introduced many of the amendments that had been rejected by the Commission and Council. The Parliament was scheduled to hold a final vote during the last days of October and, if it had, the Commission and Council would probably have taken no notice of the amendments and instead have adopted the Directive as they pleased.

However, the Parliament decided to postpone the vote until 19th January 1994, following the entry into force, on 1st November 1993, of the Treaty of Maastricht and, with it, the Parliament's power to make co-decisions with the Council. During the meeting, the Parliament approved a set of amendments²⁶⁸ to the text it had received, and returned them to the Commission.

Next, the Commission drafted an Opinion²⁶⁹ on the amendments submitted by the Parliament, in which it accepted some of them but again rejected the main ones. Therefore, in accordance with the procedure established in article 189B (currently Art. 294) of the Treaty, a Conciliation Committee held a series of meetings on 29th March and 26th April 1994, after which no satisfactory agreement was reached. During its meeting on 30th May 1994, the Council²⁷⁰ ratified its initial positions and rejected the Parliament's proposals²⁷¹.

Finally, on 15th July 1994, the Parliament made the Decision²⁷² to reject the proposal for a Directive on voice telephony, so the process had to begin again from scratch. It was the first time that the Parliament resorted to the prerogatives it enjoyed under the co-decision procedure, tired of the fact that neither the Commission nor the Council were paying much attention to its opinions.

One of the discrepancies that divided the European Parliament from the Council and the Commission was the so-called "*comitology*"²⁷³. The Parliament itself, in its report in which it admitted that the negotiations on this matter had finished, said the following:

"The term comitology refers to the system under which powers are delegated from the Council to the Commission, which in turn refers to management measures... and to legislative instruments...."

Very often the Commission can decide the measures to be applied, provided that an agreement has been reached by a committee formed by national officers...

Back in 1987, the Parliament opposed any kind of committee ...that is not of a consultative or management nature without having to wait for a Council Decision....The opposition of the

²⁶⁶ COM(93) 82 Amended proposal for a Council Directive on the application of open network provision (ONP) to voice telephony. Brussels, 7 May 1993. OJ C 147. 27 May 1993. P. 12

²⁶⁷ SEC(93) 69. Common position. Council Directive on the application of open network provision (ONP) to voice telephony Brussels, 30 June 1993.

²⁶⁸ European Parliament. Amendments of the second reading to the Common position of the Council and the Commission on the application of the open network provision (ONP) to voice telephony. OJ C 44. 14 February 1994.

²⁶⁹ COM(94)48. Opinion of the Commission pursuant to Article 189b(2)(d) of the EC Treaty on the European Parliament's amendments to the Council's common position regarding the proposal for a European Parliament and Council Directive on the application of open network provision (ONP) to voice telephony. Amended proposal for a Directive on the application of open network provision (ONP) to voice telephony. Brussels 1 March 1994.

²⁷⁰ Press release 94/90. Meeting n° 1760 Council of Ministers Telecommunications. 30 May 1994

²⁷¹ Letter of the President of the Council of the European Union to the President of the European Parliament. July 1994.

²⁷² A4-0001/94. Report of the European Parliament delegation to the Conciliation Committee regarding the Directive on the application of open network provision (ONP) to voice telephony. 15 July 1994.

²⁷³ Duverger, M. *L'Europe des Hommes*. Ed. Odile Jacob 1998

Parliament is justified both by the arguments of institutional equilibrium and reasons of efficiency in the decision-making process.

Since the Co-Decision procedure came into force, it has become absolutely unacceptable for the Council, one of the two branches of the legislative authority, to try to keep exclusive control of measures implementing a common decision of the Parliament and of the Council.

Therefore the Parliament calls for respect for the equilibrium between the two branches of the legislative authority, also in the field of measures implementing....”

It was clear that article 29 of the proposal for a Directive established the existence of a *regulatory committee* with the capacity to discuss regulatory issues, a matter about which the Parliament did not agree.

The rest of the contents of this Directive are not worth mentioning because in our opinion, little did the Directive matter any more in 1994. This document was first proposed in 1992, when the decision to open voice telephony to competition was still a long way off and the last discussions took place in the middle of 1994, when not had a decision been made to liberalise this service in 1998, but it was almost known that infrastructures would also be liberalised.

In this context, it made little sense to try to harmonise a one-hundred year old service through a Directive that would be short-lived, because it would have to be amended altogether when the service was opened up to competition. Everyone knew this.

Therefore the discussions about this Directive had little to do with telecommunications and even less with voice telephony. The idea was to set a precedent on the Parliament's role in the new institutional order established in Maastricht. So the Parliament saw a chance to reassert its rights, the Council was not fast enough at accepting the new rules of the game established in the Treaty and the Commission, which stood to benefit most from the comitology practices, took sides with the Council for coherence's sake, perhaps convinced that little did it matter whether or not the Directive was approved.

As expected, the process had to start from scratch. In January 1995, the Commission presented a new proposal for a Directive²⁷⁴ which, after the pertinent formalities, was adopted by the Parliament and Council, and published as Directive 95/62/EC in the Official Journal on 30th December 1995²⁷⁵. This new text included some of the amendments proposed by the Parliament but, surprisingly, the articles that referred to the committee rules of procedures and that had sparked such a controversy, remained untouched and nobody seemed to care this time!

According to the Directive, 13th December 1996 was the deadline by which the Member States had to adopt measures set forth in it, on the understanding that free competition would enter into force on 1st January 1998. At the very best, the Directive would be implemented for only one year. Clearly, voice telephony would have been operating for a century without the Directive, but it could wait for another year without it.

Not long after, in September 1996, the Commission presented the proposal for a Directive on the application of ONP to voice telephony and the universal service in a competitive environment that was soon to replace it²⁷⁶.

²⁷⁴ COM(94) 689. Proposal for a Directive on the application of open network provision (ONP) to voice telephony. OJ C 122. 18 May 1995. P. 4

²⁷⁵ Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony. OJ L 321. 30 December 1995. P. 6

²⁷⁶ COM(96) 419. Proposal for a Directive on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment - (replacing European Parliament and Council Directive 95/62/EC). OJ C 371. 9 December 1996. P. 22

3.9.- Comments on the development of ONP in the 1987 telecommunications strategy

As explained in the previous sections, throughout the 1987 strategy, the Harmonisation actions were considered almost on an equal footing to the actions oriented towards achieving the Liberalisation of the telecommunications sector. However, while the latter grew more important and attracted further support, interest in harmonisation began to wane at the same pace.

The final outcome of the harmonisation process during the 1987 strategy was the ONP Framework Directive, a Directive for the application of ONP to leased lines, two Recommendations for its application to packet switching networks and ISDN and a confrontation between the Parliament, Council and Commission over a draft Directive for the application of ONP to voice telephony. Quite a poor outcome when compared to the results of the liberalisation process.

4.- HARMONISATION IN THE DECISIONS OF 1993.

4.1.- The decisions of 1993

As scheduled, in October 1992 the Commission published²⁷⁷ a review on the situation of the telecommunications sector, following the mandate set forth in article 10 of its Service Directive and article 8 of the ONP Framework Directive.

According to the information furnished by the Commission, a broad cross-section of the different players with interests in the telecommunications sector took part in the consultation process.

On 28th April 1993, the Commission issued a Communication²⁷⁸ to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector. This document included a timetable of actions that would lead to the full liberalisation of public voice telephony services before 1st January 1998.

Barely two months after receiving the Commission's proposal, the Council of Ministers, at its meeting on 16th June 1993, adopted a preliminary Resolution, whereby it established the timetable for the liberalisation of public voice telephony services. The final text of the Resolution was adopted at a subsequent meeting held on 22nd July²⁷⁹.

4.2.- How ONP was affected by the decisions of 1993

The consultation document about the situation of the telecommunications sector hardly included any reference to ONP. However, in the document with the conclusions drawn from the consultations, the Commission proposed the following actions with regard to ONP:

- Before 1st February 1994:

²⁷⁷ SEC(92) 1048. Report 1992 on the situation of the sector of telecommunications services. Brussels, 21 October 1992.

²⁷⁸ COM(93) 159. Communication to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector. Brussels, 28 April 1993.

²⁷⁹ Council Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market. OJ C 213. 6 August 1993. P. 1

Adoption of outstanding Directives: application of ONP to Voice Telephony and mutual recognition of licenses.

- Before 1st January 1996

Amendment of the ONP framework, whenever required, in accordance with the evolution of the ONP principles.

As a result, the Council Resolution of 22nd July 1993 referred to ONP extensively, as follows:

RECOGNIZES as key factors in the development of future regulatory policy for telecommunications in the Community:

1. the application of open network provision (ONP) measures, which constitute the basis for the definition of universal service and provide an appropriate framework for interconnection, the implementation of the principle of mutual recognition of national licences and authorizations based on harmonized conditions and with an interim solution based on one stop shopping procedure, as well as the development of the policy established in the Council resolution of 19 December 1991 (4) in respect of satellite communications, in particular the adoption of measures envisaged in that framework;

As you can see, this text provides the guidelines for what would be the next change in the direction of the ONP.

4.3.- The ONP Work Programme for 1994.

In December 1993, the ONP Work Programme for 1994 was published, in accordance with the indications of the Directive²⁸⁰.

The main activities carried out during 1994 included the following:

- Drafting of proposals on the future ONP orientations within a framework of liberalised telecommunications.
- Follow-up of processes for the application of ONP legislative procedures that have already been published.
- Drafting of mandates for the ETSI for the creation of standards.

4.4.- Consultation on the studies on future areas of application of ONP, July 1994 and gathering of comments on the consultation, February 1995.

Annex 1 of the ONP Framework Directive established the sectors where the ONP concepts should be applied. Following the mandate, regulations had been adopted with regard to leased lines, ISDN and Packet Switching networks, and the application of ONP to voice telephony was being discussed.

The Commission had ordered a study on the application of ONP to Mobile Services and, in 1994, it had launched a consultation on the Green Paper on Mobile and Personal Communications published in

²⁸⁰ ONPCOM 93-60. ONP 1994 Work Programme. Commission of the European Communities. DG XIII Brussels, 10 December 1993

April²⁸¹, and in November of that same year, the Commission had published the conclusions of the consultation, which included the aspects regarding the application of ONP to these services²⁸².

The results of the consultations published by the Commission showed that competition should be introduced into these types of services immediately, instead of waiting for the liberalisation of voice telephony, scheduled for 1998. On the issue of applying ONP to mobile services, the conclusion was that the measures should be mainly applied to regulate the interconnection of mobile communications networks with all other telecommunications networks.

Similarly, in the Framework Directive of 1990, the Commission had received the mandate to extend the application of ONP to: new network services and access to the new network intelligence functions, as well as access to the broadband network. Accordingly, the Commission had also ordered studies on the application of ONP to the following sectors: intelligent network functions, network management, local loop and broadband communications, which all required some sort of decision.

In July 1994, the Commission submitted²⁸³ these aspects to consultation and presented the conclusions in February 1995²⁸⁴.

The highlights of this document's conclusions were that the Commission was no longer going to apply the old ONP principles to new networks or services, and instead devote all its efforts to amending the ONP Framework Directive and re-orientating the harmonisation process for its application within the framework of full competition in telecommunications networks and services.

At the same time, throughout 1994, the Commission drafted the new orientation of the ONP²⁸⁵, which would lead to the publication of a Communication entitled "Present status and future approach for open access to telecommunications networks and services", on 29th November 1994²⁸⁶ which would define the future approach of the harmonisation process.

4.5.- ONP Work Programme for 1995

In December 1994, the Commission published the ONP Work Programme for 1995, in accordance with the Directive's guidelines²⁸⁷.

This document openly announced the Commission's intention to carry out the following legislative reforms that would mark the future ONP approach:

- Amendment of the ONP Framework Directive for application within the framework of free competition.
- Amendment of the Directive for the application of ONP to leased lines.
- Drafting of a new Directive for the application of ONP to network interconnections.

²⁸¹ COM(94) 145. Towards the Personal Communications Environment: Green paper on a common approach in the field of mobile and personal communications in the European Union. Brussels, 27 April 1994

²⁸² COM(94) 492. Communication of the consultation on the green paper on mobile and personal communications. Brussels, 23 November 1994.

²⁸³ Open Network Provision. Analysis report on Intelligent Networks Function, Network Management, Local Loop and Broadband Communications. European Commission. DG XIII. Brussels, 7 July, 1994

²⁸⁴ Public Comments on the Open Network Provision 1994. Analysis Report on Intelligent Networks Function, Network Management, Local Loop and Broadband Communications. European Commission. DG XIII. Brussels, February, 1995

²⁸⁵ ONPCOM 94-29. Memorandum on Future Approach to Open Network Provision. European Commission. DG XIII. Brussels, 23 June, 1994

²⁸⁶ COM(94) 513. Communication from the Commission to the Council and the European Parliament - Present status and future approach for open access to telecommunications networks and services (ONP). Brussels, 29 November 1994.

²⁸⁷ ONPCOM 94-51. ONP. 1995 Work Programme. European Commission. DG XIII. Brussels, 19 December, 1994

4.6.- Comments on the development of ONP in the decisions of 1993

As already mentioned elsewhere in this book, the decisions made during 1993 were quite transitional ones and served to prepare the actions that would lead to the full liberalisation of telecommunications in the European Union. This transition had a bearing on ONP-related matters.

The ONP activities proposed in the 1987 strategy and developed in the 1990 Framework Directive were based on the fact that the Value Added Services were liberalised and the Voice Telephony and Infrastructure services were still being run as a monopoly. In this context, the ONP activities were clearly oriented towards harmonising relations between operators interested in operating the services in a competitive environment and traditional operators who continued running the network as a monopoly.

When the decisions were adopted in 1993, the Commission had completed the first stage of the task entrusted to it by the Council, which ended with the adoption of the Directive on Leased lines and the Council Recommendations on packet switching data networks and ISDN. However, the Directive on ONP in Voice Telephony had yet to be approved.

Likewise, the Council has asked the Commission to apply ONP to other areas, such as new network services and access to new network intelligence functions, as well as access to the broadband network, and the Commission had already ordered a series of studies in this regard.

In June 1993, when the Council set 1998 as the date for the liberalisation of voice telephony services, the ONP scene was starting to change. The same month, the Commission was asked to draft a Green Paper on Infrastructures by year 1995, so that a decision could be made that year as to whether or not Infrastructures should remain a monopoly or be liberalised.

Evidently, the regulatory changes in the voice telephony and infrastructures sectors would entail making certain amendments to the harmonisation principles, but it was necessary to wait for the decisions about infrastructures before reorganising the ONP conditions that might enter into force after 1998.

In any case, apart from the infrastructure-related decisions, which were expected during 1995, certain issues that had arisen from the mandates that the Commission had received from the Council in 1990, still remained to be solved.

The previous section explained how the Commission completed its commitments with the Council. The Commission decided not to draft any other proposal for the application of ONP and settled the issue by sending a set of Evaluation Technical Report (ETR) mandates to the ETSI for the definition of the technical requirements and work plans required for drafting the standards. Any application of these standards would be voluntary.

Even though the work plan was ready, the Commission's Communication that formally proposed the ONP amendment did not appear until 29th November 1994²⁸⁸, after Part One of the Green Paper on Infrastructures was published in October 1994.

²⁸⁸ COM(94) 513. Communication from the Commission to the Council and the European Parliament - Present status and future approach for open access to telecommunications networks and services (ONP). Brussels, 29 November 1994.

5.- HARMONISATION DURING ACTIONS SINCE 1995.

5.1.- Actions after 1995

As explained elsewhere, 1995 marked the start of the last stage in the process of opening up the telecommunications market, the main goal being to remove any obstacles to the liberalisation of infrastructures. It is already quite clear that opening up infrastructures to competition was a process that called for a consensus within the Community's top decision-making body, i.e., none other than the European Council.

To this end, the Commission arbitrated a mechanism that began with the publication of the White Paper on Growth, Competition and Employment in December 1993²⁸⁹, in which it broached the need to address the construction of the Information Society in Europe. This proposal prompted the European Council to decide, that same month, to ask a High Level group to draft a report on the method for achieving such objectives.

The High Level group, chaired by Commissioner Bangemann²⁹⁰ published a report in May 1994 which it addressed to the European Council and in which it made several recommendations, including that infrastructures be opened up to competition. The report also proposed a new approach to the European standardisation process.

However, the Bangemann Report only made a passing remark about ONP, as follows:

“Open systems standards will play an essential role in building a European information infrastructure”

These two statements would lead to the start of the process for the restructuring of the ETSI.

In June 1994, the Council of Europe accepted the Bangemann Report and invited the Commission to prepare an action programme to carry out the measures proposed²⁹¹.

In July 1994, the Commission published a Communication called “Europe’s way to the Information Society”,²⁹² presenting a work programme, in accordance with the mandate from the European Council. Annex II of the document titled “New Measures being considered” mentioned the following in relation to ONP:

*“- Updating ONP framework: Commission's proposal by end of 1995
- Interconnection Directive: Adoption by Commission 1995.”*

In October 1995, the Commission published the Communication²⁹³ which included Part One of the Green Paper on Infrastructures, in which it clearly announced its decision to liberalise infrastructures, in accordance with the prerogatives granted under article 90 (currently art. 106), establishing the timetable of actions for implementing the project.

²⁸⁹ COM(93) 700. Growth, competitiveness, employment - the challenges and ways forward into the 21st century - White paper. Brussels, 5 December 1993.

²⁹⁰ Europe and the Global Information Society. Recommendations to the European Council. Brussels, 26 May 1994

²⁹¹ Conclusions of the European Council. Corfu, 24-25 June 1994. European Union Bulletin, n° 6 June 1994. Pp. 7-21

²⁹² COM(94) 347. Europe's way to the information society. An Action Plan. Brussels, 18 July 1994

²⁹³ COM(94) 440. Green Paper on the liberalisation of telecommunications infrastructure and cable television networks: Part One - Principle and timetable. Brussels, 25 October 1994.

Subsequently, in January 1995, the Commission published Part Two of the Green Paper on Infrastructures²⁹⁴ starting the process for the gathering of information from the sector. This document mentioned ONP, specifically in the section on Interconnection and Interoperability issues, among others, in the following terms:

As regards public telecommunications infrastructures, the principles of Open Network Provision should be extended as far as ONP applied (), within the context of a specific Directive on Interconnection, to create a harmonised approach for public telecommunication infrastructures and to enhance interoperability of the public networks and service throughout the Union*

() Currently, ONP applies to public networks provided under exclusive or especial rights. The future scope of the application of ONP to operators will be defined in the context of the current review of ONP.*

The consultation process ended with the publication in May 1995²⁹⁵ of a Commission Communication with the timetable of actions that it was willing to carry out to complete the liberalisation process before 1998.

The Commission made the following proposals about the Harmonisation process:

“Before 1st January 1996

- Adoption of the proposal for a European Parliament and Council Directive for ONP Voice Telephony*
- Proposed amendment to Council Directives 90/387/EC (ONP Framework) and 92/44/EC (ONP on Leased Lines)*
- Proposal to the European Parliament and Council of a Directive on the application of the ONP principles to telecommunications network and public services*
- Adoption of the foregoing licensing proposals*
- Proposal for a Council Decision on the coordination of licenses in the European Union, on satellite PCS services*
- Communication to the European Parliament and Council on the development of a liberalised telecommunications environment, in particular, on the universal service*
- Communication to the European Parliament and Council on the information and service guides*

Before 1st January 1997

- Adoption of the aforesaid measures by the European Parliament and Council*

Before 1st January 1998

- Complete the implementation of the aforesaid harmonisation measures in the Member States, in accordance with the timetable adopted”*

During the meeting held on 13th June 1995²⁹⁶ the Council examined the Commission's proposal and adopted a Resolution in which, among other issues, it stressed the need to proceed to:

²⁹⁴ COM(94) 682. Green Paper on the liberalisation of telecommunications infrastructure and cable television networks – Part II - A common approach to the provision of infrastructure for telecommunications in the European Union. Brussels, 25 January 1995.

²⁹⁵ COM(95) 158. The consultation on the Green paper on the liberalisation of telecommunications infrastructure and cable television networks. Brussels, 3 May 1995.

²⁹⁶ Press release 7840/95. Session n° 1854 . Council of Ministers. Telecommunications. Luxembourg 13 June 1995

“ the adaptation of ONP measures to the future environment of competition ”

An explanation of the implementation of the proposal is described next.

5.2.- Work Programme of the ONP Committee for 1996 and 1997

As usual, at the end of 1995, the Commission published the ONP work programme for 1996²⁹⁷.

This document referred to the harmonisation process review programme mentioned in the previous sections, stating that it should be completed during 1997. Even so, the Commission announced a very tight timetable of activities with the launch of a large number of studies and the publication of standards in the Official Journal.

As far as the legislative actions for 1996 were concerned, the document mentioned the following:

- A proposal for a Directive on the Interconnection of telecommunications services and ensuring universal service and interoperability characteristics.
- A proposal for a Directive on the amendment of Directives 90/387/EC (ONP framework) and 92/44/EC (leased lines), for their adaptation to a competitive environment.

As for the Directive on the application of ONP to voice telephony, the document drafted in October 1995 referred to the imminent adoption of the said Directive, which would complete the process started in 1992. Oddly enough, it did not mention the presentation of a new proposal for a Directive for the application of ONP to voice telephony. Perhaps, the Commission preferred to finish what it had started before announcing its complete and final amendment.

As in previous years, at the end of 1996, the Commission published the ONP work programme for 1997²⁹⁸.

As usual, this document went through the activities carried out during 1996, which were as it had announced. The most important activities were as follows:

- Adoption of the Directive for the application of ONP to voice telephony, which took place in December 1995, as mentioned above.
- Presentation and discussion of the proposal for a Directive on Interconnection issues.
- Presentation and discussion of the proposal for a Directive on the amendment of the ONP Framework Directives and the leased line Directive.
- Presentation of the new Directive for the application of ONP to Voice Telephony in the free competition environment.
- Presentation of the proposal for a Directive on licensing procedures.
- Presentation of a Green Paper on a telecommunications line numbering procedure.

The fact is that the adoption of these regulations would cover almost all of the ONP development objectives listed in the 1995 telecommunications strategy.

²⁹⁷ ONPCOM 95-41. ONP 1996 Work Programme (draft). European Commission. DG XIII. Brussels, 31, October 1995

²⁹⁸ ONPCOM 96-44. ONP 1997 Work Programme. DG XIII. Brussels, 6 December 1996.

The next sections analyse the contents of the ONP Directives adopted for the harmonisation of telecommunications in a free competition environment after 1998.

5.3.- The amendment of the ONP Framework Directive and ONP Directive on Leased Lines.

On 13th November 1995, the Commission sent the Council and Parliament a proposal for a Directive²⁹⁹ amending the ONP Framework Directive 90/387/EEC and Directive 92/44/EEC on the application of ONP to leased lines.

The explanatory memorandum that preceded the Commission's proposal described how ONP had evolved since 1990, concluding with the need to modify the harmonisation conditions of the telecommunications sector and the ONP. In its best style, the Commission argued that the only thing worth keeping from the previous harmonisation process was the ONP name and even that not for long.

After it had been discussed by the Community Institutions, the Commission drafted a new proposal for this Directive³⁰⁰ which as well as including the agreed amendments to the original text³⁰¹ made substantial changes to article 8, which indicated that the European Parliament and Council should examine the Directive's effects before 31st December 1999, and allowing the Commission to propose the creation of a European Regulation Authority, depending on the results.

This Directive was discussed for almost two years and it was finally adopted in October 1997³⁰², on the eve of the liberalisation, when the new regulatory community framework was ready.

The new ONP Directive 97/51 rendered the ONP mechanisms established in the ONP Framework Directive 90/387 almost useless, since they would not be necessary in the future.

What article 8 of the Directive had to say about allowing the Commission to analyse the feasibility of creating a European Regulation Authority was one of the old ambitions that had met with head-on opposition from the Member States from the very start.

In the same Directive, the Commission made amendments to the Leased lines Directive 92/44/EC, such as extending the list of the original five types of harmonised leased lines with these new categories: structured and unstructured 34 Mbps, structured and unstructured 139 Mbps and 155 Mbps.

5.4.- The Directive on the Interconnection of telecommunications networks and Universal Service

As planned, on 19th July 1995 the Commission published a proposal for a Directive on the Interconnection of telecommunications networks, so as to ensure universal service and the interoperability through the application of ONP principles³⁰³.

²⁹⁹ COM (95) 543. Draft Proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications. Brussels, 13 November, 1995

³⁰⁰ COM(97)32. Modified proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications. Brussels, 28 May 1997.

³⁰¹ Informal Consolidated text of the ONP Framework Directive (Directive 90/387/EC - revised). European Commission. DG XIII. Brussels 10 June 1997.

³⁰² Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications. OJ L 295. 29 October 1997. P. 23.

³⁰³ COM(95) 379. Proposal for a Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). OJ C 313. 24 November 1995. P. 7

This was the first regulation of the 1995 strategy, oriented at harmonising one of the situations that had been expected to arise as a result of the appearance of new public telecommunications network operators. When free competition was implemented, it would be necessary to ensure that all these networks would operate coherently, providing a continuous and universal service, in particular in voice telephony and basic data transmission.

The European Parliament was kept very busy by the contents of this Directive, and adopted a Resolution at its first reading in February 1996. The Commission drafted a new text³⁰⁴ which was resubmitted to the approval of the Parliament, which adopted a new Resolution after a second reading, in September 1996.

Immediately afterwards, and after making the appropriate amendments, the Commission drafted a new proposal³⁰⁵ which was accepted by the Council and served as the basis for the discussions with the Parliament during the Conciliation Committee meetings. Finally, the Council and Parliament reached an agreement on the Contents of the Directive on 19th March 1997, and the two co-decision bodies finally adopted Directive 97/33/EC on 30th June 1997³⁰⁶.

The main purpose of the Directive was to regulate operators' rights and obligations with regard to the interconnection of their networks, so as to ensure their interoperability and the provision of universal service. The philosophy underlying the Directive is interconnection agreements between operators must be reached voluntarily, with the Regulatory Authorities only intervening in the event of a conflict.

As for the scope of this Directive, it was clearly limited to public networks which, according to Annex I, consisted of the following: the public telephone network, leased line services and mobile telephone networks. Thus, it would not be applied to data communications networks or the Internet.

Article 5 of the Directive specified the manner for determining the universal service costs and for establishing the criteria to be used by National Regulatory Authorities in deciding how operators should contribute to such costs.

Furthermore, article 9 of the Directive included a comprehensive description of the responsibilities and functions of National Regulatory Authorities, not only regarding interconnection issues, but also in the general in performing their role as arbitrators in ensuring that full competition developed properly.

Finally, this Directive also envisaged the possibility of a European Telecommunications Regulation Authority. It should be noted that this proposal did not appear in the Commission's first draft, partly due to the aforementioned insistence of the European Parliament.

The contents of the Directive had a major bearing on how telecommunications developed in the competitive environment.

In 1998, after the Commission had made the pertinent proposals, this Directive was extended and partly amended by the new Directive 98/61/EC³⁰⁷ which established users' right to port their telephone numbers whenever they changed operator, and urged Member States to ensure that this possibility became feasible before 2000.

³⁰⁴ COM(96) 212. Amended proposal for a Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). OJ C 178. 21 June 1996. P. 3

³⁰⁵ COM(96) 535. Amended proposal for a Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP). Brussels, 11 November 1996

³⁰⁶ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). OJ L 199. 26 July 1997. P. 32

³⁰⁷ Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection. OJ L 268. 3 October 1998. P. 37

5.5.- The Directive on Voice Telephony in a competitive environment

As already mentioned, after three and a half years of discussions Directive 95/62/EC on the application of ONP to voice telephony was adopted in December 1995, but was to be short-lived.

So as to adapt the contents of this Directive to the situation derived from free competition, in September 1996 the Commission drafted a proposal³⁰⁸. Unlike the rest of the Directive amendments, in this case, the Commission proposed a totally new text, because there were so many changes to be made.

This, together with the Interconnection one, was another of the Directives that played a key role in the harmonisation of free competition in the telecommunications sector, because voice telephony was going to be the main service offered over public telecommunications networks in the European Union. Neither the data networks nor any other type of network would be considered in the same way, and thus, be subject to any sort of harmonisation process.

In February 1997, the Parliament approved an Opinion after the first reading of the document, which included a large number of amendments regarding consumer protection, services for disabled users, universal service and the inclusion of mobile telephony within the scope of this Directive.

At its meeting on 6th March 1997, the Council³⁰⁹ adopted an agreement on the contents of this Directive accepting some of the Parliament's proposals on universal service, but outright rejecting any reference to mobile telephony. The Commission quickly used the Council's decisions to prepare a new proposal³¹⁰ which served as the basis for the text of the Common Position that was adopted on 9th June 1997³¹¹. This text was sent to the Parliament for a second reading and gave rise to another report that served as the basis for the resolution adopted by the Parliament on 17th September 1997.

Directive 98/10/EC³¹² on voice telephony was adopted in February 1998. It included 35 articles in 4 Chapters and 5 Annexes.

Chapter I clearly defined the objectives and scope of the Directive.

Chapter II referred to the universal service obligations, in keeping with the Interconnection Directive 97/33/EC.

Chapter III was much longer, and specified a set of obligations to be met by the operators of landline and mobile voice telephony services, regarding terminals, contracts, quality of service, conditions for use, billing and special services, among others.

Finally, Chapter IV regulated the procedures for the application of the Directive, which ought to be in place and ready to harmonise voice telephony after 1st January 1998, replacing the current Directive 96/62/EC after this date.

³⁰⁸ COM(96) 419. Proposal for a European Parliament and Council Directive on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment - (replacing European Parliament and Council Directive 95/62/EC). Brussels, 11 September 1996. OJ C 371. 9 December 1996. P 22.

³⁰⁹ Meeting n° 1991. Council of Ministers. Telecommunications. Voice telephony. Amendments to the ONP Directive. Brussels, 6 March 1997.

³¹⁰ (New) Proposal for the European Parliament and Council Directive on the application of ONP to voice telephony.... Draft text agreed in principle at the Telecommunication Council on 6 March 1997. Brussels, 10 March 1997.

³¹¹ Common position adopted by the Council on 9 June 1997 with a view to adopting a European Parliament and Council Directive on the application of the ONP to voice telephony and on Universal service for telecommunications in a competitive environment.

³¹² Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment. OJ L 101. 1 April 1998. P. 24

As in the case of Interconnection, the contents of the Directive were hugely important during the initial stage of the implementation of free competition in the sector.

5.6.- The Directive on the common framework for General Authorisations and Individual Licenses

Despite the fact that the regulations on granting licenses for the operation of competitive services did not constitute a direct application of ONP principles, it was indeed an essential element of the Telecommunications Harmonisation process in the European Union.

The backgrounds to the regulations on this issue are being found in article 7 of the ONP Framework Directive³¹³ which read as follows:

Article 7

The Council, acting in accordance with Article 100a of the Treaty, taking Article 8c of the Treaty into consideration, shall, where required, adopt measures for harmonizing declaration and/or licensing procedures for the provision of services via public telecommunications networks, with a view to establishing conditions in which there would be mutual recognition of declaration and/or licensing procedures.

On the basis of these regulations, in July 1992 the Commission quickly presented a proposal for a Directive³¹⁴ the title of which was highly illustrative Proposal for a Council Directive on the mutual recognition of licenses and other national authorisations to operate telecommunications services, including the establishment of a Single Community Telecommunications License and the setting up of a Community Telecommunications Committee. In this regard, one should focus on the underlined term “mutual recognition of licenses”.

After a lengthy introduction, in article 1 the Commission made its intentions quite clear:

“ Article 1.

The objective of this Directive is to achieve a common telecommunications services market through the establishment of procedures under which a serviced provider authorised to operate telecommunications services in one Member State, either by license or any other means, can provide all or part of such services throughout the Community without having to obtain individual licences or authorisations in the other States,”

Later on, in January 1994, the Commission presented another proposal on satellite communications services³¹⁵ article 1 of which was similarly worded.

One does not have to analyse it very hard to realise that what the Commission wanted to do was simply impose a single European license, making services subject to the same policy that it applied to the free movement of goods. That is why the ONP Framework Directive referred to Article 8 (currently Art. 28) of the Treaty.

³¹³ Council Directive 90/387 of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision. OJ L 192. 24 July 1990. P. 1

³¹⁴ COM(92) 254. Proposal for a Council Directive on the mutual recognition of licences and other national authorizations to operate telecommunications services, including the establishment of a Single Community Telecommunications Licence and the setting up of a Community Telecommunications Committee (CTC). Brussels 15 July 1992. OJ C 248. 1992 P. 4

³¹⁵ COM(93) 652. Proposal for a Directive on a policy for the mutual recognition of licences and other national authorisations for the provision of satellite network services and/or satellite communications services. OJ C 36. 4 February 1994. P. 2

Evidently, the Member States were not going to give way on the mutual recognition of licenses. Granting licenses for operating telecommunications services in their territory represented an area of sovereignty that they simply were not prepared to give up. This situation, which might have made sense in the case of value added services, verged on the unreasonable when the decision to liberalise voice telephony services and infrastructures was made.

Therefore, in November 1995, the Commission was forced to present a new proposal for a Directive³¹⁶ which no longer included any direct reference to the single license and focused efforts on achieving the harmonisation of the Member States' licensing procedures, which had nothing to do with the original proposal. This new text enabled a consensus to be reached about the solution.

After being formally debated by the Community Institutions in April 1997, the Directive was adopted as number 97/13/EC³¹⁷. One of the highlights is that it made a clear distinction between general authorisations for operating telecommunications services and individual licenses, further establishing that Member States should only grant individual licenses in the event of access to scarce resources, such as radioelectric frequencies and numbering, or whenever it became necessary to impose special obligations upon the operator in question, or grant it special rights. In any case, the Directive established that the provision of landline and mobile public voice telephony services would be subject to individual licenses.

The Directive also referred to the harmonisation of Member States' procedures in order to guarantee the provision of services throughout the Community. So to carry out all these tasks, the Directive created a Licensing Committee which was chaired, as usual, by the Commission.

Finally, it was agreed that the Directive would come into force before 1st January 1998, and be reviewed by 1st January 2000.

5.7.- The Privacy Protection Directive.

To complement Directive 95/46/EC³¹⁸ on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in December 1997 the Parliament and Council adopted Directive 97/66/EC³¹⁹ concerning the processing of personal data and the protection of privacy in the telecommunications sector. The history of this Directive is a long one and the proposals date back to the start of the Telecoms Liberalisation Process in 1990³²⁰ and it was debated in a long and drawn-out process³²¹.

This Directive talked about the right to the confidentiality of communications and addressed aspects liable to affect the protection of users' privacy in telecommunications services, in activities relative to itemised billing, automatic call forwarding, telephone guides and unsolicited calls.

³¹⁶ COM(95) 545. Proposal for a European Parliament and Council Directive on a common framework for general authorizations and individual licences in the field of telecommunications services. Brussels 14 November 1995. OJ C 90. 27 March 1996. P. 5

³¹⁷ 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 licences in the field of telecommunications services. OJ L 117. 7 May 1997. P. 15

³¹⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data . OJ L 281. 23 November 1995. P. 31.

³¹⁹ 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. OJ L 24. 30 January 1998. P. 1

³²⁰ COM(90) 314. Proposal for a council directive concerning the protection of personal data and privacy in the context of public digital telecommunications networks, in particular the integrated services digital network (ISDN) and public digital mobile networks. OJ C 227. 5 November 1990. P. 12.

³²¹ COM(94) 128. Amended proposal for a European Parliament and Council Directive concerning the protection of personal data and privacy in the context of digital telecommunications networks, in particular the Integrated Services Digital Network (ISDN) and digital mobile networks. OJ C 200. 22 July 1994. P. 4

This Directive completed the regulatory telecommunications framework for the enforcement of free competition in 1998, which had begun to be developed in 1987.

5.8.- Comments on the Harmonisation process during the 1995 actions.

During 1995, all the European Institutions geared their efforts towards achieving the implementation of full competition in the sector after 1st January 1998 and, as a result, towards the adoption of all the liberalisation and harmonisation measures required for such purposes.

The previous Chapter explained how the Commission adopted the liberalisation-related regulations directly, on the basis of Article 90 (currently Art. 106) of the Treaty, by making a string of amendments to Directive 90/388/EC. This procedure enabled the legislative process to be completed by the end of April 1996, 20 months before full competition came into force, and with enough time for it to be transposed into each Member State's national laws.

Nonetheless, the process of harmonising the Member States' laws was slower than originally envisaged, partly due to the need to revise the ONP concept, as well as the complexity of the procedure for the adoption of Directives of the Parliament and Council under the co-decision legislative procedure.

As analysed in the previous sections, the harmonisation tasks derived from the 1995 strategy resulted in the adoption of the amendment to the ONP Framework Directive, the amendment to the Leased Line Directive, the Interconnection Directive and the Voice Telephony Directive. In addition to the specific regulations of the Harmonisation process, it is worth mentioning the adoption of Directive 97/13/EC of 10th April 1997, on authorisations and licenses for telecommunications services and the efforts oriented at devising a numbering policy for European telecommunications services.

Moreover, in addition to the aforementioned regulations, the European Institutions gave themselves two years to draft the proposal for the creation of the European Telecommunications Agency, although it finally did not come to fruition.

6.- CONCLUSIONS

This Chapter has analysed how the Telecommunications Harmonisation Policy developed in the European Union during the period 1987 – 1998, at the same time as the liberalisation process described in the previous Chapter.

The next two Chapters will complete the analysis of this stage, which was so crucial for the introduction of free competition.

CHAPTER 7

**THE STANDARDISATION AND
CERTIFICATION OF TELECOMMUNICATIONS
EQUIPMENT.
PERIOD 1987 – 1998**



CHAPTER 7

THE STANDARDISATION AND CERTIFICATION OF TELECOMMUNICATIONS EQUIPMENT. PERIOD 1987 – 1998

1.- INTRODUCTION

The objective of this Chapter is to analyse the Standardisation and Certification Policy for telecommunications equipment and services in the European Union during the period 1987 - 1998 and its evolution alongside the Telecommunications Liberalisation and Harmonisation Policy that we have discussed in previous Chapters.

Throughout the transition to free competition, the European Union's strategy for standardisation and certification in the field of telecommunications was a natural follow-on from the activities which started at the beginning of the eighties which we discussed in Chapter 4 of this book. It was about developing a single market for telecommunications equipment and services and this task required two bold measures: the opening up of the markets and imposing the use of common technical standards throughout the Union.

The first of these objectives was fully achieved by the adoption of Commission Directive 88/301 which opened up the telecommunications terminals market to competition and which despite the complaints of some Member States finally came into force in 1991.

However, fulfilling the second objective took an entire decade of hard work. Guaranteeing the interworking of telecommunications terminals, networks and services in the European Union, which had characterised the sector throughout a century of monopolies, also had to be guaranteed when the sector was in free competition. The CEPT had started to work to that effect by drawing up European Telecommunications Regulations – NET, with this objective the ETSI was created and the European Institutions worked in that direction by adopting Common Technical Regulations – CTR.

This Chapter will deal precisely with the analysis of that period.

Firstly, we will look at the analysis of standardisation in the 1987 strategy from the publication of the Green Paper to the creation of the European Telecommunications Standards Institute – ETSI.

Secondly, we will discuss the evolution of standardisation policy during the actions of 1993 and 1995.

However, we can already reveal to the reader that from 1998 onwards, things were going to be very different. Once free competition was introduced, consensus broke down and the operators demanded their right to incompatibility between their services and, naturally, between their terminals, in other words, their customers. The market rules!

In 1999, in a disciplined manner, the Council adopted a Directive which with one stroke of the pen undid the entire Telecommunications Standardisation Policy which had taken so much time and effort to put together. Subsequently, to bring back the incompatibility it was necessary to re-invent

interoperability, voluntarily of course, to try and remedy the irremediable. However, we will take a look at all of this in Chapter 10.

2.- STANDARDISATION IN THE 1987 STRATEGY

2.1.- Overview of Standardisation in the 1987 Telecommunications Strategy

As analysed previously, it was the 1987 strategy³²² that really started off the process of liberalising the telecommunications markets in the European Union, firstly the equipment market and then that of services. It was then in the context of this strategy that the Standardisation and Certification Policy acquired its deserved stature using the foundations built in previous years.

In this context of transition towards a free market it was absolutely necessary to establish a reasonable balance between the obligatory and voluntary natures of any action relating to standardisation in the field of telecommunications. As part of the actions taken between 1980 and 1987 analysed in Chapter 4, the Community Institutions gradually established criteria for acting in the field of standardisation and certification, which we can summarise as follows:

- Promoting the drafting of European telecommunications standards and their voluntary adoption by sector agents in the Member States, as a strategy to strengthen the industry, encourage the creation of a single market and achieve the interoperability of Community services.
- Promoting the creation of Centres to verify and certify observance of the standards.
- The compulsory adherence to specific European standards with the aim of guaranteeing the fulfilment of certain essential requirements.
- The harmonisation of national legislation with the aim of guaranteeing mutual recognition of conformity.

In the following sections we will attempt to analyse the way in which these actions were implemented following the adoption of the 1987 Telecommunications strategy.

2.2.- The creation of the European Telecommunications Standards Institute – ETSI.

Whilst in the sectors related to information Technologies and electronics, CEN and CENELEC had been carrying out their activities as European Standardisation bodies, there was no similar body in the area of telecommunications.

Undoubtedly the prestige of the CCITT of the International Telecommunications Union (currently ITU-T³²³) in the drafting of Recommendations and their acceptance by the national telecommunications Administrations had made the appearance of a European body specifically in charge of drafting European telecommunications regulations historically unnecessary. Furthermore, any coordination activity by European Telecommunications Administrations had its place at the European Conference of Postal and Telecommunications Administrations - CEPT.

³²² COM(87) 290. Green paper on the development of the common market for telecommunications services and equipments. Brussels, 30 June 1987.

³²³ ITU Telecommunication Standardisation Sector (ITU-T). <http://www.itu.int/ITU-T>, visited 8/9/2010.

To that effect, in November 1985, as a consequence of the signing of the Copenhagen agreement, the Administrations conferred upon the CEPT the authority to draft the European Telecommunications Regulations – NET. This decision recognised the need to rely on them as a basis both for promoting a European industry in this sector and to try and resolve the problems derived from the need to have common technical specifications in order to establish conformity proceedings for mutual recognition by the different national Administrations.

It seemed obvious that the only place where that idea could take root at the time was at the CEPT but it was also clear that this was not going to be the most suitable place for this idea to bear fruit in the long term.

Starting to open up to free competition required the participation, on an equal footing, of all the telecommunications sector players: operators, industries, users and, of course, the Public Administrations in their new roles as Regulatory Bodies. Consequently, any action in the field of standardisation had to take this circumstance into consideration.

It was clear to the European Commission and Member States that neither CEN nor CENELEC were the ideal settings for the creation of a European Telecommunications Standards body, due as much to their general character as the fact that they have an indirect representation structure via national standardisation organisations.

As such, it was necessary to create a completely new Body able, right from the start, to efficiently meet the standardisation needs of the telecommunications sector. This was the deal that the Commission had accepted with the acquiescence of national Administrations. The CEPT was relying on the reputation of the national Administrations and it was undoubtedly the springboard from which it could launch a more far-reaching action.

It is worth mentioning here that from 1982 onwards the CEPT had been carrying out an exceptional operation to draft a standard concerning the Pan-European GSM mobile telephony service which had to be retained so as to guarantee its successful conclusion. When we refer to the mobile communications policy we will analyse the progress of this outstanding action which as a result of the general consensus turned into a European technology success story and, fundamentally, a triumph of the sector agents' hard work and common sense.

As we saw in the previous section, the Community Institutions began to give the CEPT a lot of work after the initial actions in 1979 and they would continue to do so throughout the first stage of the Community telecommunications standardisation policy. As such, when the time came to open up the sector to competition, the Commission and Member States agreed to use the CEPT's work as a basis for the creation of what was to become the European Telecommunications Standards Institute – ETSI.

The 1987 Green Paper clearly mentions the need to create a European Telecommunications Standards Institute which should perform the functions of a permanent core able to accelerate the standardisation work in this sector. ETSI was going to base itself on the activities which had until then been performed by the CEPT and benefit from the legacy of the NETs and all of their current projects, particularly that concerning the development of GSM. The confrontation with CEN and CENELEC, however predictable, could not be avoided but, in the end, the creation of ETSI as a European standards organisation open to all sector agents was going to be a reality.

The Council itself quickly intervened in this conflict appealing for good sense and collaboration through a new Resolution³²⁴, adopted in April 1989, concerning standardisation in the area of information technologies and telecommunications.

³²⁴ Council Resolution of 27 April 1989 concerning standardisation in the fields of information technology and telecommunications. OJ C 117. 11 May 1989. P. 1.

ETSI was created in 1988 and since then it has played an increasing role in drawing up European telecommunications standards and has been recognised by the European Institutions as a European Standards Body. It is not our intention to look further at either the structure or the workings of this Institution here³²⁵. Those readers wishing to know more details about how the Institute was created are recommended to read a document which cannot fail to interest them³²⁶.

2.3.- The May 1988 Directive on the approximation of legislations and its amendment

The application of the principles of the creation of a common telecommunications services and equipment market expressed in the 1987 Green Paper led the Commission to adopt Directive 88/301/EEC³²⁷ on competition in the markets in telecommunications terminal equipment. This Directive called for the abolition of all exclusive rights relating to terminals as well as guaranteeing the rights to free importation, commercialisation, putting into operation and maintenance of these terminals for public telecommunications networks.

Due to the fact that public telecommunications networks were still subject to the regulated monopoly it was up to each Member State to make a decision about the characteristics that the aforementioned terminals should fulfil, the Directive establishing, amongst other things, the following:

Article 5

1. Member States shall,, communicate to the Commission a list of all technical specifications and type-approval procedures which are used for terminal equipment, and shall provide the publication references

Later adding:

“Article 6

Member States shall ensure that, from 1 July 1989, responsibility for drawing up the specifications referred to in Article 5, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.”

These were explicit statements in line with the policy initiated by the European Institutions in previous years.

From this moment onwards, a process was launched aimed at achieving the convergence of the provisions regulating this sector. As a consequence of a July 1989 Commission proposal³²⁸, and after a long period of discussion, in April 1991, the Council adopted Directive 91/263/CEE³²⁹ on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity.

³²⁵ ETSI. <http://www.etsi.org>, visited 8/9/2010.

³²⁶ Temple, S. A Revolution in European Telecommunications Standard Making. ETSI 1991

³²⁷ Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment. OJ L 131. 27 May 1988. P. 73

³²⁸ COM(89) 289. Proposal of Council Directive on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity. OJ C 221. 17 August 1989. P. 12

³²⁹ Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity. OJ L 128. 23 May 1991. P. 1

The scope of this Directive was subsequently extended to satellite earth station equipment via the adoption of Directive 93/97/EEC³³⁰. With the adoption of Directive 91/263/EEC the previous Directive 86/361/EEC was repealed.

Thus, after the liberalisation of the terminal market took effect, the former procedures established to obtain mutual recognition of terminal approval were to be substituted by mutual recognition of conformity.

The objective of Directive 91/263/EEC was the harmonisation of national legislations in relation to terminals, and this is stated as follows:

Article 3

1. *Member States shall take all appropriate measures to ensure that terminal equipment may be placed on the market and put into service only if it complies with the requirements laid down in this Directive when it is properly installed and maintained and used for its intended purpose.*

Where the characteristics of the aforementioned equipment were concerned, the Directive said the following:

Article 4. Terminal equipment shall satisfy the following essential requirements:

- a) *user safety, in so far as this requirement is not covered by Directive 73/23/EEC;*
- b) *safety of employees of public telecommunications networks operators, in so far as this requirement is not covered by Directive 73/23/EEC;*
- c) *electromagnetic compatibility requirements in so far as they are specific to terminal equipment;*
- d) *protection of the public telecommunications network from harm;*
- e) *effective use of the radio frequency spectrum, where appropriate;*
- f) *interworking of terminal equipment with public telecommunications network equipment for the purpose of establishing, modifying, charging for, holding and clearing real or virtual connection;*
- g) *interworking of terminal equipment via the public telecommunications network, in justified cases.*

But the real issue was to determine what the compulsory regulations in line with article 4 of the Directive should be. The text itself clarifies this point:

Article 6

1. *Member States shall presume compliance with the essential requirements referred to in Article 4 (a) and (b) in respect of terminal equipment which is in conformity with the national standards implementing the relevant harmonized standards, the references of which have been published in the Official Journal of the European Communities. Member States shall publish the references of such national standards.*
2. *The Commission shall, in accordance with the procedure laid down in Article 14, adopt:*

³³⁰ Council Directive 93/97/EEC of 29 October 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment. OJ L 290. 24 November 1993. P. 1.

- *as a first step, the measure identifying the type of terminal equipment for which a common technical regulation is required, as well as the associated scope statement for that regulation, with a view to its transmission to the relevant standardisation bodies,*
- *as a second step, once they have been prepared by the relevant standardisation bodies, the corresponding harmonized standards, or parts thereof, implementing the essential requirements referred to in Article 4 (c) to (g) which shall be transformed into common technical regulations, compliance with which shall be mandatory and the reference of which shall be published in the Official Journal of the European Communities.*

It is worth highlighting the distinction that the Directive made between those requirements only calling for the adherence to harmonised standards, in other words those drawn up by a European standards body and adopted by the Member States, and others which require the adherence to Common Technical Regulations, compliance with which was compulsory throughout the Community, without the need for Member States to intervene. We will return to these points in the following section.

Where assessing conformity and the obligatory CE certification to prove compliance with the essential requirements is concerned, the Directive stated:

Article 9

1. *According to the choice of the manufacturer or his authorized representative established within the Community, terminal equipment shall be subject to either the EC type-examination, as described in Annex I, or to the EC declaration of conformity, as described in Annex IV.*
2. *An EC type-examination as described in Annex I shall be accompanied by a declaration issued according to the EC declaration of conformity to type procedure as described in Annex II or Annex III.*
3. *The records and correspondence relating to the procedure referred to in this Article shall be in an official language of the Member State where the said procedure will be carried out, or in a language acceptable to the notified body involved*

However, the main content of the Directive was clearly reflected in article 5:

Article 5

Member States shall not impede the placing on the market and the free circulation and use on their territory of terminal equipment which complies with the provisions of this Directive.

In order to assist the Commission with matters arising from the application of this Directive the Telecommunications Equipment Approval Committee (CAET) was created, made up of representatives from the Member States and chaired by the Commission representative. From then on, as a result of the work carried out by the CAET, the Commission sent ETSI a series of proposals for Common Technical Regulations which, following their publication in the Official Journal were to be of compulsory application to terminals.

When this Directive came into effect it resolved the technical aspects related to free movement of terminals throughout the Community.

In 1993, Directive 91/263/EEC was amended for the first time by Directive 93/68/EEC³³¹, specifically in the areas related to CE certification and its scope was extended to satellite ground station equipment through Directive 93/97/EEC as we mentioned earlier.

The Commission made regular statements about the progress relating to compliance with the aforementioned Directive^{332, 333}. We will also mention that in December 1995, the Commission proposed to the Parliament and Council the adoption of a new Directive³³⁴ which would rewrite the three Directives referred to in this section. As a consequence of the discussion of the aforementioned document in June 1997, a new proposal for a similar Directive was drawn up³³⁵ with the aim of adapting the procedures in line with the sector's new situation which had arisen as a result of the introduction of full competition.

Finally, it must be remembered that, as a consequence of signing the GATT agreement in 1994, in mid-1997 the European Commission signed³³⁶ mutual recognition of conformity agreements with both the US and Canada which applied to telecommunications equipment. As a result of this agreement, equipment manufactured in the US and Canada was subject to mutual recognition of conformity procedures which were similar to those existing between the Member States of the European Union.

2.4.- Harmonised Standards and Common Technical Regulations concerning terminals

As we saw in the previous section, during the process of opening up the terminal markets to competition, the Community Institutions had to make a slight adjustment to the use of technical standards and their voluntary and obligatory nature.

By definition, fulfilling the technical specifications detailed in a standard always has a voluntary nature, whilst fulfilling those technical specifications detailed in a technical regulation is obligatory.

Directive 86/95/EEC covered the first stage of applying the spirit of the New Approach to telecommunications terminals. It was clear that the power to approve terminals belonged to the Member States but the Community Institutions insisted on drawing up European standards which were to have the character of harmonised standards so that all of the Member States could adopt them in the technical regulations that they were drafting and they would be compulsory with a view to achieving the mandatory certificates of approval which are necessary for the sale of the terminals.

The NET standards fulfilled this role and were the first harmonised European telecommunications standards with the added bonus that, furthermore, they were to be common specifications with application throughout the Community.

³³¹ Council Directive 93/68/EEC of 22 July 1993 amending Directives 87/404/EEC (simple pressure vessels), 88/378/EEC (safety of toys), 89/106/EEC (construction products), 89/336/EEC (electromagnetic compatibility), 89/392/EEC (machinery), 89/686/EEC (personal protective equipment), 90/384/EEC (non-automatic weighing instruments), 90/385/EEC (active implantable medicinal devices), 90/396/EEC (appliances burning gaseous fuels), 91/263/EEC (telecommunications terminal equipment), 92/42/EEC (new hot-water boilers fired with liquid or gaseous fuels) and 73/23/EEC (electrical equipment designed for use within certain voltage limits). OJ L 220. 30 August 1993. P. 1

³³² COM(96) 114. Progress report 1995 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity supplemented in respect of satellite earth station equipment. Brussels, 27 March 1996

³³³ Commission Communication concerning the use of harmonized standards for certification provided for under Directive 91/263/EEC. OJ C 138. 9 May 1996. P. 8.

³³⁴ COM(95) 612. Draft Directive relating to Telecommunications Terminal Equipment and Satellite Earth Station Equipment, including the mutual recognition of their conformity. Brussels 6 December 1995.

³³⁵ COM(97) 257. Proposal for a Parliament and Council Directive on connected telecommunications equipment and the mutual recognition of the conformity of equipment. Brussels 30 May 1997.

³³⁶ Mutual Recognition Agreements on Conformity Assessment with United States and Canada. European Commission. DG I. June 1997.

With the liberalisation of the terminal market, the outlook changed radically. Firstly, in order to guarantee free movement it was necessary to define a set of common characteristics which the terminals should fulfil in order to circulate freely within the European Union. The first topic to address was the requirement to fulfil certain technical standards.

All of the above implied that from then on the requirement that terminals should fulfil certain technical standards was no longer due to the independent application of national legislation but it was instead to be a consequence of a legal Community action. Following the liberalisation of terminals compulsory technical standards were going to start appearing.

Just as it appeared in Directive 91/263/EEC, the compulsory nature of these standards was to establish itself via the approval of Common Technical Regulations – CTR, adopted with all the necessary guarantees through Commission Decisions.

It must be added that, also in this new context, Member States were going to continue having the prerogatives to issue compliance certificates for terminals to be used in their country. However, all things considered, by defining CTRs, the Community Institutions were imposing a single, identical standardisation procedure for all Member States, the results of which applied throughout the Union.

As a consequence of this, national legislations were automatically going to have to issue the compliance certificate if the requirements were met. Demonstrating compliance of the said requirements was to be proven using a Certificate of Conformity that would confer the right to use the CE marking.

As the Commission itself explained in the documents mentioned, the approval process for a CTR started with a request that the Commission presented to the Telecommunications Equipment Approval Committee (CAET), created by Directive 91/263/EEC, which had to include the compulsory Telecommunications Regulations Application Committee (CART) report.

Once this stage has been successfully negotiated, the Commission asked ETSI, and in some cases CEN/CENELEC, to draw up a harmonised standard known as a Technical Basis for Regulation (TBR). Using this document and following the compulsory consultation procedure, the Commission drafted a Common Technical Regulation (CTR) and adopted a Decision on its application which was published in the Official Journal of the European Community. The list of adopted CTRs appeared in the Reports on the European Telecommunications Policy Published regularly by the Commission³³⁷.

2.5.- Standardisation in the ONP framework

Another aspect worth highlighting as part of the European Union Standardisation Policy is that referring to the use of technical standards in the area of the Harmonisation Policy and its development through the Open Network Provision (ONP).

As we pointed out in Chapter 6, the policy of harmonising the Member States' telecommunications legislation arose out of the need to establish criteria to enable us to control the relationships between network operators and services still under a monopoly and those other operators who began to appear to exploit, in the free market, the new value-added services.

For this purpose, the ONP Framework Directive 90/387/EEC³³⁸ already made reference to standardisation, as a support to the harmonisation process, in the following terms:

³³⁷ Status Report on European Union Telecommunications Policy. DG XIII/A/1. Brussels, 7 May 1997.

³³⁸ Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision. OJ L 192. 24 July 1990. P. 1

Article 5

- c) *Reference to European standards drawn up as a basis for harmonized technical interfaces and/or service features for open network provision according to Article 4 (4) (c) shall be published in the Official Journal of the European Communities as suitable for open network provision.*
- d) *The standards mentioned under paragraph 1 shall carry with them the presumption:*
 - (a) *that a service provider who complies with those standards fulfils the relevant essential requirements, and*
 - (b) *that a telecommunications organisation which complies with those standards fulfils the requirement of open and efficient access.*

It is worth saying that letter c) of section 4 of the aforementioned article 4 said the following:

Article 4

- 4. *For the work programme referred to in paragraph 3, the Commission shall:*
 - (c) *request, where appropriate, the European Telecommunications Standards Institute (ETSI) to draw up European standards, taking account of international standardisation as a basis for setting up, where required, within specified time limits, harmonized technical interfaces and/or service features. In so doing, ETSI shall coordinate, in particular, with the Joint European Standards Institution CEN/Cenelec;*

With this legislative basis, standardisation activity began within the ONP framework. As such, each ONP provision that was adopted referred to technical standards, although it must be said with varying success depending on the scope of the provision.

In cases such as that of the ISDN and Packet Switching Networks in which ONP actions remained as simple Council Recommendations, any reference to the standards to be used in these services did not progress from being a Recommendation. Only in the case of the ONP Directive on leased lines did the reference to technical standards result in a compulsory requirement.

In any event, in the Official Journal of the European Community several lists of technical standards were published to which we direct the reader^{339, 340, 341, 342, 343}.

At the time the Commission published a working document for the ONP Committee entitled: Handbook on the application of ONP principles in European Technical Standards³⁴⁴ which tackled this subject thoroughly but we have no knowledge that the said text was published as a public document.

³³⁹ List of standards. OJ C 327. 29 December 1990. P. 12

³⁴⁰ Telecommunications. Open network provision. List of ONP standards. OJ C 100. 8 April 1993. P. 4

³⁴¹ Telecommunications. Open network provision. List of ONP standards. OJ C 219. 13 August 1993. P. 2

³⁴² Telecommunications. Open network provision. List of ONP standards, OJ C 266. 13 October 1995. P. 2

³⁴³ Telecommunications. Open network provision. List of ONP standards. OJ C 180. 13 June 1997.

³⁴⁴ ONP93-59. Handbook on the application of ONP principles in European Technical Standards.

3.- STANDARDISATION IN THE 1993 AND 1995 ACTIONS.

3.1.- Standardisation on the eve of Full Competition.

With the introduction of full competition in both services and infrastructure, community standardisation policy extended to telecommunications networks and services.

In the area of telecommunications, under free competition it remained clear that the principle of needing to rely on European standards of a voluntary nature except in those cases where it was considered necessary to make compliance compulsory, either to guarantee the protection of people and facilities or to ensure interfunctionality and interoperability of specific services, had been established.

Where telecommunications terminals are concerned everything appeared to indicate that the provisions in force aimed at encouraging their free movement throughout the Community would continue to develop and apply as planned; nevertheless it is worth emphasising the Commission's comments in the sense of needing to improve the established procedures, particularly those concerning the drafting of Common Technical Regulations (CTR), with the aim of avoiding unnecessary delays for new products entering the market with the guarantees associated to bearing the CE marking.

It seemed unlikely that there would be substantial amendments in relation to terminals other than those aimed at simplifying and improving the established procedures. It seemed unlikely but in the end they took place.

3.2.- Standardisation in the new ONP framework of 1997.

Where the treatment given to aspects related to standardisation in the ONP framework is concerned, it is worth making a few comments.

Directive 97/51³⁴⁵ which amended ONP Framework Directive 90/387/EEC the voluntary character of the standards was clearly established, as was the interest in having European standards and the pre-eminence of European standards as opposed to international and national ones.

It was also pointed out that when considered necessary, European Standards Bodies could be asked to draw up technical standards. Likewise, the procedure of periodically publishing a list of ONP standards in the Official Journal which had been laid down in the previous text was maintained with the aim of encouraging its use. Member States were also asked to promote the use of ONP standards published in the Official Journal.

Where the interconnection of telecommunications networks is concerned it must be said that Directive 97/33/EC on Interconnection³⁴⁶ made specific reference to the technical standards. Maintaining the general principle of the voluntary nature of the standards, the Directive established that in certain cases, the National Regulation Authorities, in interconnection agreements between operators, could impose the obligation of fulfilling basic requirements guaranteeing: network security, the maintenance of network integrity, service interoperability and data protection.

Specifically, when referring to service interoperability, the Directive said:

³⁴⁵ Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications. OJ L 95. 29 October 1997. P. 23.

³⁴⁶ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). OJ L 199. 26 July 1997. P. 32.

Article 10

Essential requirements

- c) *Interoperability of services: Member States may impose conditions in interconnection agreements in order to ensure interoperability of services, including conditions designed to ensure satisfactory end-to-end quality. Such conditions may include implementation of specific technical standards, or specifications, or codes of conduct agreed by the market players.*

Likewise, in article 13, this Directive referred to the technical standards in the following terms:

Article 13

Technical standards

1. *Without prejudice to Article 5 (3) of Directive 90/387/EEC whereby the implementation of specified European standards may be made compulsory, national regulatory authorities shall ensure that organisations providing public telecommunications networks or publicly available telecommunications services take full account of standards listed in the Official Journal of the European Communities as being suitable for the purpose of interconnection.*

In the absence of such standards, national regulatory authorities shall encourage the provision of technical interfaces for interconnection according to the standards or specifications listed below:

- *standards adopted by European standardisation bodies such as the European Telecommunications Standards Institute (ETSI) or the European Committee for Standardisation/European Committee for Electrotechnical Standardisation (CEN/CENELEC), or, in the absence of such standards,*
 - *international standards or recommendations adopted by the International Telecommunications Union (ITU), the International Organisation for Standardisation (ISO) or the International Electrotechnical Committee (IEC), or, in the absence of such standards,*
 - *national standards.*
2. *The Commission may, acting in accordance with the procedure laid down in Article 15, request standards for interconnection and access to be drawn up, where appropriate, by European standardisation bodies. Reference to standards for interconnection and access may be published in the Official Journal of the European Communities in accordance with Article 5 of Directive 90/387/EEC.*

Where vocal telephony is concerned, it must be said that the Directive on the application of ONP to Vocal Telephony³⁴⁷ made reference to the technical standards in various ways: terminals, interconnections, quality of service and additional network services.

Where telecommunication terminals which may be connected to public vocal telephony networks are concerned, given the existence of significant Community regulations in this area, it was clear that these networks would be obliged to guarantee the correct functioning of the terminals. This is what Annex II and particularly article 9 of the Directive was referring to:

³⁴⁷ Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment. OJ L 101. 1 April 1998. P. 24.

Article 9 Connection of terminal equipment and use of the network

Member States shall ensure that all users provided with a connection to the fixed public telephone network can:

- a) connect and use terminal equipment suitable for the connection provided, in accordance with national and Community law;*
- b) access operator assistance services and directory enquiry services in accordance with Article 6.2(c), unless the subscriber decides otherwise;*
- c) access Emergency Services at no charge, using the dialling code '112' and any other dialling codes specified by national regulatory authorities for use at a national level.*

Member States shall ensure that mobile users can also access the services mentioned in (b) and (c).

It is worth mentioning that article 15 of the Directive referred to those cases of special network access at points other than those planned for terminals; it pointed out that operators could offer them when they were requested and authorised by the Commission so that in the event where it was considered necessary the ETSI could be asked to draw up technical standards for these special accesses.

Where interconnection is concerned, these networks remained subject to the provisions of Directive 97/33/CE on interconnection to which we referred previously.

When it comes to the quality of the services offered to users, article 12 dealt with this and the list of ETSI's technical standards which would be used to measure the quality parameters appeared in Annex III.

Finally, articles 14 and 15 referred to specific additional services that could be provided by these networks and Annex I referred to their characteristics and, where appropriate, to the associated technical standards.

3.3.- Standardisation in the context of the Information Society. The start of a new direction.

With the introduction of full competition in the telecommunications equipment and services markets from 1988, the foundations were laid for the development of the Information Society just as it had been envisaged in both the 1993 White Paper and the 1993 and 1995 Telecommunications Programmes. From then on, the standardisation and certification policy priorities with regard to telecommunications began to change.

In this respect it is worth highlighting two actions, firstly the third set of amendments to Directive 83/189^{348, 349, 350} concerning the information procedures relating to standards and regulations and secondly, a Communication COM(96) 353 from the Commission concerning the role of standardisation in the Information Society³⁵¹.

³⁴⁸ 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. OJ L 109. 26 April 1983. P. 8

³⁴⁹ Council Directive 88/182/EEC of 22 March 1988 amending Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations. OJ L 81. P. 75

³⁵⁰ Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 materially amending for the second time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations. OJ 100. 19 April 1994. P. 30.

³⁵¹ COM(96) 359. Communication on standardisation and the global information society. Brussels 24 July 1996.

The third amendment of Directive 83/189 involved it being repealed and replaced by a completely new one, Directive 98/34³⁵² which would soon also be modified by Directive 98/34³⁵³. It sought to prevent the Member States from passing legislative measures which could hinder free movement of not only goods but also services in the European Union.

In Communication COM(96)353 of July 1996, the Commission once again considered the difficult balance between standards and free competition, particularly in the Information and Communications Technology sector. The Commission made it clear that technical standards should fit in to the products and services life cycle, it discussed the conflict between their ever reducing duration and the traditionally slow law-making process, and suggested that the Standards Bodies reflect on the activities they have been engaged in and whether or not they serve market needs.

In short, the Commission proposed that as well as drafting regulations, the Standards Bodies could devote part of their time to writing Common Technical Specifications which could be accessed by the public and which, not having the weight of Standards, could enjoy widespread consensus within the sector. In the document, the Commission considered the idea that the aforementioned Common Technical Specifications would not need to be limited to a specific function, which is why they are not classified as Technical Standards.

In other words, what the Commission was proposing was that the Standards bodies could be Common Technical Specification repositories as well as discussion forums and, they would naturally continue to produce Technical Standards. In short, the Commission recognised, in its own words, that the market is the motor of the Information Society and that, it is obviously up to market players to play the main role in producing technical specifications in this field. The Commission, without actually saying so, created the doubt about whether Technical Standards were really needed for the development of the Information Society.

In our opinion, with this document the Commission, conscious of what it was doing, started a dangerous manoeuvre which ended up dealing a hard blow to the standardisation process as it had been known until that point. It basically stated that Technical Standards should take a back seat in relation to Common Technical Specifications, which would not only retain their voluntary nature but also destroy the uniqueness of the technical solution.

It is important to reveal that this proposal was accepted with the approval, in 1999, of Directive 99/5/EC³⁵⁴ which radically changed the standardisation policy concerning telecommunications to which we will refer later in this book.

The Council, in a Resolution³⁵⁵ issued during November 1996 established its political priorities in relation to the Information Society, echoing, amongst other things, the proposal concerning standardisation and inviting the Commission to continue defining the new regulatory framework for the development of the Information Society.

Finally, where mutual recognition of handset conformity is concerned it must be said that in 1998, Directive 91/263 and its amendment in Directive 93/97³⁵⁶ were updated with the adoption of Directive 98/13³⁵⁷, which will undoubtedly be short lived.

³⁵² Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations. OJ 204. 21 July 1998. P 37.

³⁵³ Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations. OJ 217. 5 August 1998. P. 18.

³⁵⁴ Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity. OJ L 91. 7 April 1999. P. 10

³⁵⁵ Council Resolution of 21 November 1996 on new policy- priorities regarding the information society. OJ C 376. 12 December 1996. P 1.

³⁵⁶ Council Directive 93/97/EEC of 29 October 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment. OJ L 290. 24 November 1993. P. 1

³⁵⁷ Directive 98/13/EC of the European Parliament and of the Council of 12 February 1998 relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity. OJ L 74. 12 March 1998. P. 1

4.- CONCLUSIONS

The Telecommunications Standardisation and Certification Policy, along with that concerning Harmonisation and, naturally, that on Liberalisation, constitutes one of the fundamental themes of Community actions in the area of telecommunications during the transition from the monopolies to free competition in this sector.

Throughout this Chapter we have tried to analyse the main actions in the field of standardisation and certification in the area of telecommunications which the European Community Institutions have been carrying out in recent years and which would have been difficult to understand out of context.

Chapter 8

CORRECTIVE ACTION REGARDING FREE COMPETITION. PERIOD 1987 – 1998



CHAPTER 8

CORRECTIVE ACTION REGARDING FREE COMPETITION. PERIOD 1987 – 1998

1.- INTRODUCTION

This Chapter analyses the set of corrective measures that the European Institutions implemented in the period 1987 – 1998 during the transition to free competition, which has been analysed in the previous three Chapters.

One should remember that, during the monopoly stage, the nature of telecommunications was similar to *essential state-run services*. As a consequence of the regulatory modifications adopted within the framework of the European Union, telecommunications became *general interest services operated under free competition conditions* subject to certain *public service obligations*.

Thus, when the Community Institutions broached the idea of opening up telecommunications services to competition and regarded them as the linchpin for Europe's economic development, they came up against at least three types of problems that needed tackling as they implemented the regulatory changes that would lead to the elimination of monopolies.

Firstly, the problems derived from the territorial imbalances throughout the Community, which meant that the geographical coverage, characteristics and quality of the telecommunications services varied from one region to another.

Secondly, those derived from the imbalances between the situation of national telecommunications operators and their consequences, in particular, as regards the network characteristics and tariff structure of the different services, which in many cases were far from their real costs, as a result of the application of cross-subsidies.

Thirdly, the need to ensure that all users enjoyed access to basic telecommunications services at affordable prices to avoid them losing the rights they had acquired when the State was responsible for providing such services.

The following sections analyse how the Community Institutions have coped with each of these aspects, and the corrective actions taken to deal with the effects that the arrival of free competition in the sector was expected to bring.

Despite the virtues attributed to free competition, not everything could be left to it, and that opinion was shared by the people in charge of Telecommunications Policy both in the European Union and the Member States. However, in the face of the turmoil prompted by the liberalisation of the telecommunications sector, any course of action geared towards establishing corrective and compensatory actions would be regarded as swimming against the tide, as will be seen in the next sections.

In our opinion, the analysis of this stage would be incomplete without the contents of this Chapter.

2.- TELECOMMUNICATIONS AND THEIR CONTRIBUTION TO THE ECONOMIC AND SOCIAL COHESION OBJECTIVES.

2.1.- The Cohesion objectives of the 1987 Strategy

If one goes over the contents of the Green Paper that contains the 1987 Telecommunications strategy³⁵⁸ one will find some references to the attitude that the Commission began to take towards cohesion-related activities through the telecommunications policy.

The document acknowledged the importance of telecommunications in economic development:

“The strengthening of European telecommunications has become one of the major conditions for promoting a harmonious development of economic activities and a competitive market throughout the Community and for achieving the completion of the Community-wide market for goods and services by 1992. (pg. 23)”

Likewise, it proposed speeding up the application of measures oriented towards investment in community funds and telecommunications infrastructures:

“An accelerated programme of investment in digitised and later broad-band, technologies as foreseen in the STAR programme, could turn the potential danger to the development of the periphery posed by the informatics society, into a unique opportunity to overcome the handicap of geographic isolation. (pg. 47)”

Yet all in all, the document recognised that, in the future, telecommunications operators themselves would have to invest in modernising their networks and infrastructures, applying the profits obtained from operating the services.

“It must be ensured that the new digital narrow-band and broadband infrastructure will be provided in all Member States within a reasonably equal time to ensure the pre-requisite for future efficient national Community-wide and world-wide communications; essential both for future economic and social development but also for emergency and security purposes.

To ensure that this costly investment task is carried out re-regulation of the telecommunications sector must safeguard the revenue-earning capacity of the central network infrastructure provider. This includes reasonable protection against excessive “cream-skimming”: exploitation by competitors of the most profitable parts of the market (i.e., high-density business traffic).

These same arguments would be used in the Service Directive 90/388/EC to preserve voice telephony from free competition.

This contradiction in terms would appear years later when the application of free competition began to affect not only the operators' economic stability but also their plans to upgrade their networks and infrastructures wherever they operated. However, in 1987, it was still early to verify these facts.

As mentioned in Chapter 3, the 1986 STAR Programme was carried out during the period 1987-1991, in parallel to the start of the telecommunications service liberalisation process.

³⁵⁸ COM(87)290. Towards a dynamic European economy. Green Paper on the development of the common market for telecommunications services and equipment. Brussels, 30 June 1987.

In 1991, almost at the end of the STAR Programme, the Commission launched its TELEMÁTIQUE Community Initiative, designed to foster data communications in the less developed regions.

As already mentioned above, in the 1988 European Regional Development Fund – ERDF reform, Community Initiatives had been created for the purpose of implementing specific actions for the Community. This new instrument was what the Commission used to carry out the new telecommunications actions.

The Commission adopted the TELEMÁTIQUE initiative in January 1991³⁵⁹ and as the document creating it mentions:

“3.- The aim of this initiative is to foster the use of advanced telecommunication services in the less developed (objective 1) regions, as well as to enhance access to advanced services located anywhere in the European Community”.

We must state that this course of action was certainly in keeping with the sign of the times. In accordance with the definitions given in the Green Paper of 1987, telecommunications operators had to rely on the voice telephony service operating profits as their main source of finance, because they enjoyed a monopoly. However, telecommunications operators could always put forward proposals for the creation of infrastructures in the less developed regions, within the Regional Development Plans, and thus apply for financing from ERDF funds through the standard procedures.

Since Value Added Services and, in particular, data communications, had just been liberalised, it was deemed appropriate to inject Community funds into creating demand for this type of services in the less developed regions.

The TELEMÁTIQUE Initiative³⁶⁰ was carried out during the period 1991-1993, with a total budget of 200 Million ECUs from the ERDF Funds. Approximately 52% of the whole Telematique budget was allocated to financing the deployment of data communication networks and services, and 47% to the joint financing of Value Added Service applications. As in the previous case, the Initiative was managed by the Member States.

2.2.- The Cohesion Objectives in the actions of 1993

In October 1992, the Commission published a Review³⁶¹ of the situation of the sector, in accordance with the Services Directive 90/388/EC. This document put forward different options for continuing with the liberalisation of the telecommunications sector.

In addition, the Commission's document continued to express concern about telecommunications' effect on the cohesion objectives in the following terms:

“4.3.2.- Maintaining and increasing cohesion

Support for the peripheral regions of the Community will be needed to allow for these regions to catch up and remain in step with stepped-up market expansion.

The basic aims are to "connect" LFRs with the core and with each other and to extend basic networks to remote areas. In particular, high quality public voice telephony services should be

³⁵⁹ Notice to the Member States laying down guidelines for the operational programme of a community initiative for regional development of data communications networks and services. OJ C 33, 8 February 1991. P. 4

³⁶⁰ TELEMÁTIQUE. Data Communications for regional development. Technical Status Report. European Commission. DG XIII. October 1994

³⁶¹ SEC(92) 1048. Commission's 1992 review of the situation in the telecommunications services sector. Brussels, 21 October 1992.

available to all at affordable prices. In this way businesses in these regions can compete in and benefit from the single market. The availability and quality of telecommunications services are key factors in determining business location and can in particular help offset the disadvantage of peripherality.

Substantial financial efforts have been made by the structural funds in trying to address the problem of insufficient quality and availability of telecommunications services in less favoured regions.....STAR with nearly 770 million ECUs of Community Aid.....TELEMÁTIQUE with 200 million ECUs....

Recent studies show that a substantial effort in terms of investment requirements for upgrading telecommunications infrastructure in LFRs still remains to be done if these regions are to reach levels comparable to those in regions which have good infrastructure and services.”

Likewise, in the Report³⁶² that the Commission published following the consultation carried out with regard to the aforementioned document, it again addressed the cohesion-related problems. The Commission presented a set of lines of action to which it referred as Key Factors for the development of the future regulatory framework, expressing itself in the following terms:

“F.- Ensuring Social and Regional Cohesion

(50) It is important to maintain a balanced economic and social development throughout the Community. Further liberalisation should create new employment opportunities and ensure further integration of peripheral regions.

Cohesion requires a stable and viable investment environment. At a regional level it must ensure the modernisation and increased penetration of services and networking infrastructures in peripheral parts of the Community.

(51) Self-financing by TOs to meet the investment requirements of peripheral regions is, and will continue to be, insufficient. While progressive liberalisation will increase usage and cash flows and stimulate investment in the peripheral regions, there is uncertainty as to the extent and the period in which these benefits will be felt in the peripheral regions. The Commission recognises the need for special arrangements for additional transition periods and for access charges, in order to safeguard investment capabilities in the countries concerned in the short to medium term.

(52) Resources from operations must contribute to the extension of infrastructures and services into marginal or non-profitable areas, but public financing will also be needed, including from the Community's Structural Funds.

As set out in the Communication of October 1992, funding under the Community Support Framework has made a substantial contribution to the development of telecommunications services and network investment in the peripheral regions in the recent past. In the context of liberalisation and privatisation of public services generally within certain Member States, the Funds have had to devise new conditions for funding to ensure that investments from Community sources continue to have their intended beneficial effects for the consumer.

Assuming this corresponds to the spending priorities of the Member States and regions concerned, grant funding for telecommunications could be stepped up in the coming planning period (1994-99), in view of the increased resources allocated to the Structural Funds. Furthermore, the ongoing lending programmes of the European Investment Bank can

³⁶² COM(93) 159. Communication to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services. Brussels, 28 April 1993.

be expended following the launch of the European Growth Initiative, including the new Temporary Lending Facility (TLF) and the European Investment Fund (EIF).

The Council stated the following in the Resolution³⁶³ on to the aforesaid document:

“RECOGNIZES as key factors in the development of future regulatory policy for telecommunications in the Community:

5.- the need to take into account the objectives of Community cohesion in the light of the specific circumstances of peripheral regions.

“CONSIDERS as major goals for the Community's telecommunications policy in the short term:

5.- The working-out of arrangements for suitable measures in relation to specific difficulties encountered by the peripheral regions with less developed networks. Such measures, as a complement to national funding, should where appropriate, and taking into account the priorities set at national level, make full use of appropriate Community support frameworks to assist network development and universal service in peripheral regions.”

The fact is that it was this Resolution that approved the timetable for the liberalisation of voice telephony in 1998 and established a moratorium of a maximum of five years for the Member States with less developed networks: Spain, Ireland, Greece and Portugal.

Establishing a moratorium on the introduction of competition in the voice telephony market had two important effects in relation to the cohesion measures. Firstly, maintaining a monopoly in voice telephony services for an additional period served to guarantee telecommunications operators' main source of finance. Secondly, by not implementing competition in the sector, telecommunications operators could be financed with Community funds without breaching competition regulations. The next section describes the result of these actions.

As regards the use of Structural Funds for specific telecommunications actions, when it reformed the ERDF Regulations in 1993, the Commission posed the need to reconsider the future of Community Initiatives with the publication of a Green Paper³⁶⁴ titled: “The Future of Community Initiatives under the Structural Funds”. With the results of the consultation process, the Commission presented its conclusions and proposals in March 1994³⁶⁵.

The Commission's documents did not include any concrete proposal to launch any new Community Initiative specifically geared towards the telecommunications sector that might continue with the actions started in the STAR Programme and TELEMÁTIQUE Initiative. The approach in this new edition of Community Initiatives was not to develop and promote the use of value added services, but rather to orient telecommunications-related actions towards more specific goals, in particular, the introduction of telecommunications in small and medium enterprises. It was within that context that the SME Initiative^{366, 367} was launched, so as to help small and medium enterprises to adapt to the single market, among other things, through the use of telecommunications and modern information systems.

³⁶³ Council Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market. OJ C 213, 6 August 1993. P. 1.

³⁶⁴ COM(93) 282. The Future of Community Initiatives under the Structural Funds. Green Paper. Brussels 16 June 1993.

³⁶⁵ COM(94) 46. The Future of Community Initiatives under the Structural Funds Brussels 16 March 1994.

³⁶⁶ Community Structural Funds. Guide to the Community Initiatives 1994-1999. European Commission 1994.

³⁶⁷ Notice to the member States laying down guidelines for operational programmes or global grants which they are invited to propose in the framework of a Community Initiative concerning the adaptation of small and medium-size enterprises to the single market (SMEs Initiative) OJ C 180. 1 July 1994. P. 10

Even though this Initiative facilitated the continuation of certain actions to promote the use of telecommunications, it was obvious that any action related to the joint financing of networks and infrastructure investments fell beyond the scope of its objectives.

2.3.- The Cohesion Objectives in the actions of 1995.

The turning point in the economic and social cohesion actions of the European Union's Telecommunications Policy came with the publication of the White Paper on Growth, Competitiveness and Employment³⁶⁸, in December 1993, after which Europe thought that it would be worthwhile to commit itself to the creation of the Information Society.

As explained earlier, the Commission cleverly used the publication of this document to establish the criteria for tackling the liberalisation of telecommunications infrastructures and the establishment of full competition in the sector.

The Commission's past doctrine on the use of Structural Funds to correct the imbalances in telecommunications in less developed regions was not mentioned in the White Paper, nor was it included in any of the subsequent documents, as will be seen.

The Bangemann Report³⁶⁹, which had been drafted at the request of the Council of Europe under the supervision of the Commission, laid the foundations of the doctrine that the Community Institutions would follow from then on. Among other things, the Report said that:

“The Group recommends members States to accelerate the ongoing process of Liberalisation of the Telecom sector by:

- *Opening up to competition infrastructures and services still in the monopoly area*
- *Removing non commercial political burden and budgetary constraints imposed on telecommunications operators*
- *Setting clear timetables and deadlines for implementation of practical measures to achieve these goals”*

Evidently, the road that was about to be embarked upon implied making the decision to leave the development of infrastructures, networks and telecommunications services to private initiative and capital, and it was in that context that all cohesion actions seemed to be unnecessary.

In the Action Plan for the development of the Information Society that the Commission published in July 1994³⁷⁰ as a follow up to the Bangemann Report, the cohesion matters were solely mentioned in the general considerations about the social aspects.

The document read as follows:

“Societal aspects

The information society will profoundly change everyday life and leisure time, promote new forms of urban and rural development and improve the quality of the education and health systems. However, the accelerated diffusion of new technologies may also give rise to rejection and isolation.

³⁶⁸ COM(93) 700. Growth, competitiveness and employment. The challenges and courses for entering into the XXIst century. Brussels 5 December 1993.

³⁶⁹ Europe and the Global Information Society. Recommendations to the European Council. Brussels 26 May 1994.

³⁷⁰ COM(94) 347. Europe's Way to the Information Society - An Action Plan. Brussels 19 July 1994.

In line with the actions undertaken with respect to applications and with the support of the High Level Group of Experts, the Commission will launch a series of works on the main social impacts caused by the introduction of these new technologies.

It will also launch a study assessing the impacts and benefits of the information society for regional, economic and social cohesion.”

Subsequently, the Commission published the Green Paper on infrastructures^{371, 372} and it is worth highlighting the contents of Part Two, which included the 1995 Telecommunications Strategy.

If one compares the proposals of this strategy with those included in the 1993 strategy, it is clear that most of them are almost identical, both in terms of number and contents. However, this should be viewed with one subtlety in mind which, in our opinion, is important with regard to the aspects being analysed in this document.

The proposal of the 1993 strategy titled “*Ensuring Social and Regional Cohesion*” disappeared and was replaced by “*Social and Societal Impact*”.

Finally, the document that the Commission presented in May 1995 as a consequence of the consultation regarding the Green Paper on Infrastructures referred to the scope of the Universal Service with an almost negligible statement about the cohesion aspects, as shown below:

“...It is important to stress that economic and social cohesion is a political priority of the Union”

As for the use of Structural Funds for the development of telecommunications networks and infrastructures in the less developed regions, everything seemed to indicate that the decision to introduce full competition into the sector and the objective of boosting the creation of the Information Society had proscribed any specific actions in that regard.

Indeed, the strategy which the Commission sought to implement did not involve allocating new specific Structural Funds to the development of telecommunications, but rather making the Regions realise that they should allocate part of their Structural Funds to telecommunications projects, giving priority to these investments over others, in particular over public works, which had been the traditional destination of such European Funds.

In order to put this strategy in place, the Commission used a special project financing mechanism set out in article 10 of the 1993 ERDF Regulations. As mentioned earlier, under the Regulations, 1% of all the Funds could be set aside for the implementation of pilot studies and projects in the Commission's fields of interest, within the framework of the Regional Policy³⁷³. Within this framework, in 1995 the Commission implemented a co-financing experiment in a series of pilot regions, for the design of Regional Plans and Strategies for the development of the Information Society.

The first action was the project that led to the creation of an Inter-Regional Information Society Initiative – IRISI, with the participation of six Regions: Central Macedonia, Nord-Pas of Calais, North-West England, Piedmont, Saxony and the Region of Valencia. We had the chance to participate in it supporting the Region of Valencia. During 1997, this initiative was extended to another 23 European regions under the name RISI³⁷⁴.

³⁷¹ COM(94) 440. Green Paper on the liberalisation of telecommunications infrastructure and cable television networks: Part One - Principle and timetable. Brussels, 25 October 1994.

³⁷² COM(94) 682. Green Paper on the liberalisation of telecommunications infrastructure and cable television networks - Part Two - A common approach to the provision of infrastructure for telecommunications in the European Union. Brussels, 25 January 1995.

³⁷³ Second Programme of Inter-Regional Cooperation and Innovation Actions within the Structural Funds 1995-1999. Information Pack. DG XVI. European Commission. 1995

³⁷⁴ RISI Initiative: http://ec.europa.eu/regional_policy/innovation/innovating/infosoc.htm, visited 8/9/2010.

With these actions, the Commission sought to contribute towards the development of Regional Plans for the creation of the Information Society, which would include the participation of the main socio-economic players and Regional Administrations. The Commission wanted the Plans to be the result of a consensus between the main socio-economic players in partnership with the Regional Administrations. A result of this planning task would be the decision to reorient the use of Structural Funds towards projects for the development of telecommunications and the Information Society^{375, 376}.

In these actions, the Commission dealt with the Regions directly, without involving the Member States, and expected better results.

2 4.- The Corrective Actions used after 1998

This analysis of events points to two conflicting views in the courses of action followed by the Commission when addressing how telecommunications would affect the attainment of the economic and social cohesion objectives.

During the first stage of the Community Institutions' actions, in the period 1977 – 1986, it was quite clear that the Telecommunications Policy needed to include a set of actions geared towards the achievement of the cohesion objectives throughout the European Community. This was the message conveyed by the Community texts during that period and, to that end, the Commission adopted a set of economic measures that proved its intention to solve the problems, although these measures were clearly insufficient.

After the decision to liberalise voice telephony services was made in the 1993 strategy, any general reference to the cohesion objectives started to become blurred in the Community texts on telecommunications, which were replaced by specific and concise proposals related to this sector: firstly, the granting of moratoriums of up to five years for the liberalisation of voice telephony in certain countries and, secondly, the establishment of obligations for the setting up of a Universal Service that would guarantee the delivery and access to a set of telecommunications services for all citizens.

The impression was that these measures would suffice to rid the telecommunications sector of any problems derived from the regional imbalances present throughout the Union.

It seems that the people responsible for designing the telecommunications policy considered that cohesion problems no longer had anything to do with the telecommunications sector. A telecommunications policy devised to establish full competition within the sector should not include any sort of measures for tackling cohesion problems. Instead, this type of problem should be addressed by another specific Community policy.

Yet evidently, the problems posed by the imbalances between the Community's different Regions, which were present much before the start of the telecommunications actions, unfortunately still existed after 1998. Shifting attention to other matters would not make these problems disappear.

Even though the telecommunications responsible did not do so, the people at the Commission in charge of the Regional Policy did start to warn about these issues.

³⁷⁵ Alabau, A. Telecommunications and Information Society in European Regions. *Telecommunication Policy* Vol. 21. num. 8. Pp. 761-771. October 1997.

³⁷⁶ Alabau, A. (Ed.). Las Regiones y el desarrollo de la Sociedad de la Información. Cuadernos de Telemática. Regional Council of A Coruña. 2000

In November 1996, the Commission published the First Report on Economic and Social Cohesion³⁷⁷, in accordance with the rule set forth in the amendment made, in 1993, in the Treaty of Maastricht to article 130 B (currently Art. 175), whereby every three years the Commission must report to all the other Community Institutions on the progress achieved in the cohesion process.

Among many things, this Report referred to telecommunications in the following terms:

“There are reasons to be optimistic and believe that, in the long run, the less densely populated peripheral regions will benefit from the opening up of the telecommunications market and the harmonisation policies, even if the latter have negative effects in the short term.

The main dangers are that new investments might focus on relatively high-demand, low-cost areas and that the changes in the tariff structures ... might delay the development of new services in certain regions of the cohesion countries.”

Further on, it added:

“Telecommunications are least developed in the four cohesion countries. As noted above, after liberalisation, operators may be even less inclined than before to invest in areas where spending on services is relatively low, cost of investment is high, in part because of low population density, and the returns are smaller than elsewhere.

....

As well as USOs, accompanying measures may be required to help accelerate the development of the networks in the cohesion countries, possibly using resources from the Structural Funds, and avoid significantly adverse effects from liberalisation (as acknowledged in the Commission’s 1995 Green Paper on infrastructure)”.

The disparity in the criteria applied by the Commission's own services was evident and proved that there was a problem that had to be tackled.

Proof that the cohesion problem in the telecommunications sector had not been solved lay in the fact that in January 1997, barely two months after the publication of the First Report on Cohesion, the Commission published a Communication titled “Cohesion and the Information Society³⁷⁸”.

In the foreword of this document, the Commission clearly outlined the situation that would be later analysed in depth, stating the following:

“Though the opening of telecommunications market and harmonisation measures reach out to the whole territory of the Union, the principal risk is that investments in some regions will be delayed.

Thus, the development of the information society needs to be complemented, where necessary, by policy action in order to close the existing gaps and ensure that the information society develops at the desired rate throughout the Union. This calls for the participation and coordination of regions, national governments and the European institutions so as to avert a polarisation between “information haves” and “information have-nots” as the new technologies spread”.

The Commission’s document summarised the main actions carried out until now, as explained in this Chapter. The document included a Statistical Annex with a set of general telecommunications-related indicators, comparing the situation of the Cohesion Regions with that of all the European Union

³⁷⁷ COM(96) 542. First report from the Commission on economic and social cohesion. Brussels 6 November 1996

³⁷⁸ COM(97) 7. Cohesion and the Information Society. Brussels 22 January 1997.

regions. This information had been obtained from a study prepared for the Commission in 1995, in which the author was involved³⁷⁹. In its conclusions, the Commission put forward one set of proposals for the States and another for the Commission itself.

In the proposals for the Member States, the Commission suggested the following types of actions:

- In relation to the development of the regulatory framework:
 - . *continue the debate on the scope of universal service and on the concept of public access in the information society*
 - . *provide for early completion of the liberalisation process.*
 - . *explore licensing regimes with a view of integrating coverage targets including less favoured regions*

- In relation to the Member States' general actions:
 - “give priority to the completion and upgrading of the telecom networks, identifying the link between investment and regional performance...”*
 - . *adopt a strategic and integrated approach to the information society in partnership with regional and local authorities...*
 - . *establish public/private partnerships....*
 - . *launch a range of initiatives in the areas of education, training and work organisation....”*

- As regards future actions, the Commission said that it intended to:
 - . *take into account the results of the consultation carried out at the Member state level when developing further its policy on universal service...*
 - . *increase the coherence of its actions in the field of the information society, in particular, in the relation between the 4th Framework Programme for RTD and the Structural Funds...*
 - . *prepare for spring 1997 a communication describing the set of actions to be undertaken as a follow-up to the consultation and debate process on the Green paper "Living and working in the Information Society.."*
 - . *grant technical assistance to Member States and regions...*
 - . *accompany and continuously support the actions of Member states in the framework of the Structural Funds, in particular, in order to devise integrated and strategic approaches to the information society, to enhance regional capacity building at all levels....”*

2.5.- Summary of the Cohesion-related actions during the Period 1987 – 1998

Table 8.1 summarises the contents of this section.

³⁷⁹ Nexus Europe et al. An Assessment of Social Economic Cohesion Aspects of the Development of the Information Society in Europe. Study prepared for the European Commission. DG XIII. January 1996

On the one hand, it displays the key milestones of the European Union's Regional Policy since 1984, in particular, the different ERDF Regulations and actions envisaged within them: Regional Development Plans, Community Programmes, Community Initiatives and Specific Actions described in Art. 10.

It also spotlights the actions in the Telecommunications-related actions of 1987, 1993 and 1995, showing the main activities that had an effect on the regional policies.

Year	REGIONAL POLICY					TELECOMMUNICATIONS POLICY
	ERDF Regulations	Regional Dev. Plans	Community Programmes	Community Initiatives	Actions Article 10	Programmes
1984	1984 ERDF Regulations					1984 Actions
1985	Regional Plans	Regional Development Plans 1985-88	STAR Programme			Regional Development of Telecommunications
1986	Community Programmes					
1987			Basic Networks and Infrastructures Applications			1987 Actions
1988	1988 ERDF Regulations					Liberalisation of Terminals
1989	Regional Plans	Regional Development Plans 1989-93				Liberalisation of Value Added Services
1990	Community Initiatives					
1991				Telematique Initiative		
1992				Telematic Applications		
1993	1993 ERDF Regulations			Value Added Services		1993 and 1995 Actions
1994	Regional Plans	Regional Development Plans 1994-99				Liberalisation of Voice Telephony
1995	Community Initiatives				I.S. Actions of Art. 10	Development of the Information Society
1996	Actions in Article 10				IRISI network	Liberalisation of Infrastructures
1997	REVIEW OF THE STRUCTURAL FUNDS				RISI network	
1998						FULL COMPETITION

3.- THE ADAPTATION OF THE IMBALANCES OF THE NATIONAL TELECOMMUNICATIONS OPERATORS.

3.1.- Overview of the situation of incumbent operators

From the very start, the European Institutions were well aware that their efforts to liberalise telecommunications markets, in particular the services markets, had to take account of the specific nature of all the national operators that, to date, had been involved in deploying the networks and providing the services in each Member State.

From the outset, they were aware of the delicate balance that had to be struck between introducing competition and sustaining the economic stability of each country's incumbent operators. In each of the different telecommunications strategies described in this section, they adopted measures that were clearly and formally oriented towards the attainment of such objectives. One of the aims was to give the incumbents a reasonable amount of time to make the structural adjustments they deemed necessary to ensure they remained competitive on a market that, in the long run, would be subject to the regulations of free competition.

The documents published by the Commission and other related institutions at the start of its telecommunications-related activities cited figures that eloquently described the major differences between operators at that moment. These documents³⁸⁰ also suggested that one of the reasons for such imbalances was the fragmentation of national markets over the last few decades and what was then described as the “non-Europe”:

“The immediate consequences of non-Europe during that period were that telephone services cost more than necessary and there were delays and a lack of coordination in the introduction of the new services”.

If some of the aforementioned reasons had occurred, no doubt they might have had a positive bearing on the development of telecommunications, yet it is just as true that different imbalances, in particular those related to each Member State's capacity to generate wealth, were what actually conditioned the development of national telecommunications and led to the imbalances at the start of the liberalisation process.

The next sections describe the two main types of Community actions taken to allow national operators to adapt to the new situation: first, the general delay in the liberalisation of voice telephony and, secondly, the granting of moratoria for the entrance of full competition in some Member States.

3.2.- Actions of the 1987 strategy. Safeguarding Operators' economic viability.

The 1987 telecommunications strategy document³⁸¹ posed the need to open up the service market to competition, while at the same time trying to ensure that the operators, which were still known as telecommunications administrations, remained financially viable:

³⁸⁰ Ungerer, H. Telecommunications in Europe. Ed. Commission of the European Communities. Brussels 1988

³⁸¹ COM(87)290. Towards a dynamic European economy. Green paper on the development of the common market for telecommunications services and equipment, Brussels, 30 June 1987.

“Chap. VI

4.3.3.- Financial viability

There seems to be general agreement in the Member States on the need to safeguard the financial viability company of the Telecommunications Administrations, especially in view of the massive investments in network infrastructures that are going to be required in the future, in order to comply with their public service mandate.

The biggest - and under present conditions only real - threat is the potential loss of voice traffic - which currently accounts for 85 to 90% of all telecommunications revenues....”

Based on the said arguments, the value-added service market was opened up to competition, while voice telephony services and, obviously, infrastructures continued to be run as a monopoly.

Later on, one of the recitals of Directive 90/388³⁸² on the services market, while bearing in mind the mission that had been entrusted to operators, which were still referred to as telecommunications bodies, put forward the following arguments:

“Whereas:

18.- Article 90 (2) of the Treaty allows derogation from the application of Articles 59 and 86 of the Treaty where such application would obstruct the performance, in law or in fact, of the particular task assigned to the telecommunications organizations. This task consists in the provision and exploitation of a universal network, i.e. one having general geographical coverage, and being provided to any service provider or user upon request within a reasonable period of time. The financial resources for the development of the network still derive mainly from the operation of the telephone service. Consequently, the opening-up of voice telephony to competition could threaten the financial stability of the telecommunications organizations. The voice telephony service, whether provided from the present telephone network or forming part of the ISDN service, is currently also the most important means of notifying and calling up emergency services in charge of public safety.

Therefore the Commission ordered the Member States in this Directive to proceed as follows:

“Article 2

Without prejudice to Article 1 (2), Member States shall withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony and shall take the measures necessary to ensure that any operator is entitled to supply such telecommunications services.”

At the same time it launched a series of activities that, in the future, would facilitate the implementation of full competition, with the following actions:

- The separation of regulatory functions from network and service operating functions, in order to ensure impartiality in the drafting and application of the regulations applicable to the telecommunications sector.
- The orientation of tariffs to the actual costs of the services, so as to steadily reduce cross-subsidies between services.
- Separate accounts for activities subject to competition and those operated as a monopoly.

³⁸² Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services. OJ L 192. 24 Julio 1990. P. 10.

These were the first actions that could be regarded as measures to correct - though in this case they really limited, the effects of full competition on telecommunications operators.

If one compares this situation to the one analysed in the previous sections, it becomes clear that by maintaining network and service operations as a monopoly, telecommunications operators were able to receive capital subsidies from community funds for upgrading their infrastructures and networks, always in compliance with competition regulations.

3.3.- The Actions of 1993 and 1995.

The problem of the difficulties that some national operators might face in adapting to competition arose again when 1 January 1998 was set as the deadline for the liberalisation of voice telephony.

The Commission was aware of this and, in the Communication³⁸³ that it issued after the 1992 consultation; it proposed that this situation should be taken into account.

The opinions that the Commission gathered from the sector's players included the following:

“III.- COMMENTS RECEIVED CONCERNING THE MAIN ISSUES

E.- Regional and social Cohesion

26) In summary, it was considered of particular importance to adapt any proposals for the future development of the sector to the specific needs of the peripheral regions and those countries with smaller networks.

Major means envisaged were adequate transition periods and sufficient time to adjust, as well as full use of Community and national support structures.

Based on this information, the Commission gave its own opinion:

V. EVALUATION BY THE COMMISSION

F.- Ensuring Social and Regional Cohesion

51) Self-financing by TOs to meet the investment requirements of peripheral regions is, and will continue to be, insufficient. While progressive liberalisation will increase usage and cash flows and stimulate investment in the peripheral regions, there is uncertainty as to the extent and the period in which these benefits will be felt in the peripheral regions. The Commission recognises the need for special arrangements for additional transition periods and for access charges, in order to safeguard investment capabilities in the countries concerned in the short to medium term.

As a consequence, the Commission proposed the following:

“VII. THE PROPOSED SCHEDULE

Second phase (1996-1998):

³⁸³ COM(93)159. Communication to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector. Brussels, 28 April 1993

- *examination, prior to full liberalisation, of progress on structural adjustment, in particular of tariffs, in those countries experiencing difficulties in order to take account of the situation of the peripheral regions and small or less-developed networks, including definition of additional transition periods, where justified, which should not go beyond two years.*
- *full liberalisation of public voice telephony services by 1 January 1998.*”

Clearly, the general feeling was that additional adaptation periods ought to be granted in specific cases.

The final solution was adopted at the hectic Council of Ministers held in June 1993³⁸⁴ where the well known timetable for the liberalisation of voice telephony was established. The Council set 1 January 1998 as the deadline for the liberalisation of voice telephony, but it was more generous than the Commission when setting the length of the transition period. The Commission's initial proposal for a two-year moratorium was extended to five years after a series of discussions.

The text approved by the Council read as follows:

“ In order to allow Member States with less developed networks, i.e. Spain, Ireland, Greece and Portugal, to achieve the necessary structural adjustments, in particular of tariffs, these Member States are granted an additional transition period of up to five years. The Council notes the intention of the Commission to work closely with these Member States in order to achieve such adjustments as soon as possible and in the best possible way within the period. Very small networks can, where justified, be granted a period of up to two years;

So during the transition period for the liberalisation of voice telephony, the Member States concerned and their telecommunications operators would have to devote all their efforts to the modernisation of their networks, making them more competitive and adjusting the tariffs to costs, doing away with the cross-subsidies still in force.

It is worth noting that this would not be the only means of granting moratoria for the application of the successive telecommunications services liberalisation timetables, as explained next.

Directive 96/2³⁸⁵ established the immediate liberalisation of mobile and personal communications services but the States with less developed networks would be entitled to request an additional five year period to implement the liberalisation regulations. Yet unlike in the previous instance, the Directive stipulated that these additional periods would not be granted automatically, and instead the Commission would be responsible for granting such moratoria, upon a request from the Member States:

“Art. 4.

Member States with less developed networks may request at the latest three months from the entry into force of this Directive an additional implementation period of up to five years, in which to implement all or some of the conditions set out...

Such a request must include a detailed description of the planned adjustments and a precise assessment of the timetable envisaged for their implementation...

The Commission will assess such requests and take a reasoned decision within a time period of three months on the principle, implications and maximum duration of the additional period to be granted.

³⁸⁴ Council Resolution of 22 July 1993, on the review of the situation in the telecommunications sector and the need for further development in that market. OJ C 213. 6 August 1993. P. 1

³⁸⁵ Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications. OJ L 20, 26 January 1996. P. 59

Finally, Directive 96/19³⁸⁶ of March 1996, which established the entry into force of full competition in the sector, including infrastructures, after the 1st of January 1998, regulated the procedure for granting moratoriums which, until now, had simply been mentioned in a Council Resolution. The Directive clearly stated as follows:

“Art. 2

....., Member States may maintain special and exclusive rights until 1 January 1998 for voice telephony and for the establishment and provision of public telecommunications networks.

... .., Member States with less developed networks shall be granted upon request an additional implementation period of up to five years and Member States with very small networks shall be granted upon request an additional implementation period of up to two years, provided it is needed to achieve the necessary structural adjustments.“

It was implicit that the Commission would be responsible for granting or refusing the additional periods requested.

In accordance with the provisions of the two aforesaid Directives, the Member States that deemed it appropriate requested such additional periods during the first months of 1996.

3.4.- Comments on the situation after 1998.

Evidently, due to the very nature of the type of corrective action described in this section, after a period of time, the additional periods of time that the States were given for implementing full competition in the different types of networks and services will come to an end, as described in the previous sections. The deadline established for these cases was 1 January 2003.

In line with the criteria laid down by the Commission in its last Directives, the different Member States asked the Commission to set the deadlines they believed necessary for making the structural adjustments required by their national telecommunications operator. In most cases, the Commission accepted these deadlines.

Also worth pointing out is the fact that, within the framework of the WTO and the General Agreement on Trade in Services – GATS, signed in April 1997, 1st January 1998 was also set as the deadline for the entry into force of the Agreement for the Liberalisation of Basic Telecommunications.

This circumstance undeniably prompted some States to decide not to use the whole 5-year moratorium to which they were entitled to avoid the discrimination that their own operators might face when entering into international agreements, due to the applicability of the reciprocity principle set forth in the GATS, whereby an operator in one State would be treated in a foreign country in the same way that foreign operators would be treated in its own country.

With regard to mobile telephony, Ireland applied for a moratorium until 1st January 2000 for the liberalisation of certain aspects of its service, but the Commission only granted it until 1st January 1999. Similarly, Portugal applied for and obtained from the Commission a moratorium until 1st January 1999.

Similarly, as regards the liberalisation of voice telephony and infrastructures, Luxembourg applied for a transition period until 1st January 2000, which coincided with the two years already granted.

³⁸⁶ Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets. OJ L 74, 22 March 1996. P. 13.

Likewise, Ireland and Portugal applied for a moratorium until 1st January 2000, three years less than what it was entitled to, while Greece chose to use up the full period of time and set 1st January 2003 as the date for the entry into force of full competition.

Finally, Spain chose to delay the full liberalisation of networks and services until 1st December 1998.

4.- GUARANTEEING UNIVERSAL SERVICE IN THE TELECOMMUNICATIONS SECTOR.

4.1.- Overview of the Universal Service.

The third corrective mechanism described in this section would ensure that everyone could access telecommunications services at affordable prices within the framework of free competition. The aim was to ensure a standard level of quality of the basic services offered to all users and avoid any unfair price rises after telecommunications ceased to be run as a monopoly.

The solution to this problem involved defining a set of telecommunications services to be regarded as basic and, therefore, that all users would be entitled to access. All in all, this led to the establishment of the rights and obligations of the universal service³⁸⁷.

The universal telecommunications service is usually described as a set of minimum services with a specific quality that can be accessed by all users, regardless of their geographical location and at affordable prices.

Underpinning the universal service obligations was the clear fact that, in some cases, the costs incurred in providing basic telecommunications services to some users exceed the revenues obtained. This occurs either because the costs are high, as the users are located in regions far from economic centres or because the revenues obtained are low and, in some cases, for both reasons.

This situation was by no means new or specific to the telecommunications sector and has underpinned the public service concept from the start of State intervention in the economy.

Therefore, the first issue was to decide which types of services and what levels of quality would be included in the universal telecommunications service obligations.

The second issue was to decide who should be made responsible for providing universal service in a given territory and what the costs would be.

The third issue involved devising a mechanism for compensating any losses that operators might make in complying with the universal service obligations.

The next sections analyse how this situation was addressed in the European Union as part of its Telecommunications Policy.

³⁸⁷ Garcés, M. Estudio sobre el Servicio Universal. Concepto, principios, legislación e implicaciones ante la liberalización de las telecomunicaciones. ETSI de Telecomunicación. Valencia Polytechnic University. 17 July 1996

4.2.- The Universal Service in the 1993 strategy.

The European Union's concerns about the universal service first appeared when the Commission published its Review of the sector's situation in October 1992, and suggested the possibility of opening up voice telephony services to competition³⁸⁸. Before addressing the four options for the future of the sector, the Commission clearly stated the following:

“4.- BASIC OPTIONS

4.1.- Objectives specific to telecommunications

It is essential that any new actions to be undertakenmust be compatible with the following objectives specific to telecommunications services. These are:

.....

4.1.2.- Universal Service

Universal cost effective trans-European telecommunications networks and services are vital for a flourishing single market. Universal service must therefore be guaranteed. Universal service consists of the provision and exploitation of a universal network, i.e., one having general geographical coverage, and being provided to any user or service upon request within a reasonable period at affordable prices....”

When the document had been published, the sector's players gave their opinions on the contents and scope of the universal service, which were then explained in the Communication published by the Commission in April 1993, as a result of the consultation process³⁸⁹. In this document, the Commission re-addressed the matter as follows:

“VI. KEY FACTORS FOR THE DEVELOPMENT OF THE FUTURE REGULATORY FRAMEWORK

b) Common definition of Universal Service Principles

The development of a balanced regulatory framework requires clear recognition of the vital principles of public service in this area:

- . universality, i.e., access for all, at an affordable price*
- . equality, i.e., access independent of geographical location*
- . continuity, i.e., continuous provision, at a defined quality*

... the principles of universal service at a Community level will cover:

- . Initial provision of service*

Member States must ensure the provision of a public telephone network and voice telephone service.

- . Special public service features*

³⁸⁸ SEC(92) 1048. 1992 review of the situation in the telecommunications services sector. Brussels, 21 October 1992.

³⁸⁹ COM(93)159. Communication to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector. Brussels, 28 April 1993

Member States must ensure the provision of public pay phones,directories to users,.... access to international voice telephony services...

. *Quality of service*

Member States must ensure the publication of quality targets and information about the service for users..."

Finally, during its June 1993 meeting, the Council³⁹⁰ adopted a Resolution that updated the Commission's proposals while establishing a timetable for the actions that would be carried out until 1998, in the following terms:

"CONSIDERS as major goals for the Community's telecommunications policy in the longer term:

(1) the liberalization of all public voice telephony services, whilst maintaining universal service"

As was customary, the Council invited the Commission to make a proposal on the contents of its Resolution and the scope of the universal service.

Therefore, the Commission prepared and published the first document that was especially devoted to the universal service in the telecommunications sector, i.e., the Communication of 15 November 1993³⁹¹. It was a relatively short text in which the Commission expressed its willingness to cooperate in the establishment of the principles of the universal service:

"Council Resolution 93/C213/01, of 22 July 1993 on the Review of the situation in the telecommunications sector emphasises the need to maintain and extend universal service.

The Commission fully supports this goal as an essential condition for maximising the contribution of the telecommunications sector to overall economic growth, social well being and cohesion in the Community..."

However, the Commission's initial proposal regarding the scope of the universal service, as set out in this document, differed greatly from the one that it was willing to adopt, as explained further on.

In the document, the Commission clearly portrayed the universal service as a consequence of its harmonisation policy, in other words, as a result of the definition of the ONP:

"As was broadly recognised during the consultation on the Review [on the situation of the sector], the main elements for a Community-wide definition of universal service principles have been developed within the framework of the Open Network Provision (ONP) rules"

Yet the objectives of the universal service were explained in a very long Annex to the Communication, which read as follows:

"Universal service means the provision to all users of a defined minimum service with a specific quality at affordable prices"

³⁹⁰ Council Resolution of 22 July 1993, on the review of the situation in the telecommunications sector and the need for further development in that market. OJ C 213. 6 August 1993. P. 1

³⁹¹ COM(93) 543. Communication of the Commission. Communication developing universal service for telecommunications in a competitive environment. Proposal for a Council Resolution on universal service principles in the telecommunications sector. Brussels, 15 November 1993.

After providing a vast amount of legal references, the Commission defined the basic elements of the universal service as follows:

“ *SERVICE ELEMENTS*

.....

2.1.- *Elements Basic (basic and advanced voice telephony services)*

.....

2.2.- *Leased lines (those defined in the ONP framework)*

.....

2.3.- *Recommended offerings (ISDN and packet-switched data Transmission Services)”*

In addition, the Commission’s document included a proposal for a Council Resolution concerning this matter. This was just a necessary formality because, in line with Community procedural rules, the Council had to invite the Commission to initiate the activities required to define the scope of the universal service obligations.

Indeed, at the proposal of the Commission, in February 1994 the Council adopted a specific Resolution³⁹² regarding universal service in the telecommunications sector, which stated the following:

“ *RECOGNIZES:*

(g) that in pursuing the objective of maintaining and developing a universal telecommunications service account will be taken of the specific circumstances of the peripheral regions with less-developed networks and of very small networks and the role which the appropriate Community support framework may play having regard to national priorities.”

.....

WELCOMES:

the intention of the Commission to take full account of the requirement for universal service in preparing the future adjustment of the regulatory framework for the telecommunications sector, in particular by applying and adapting the open network provision principles

.....

INVITES the Commission:

(a) to study and consult, in particular with national regulatory authorities, on the issues raised by the definition of universal service and its means of financing, taking specific account of the need for adjustment in peripheral regions with less-developed networks.”

The publication of this document completed the cycle that was mandatory according to Community legislation initiative principles, and the Commission was authorised to start defining the contents of the scope and the universal service obligations, and to put forward proposals about its regulations. This is just an example of the complexity of Community procedures.

At that moment, the Commission was so determined to link the universal service to the results of the ONP that, adding to this Council resolution, on 7th February 1995 it hastily adopted a Declaration³⁹³ that stated its opinion on the elements of the universal service; and did so in almost identical terms to those of the Annex to its Communication of November 1993. The Declaration was adopted on the

³⁹² Council Resolution of 7 February 1994 on universal service principles in the telecommunications sector. OJ C 48, 16 February 1994. P.

³⁹³ ¹ Commission Declaration of 7 February 1994 on universal service principles in the telecommunications sector. OJ C 48, 16 February 1994. P. 6

same date as the Council Resolution and in the same issue of the Official Journal, right after the Council Resolution.

However, this situation was about to change substantially because the future of the European Union's Telecommunications Policy was on the verge of a turning point, as explained further on.

4.3.- The Universal Service in the 1995 strategy.

After launching the challenge of building the Information Society in the European Union, the first clear statement about what the universal service should consist of came in the Bangemann Report. Among other opinions, the document's authors expressed the following, one supposes with the Commission's approval:

“A competitive environment requires the following:

** Telecommunication operators relieved of political constraints, such as:*

.....

- The burden to carry alone the responsibilities of universal service.”

Basically, it was simply a declaration of intent by the operators, and one that the Community Institutions were going to bear in mind.

However, the Commission carried on with its scheduled courses of action, which were mentioned in its Action Plan published in July 1994, following the publication of the Report, i.e., the Communication called "Europe's way to the Information Society"³⁹⁴.

After settling these matters and with the approval of the Council of Europe for the full liberalisation of the sector, the Commission published the Green Paper on Infrastructures³⁹⁵, ³⁹⁶ which would complete the process for the implementation of full competition in the telecommunications sector.

In Part Two of this document, the Commission referred to the need to define the obligations of the future universal service within the context of the liberalisation of infrastructures. Part of the text read as follows:

“Universal Service

Consists of access to a defined minimum service of specified quality to all users at an affordable price and respecting the principles of universality, equality and continuity. The detailed elements of this service are set out in Council Resolution and Commission statement 94/C 48, of 7 February 1994”.

The Commission seemed to be keen on sticking to its original ideas because it considered that the universal objectives service should be defined as the results of the ONP, as it has suggested until then. However, in the document the Commission paved the way for its new strategy, and with the definition of the universal service used until now; the Commission introduced the Universal Service Obligation concept, as follows:

“Universal Service Obligation:

³⁹⁴ COM(94) 347. Europe's way to the Information Society. Action Plan. Brussels 19 July 1994.

³⁹⁵ COM(94) 440. Green Paper on the liberalisation of telecommunications infrastructure and cable television networks: Part One - Principle and timetable. Brussels, 25 October 1994.

³⁹⁶ COM(94) 682. Green Paper on the liberalisation of telecommunications infrastructure and cable television networks - Part Two - A common approach to the provision of infrastructure for telecommunications in the European Union. Brussels, 25 January 1995

The obligation placed upon one or more operators to provide universal service - usually the provision of basic services, in particular telephone service”

Separating these two concepts meant that the original universal service concept could be dismantled in two stages. Firstly, the general concept of the universal service was maintained and attention was focused on the definition of the obligation, which was the main source of interest for operators. Once the obligation had been defined, it would be regarded as the true definition of universal service, and the definition originally proposed by the Commission was dropped without any problems.

The consultation about the Green Paper on Infrastructures took place during the first months of 1995 and with the comments received³⁹⁷, the Commission published its conclusions in May of the same year³⁹⁸ in the document that defined the strategy for Telecommunications in 1995.

Therefore, the Commission ascertained what the sector's main players thought about the universal service through this first opinion poll four months before it launched the public consultation that specifically addressed this matter in September 1995. What the sector's players told the Commission was that they were not prepared to shoulder the burden and obligation of providing a universal service of the broad scope initially proposed, in accordance with the ONP principles and that, at most, it should be restricted to the voice telephony service. They made that quite clear.

This explains the reason why the Commission failed to launch the universal service consultation until one and a half years after being invited to do so by the Council, in February 1994. Once again, one has to agree that the Commission made the calendar its best ally and letting months go by seemed the right move at this stage. In fact, the real consultation had already taken place.

So once the Commission had decided on the calendar of activities until 1998, it launched the planned consultation. On 20th September 1995, it published a document³⁹⁹ that included a questionnaire on the scope of the universal service, inviting the sector's players to express their opinion on three main categories:

- The scope of coverage of the universal service
- An affordable telephony service
- The public access concept in the Information Society

It is worth mentioning that, the Commission's own services, in an internal memo (Commission's cuisine) dated 5th February 1995⁴⁰⁰ acknowledged that only a few issues would remain to be tackled once a consensus had been reached about the contents of the universal service during the consultation of the Green Paper on infrastructures. The document also answered all the questions raised by the Commission, which did not differ much from those later given by the sector's players.

As far as the definitions were concerned, this document clearly stated:

“In order to clarify the debate about what is regarded as universal service in Europe, three types of services must be separated:

- Universal Service: the service for which regulations establish an obligation with regard to its universal availability and affordability.... This intervention must be limited strictly to those

³⁹⁷ XIII/95/34. Public comments on the 1995 Green Paper on the liberalisation of telecommunications infrastructures and cable television networks. Vol. I & II. Commission Européenne. DG XIII

³⁹⁸ COM(95) 158. The consultation on the green paper on the liberalisation of telecommunications infrastructure and cable television networks. Brussels, 3 May 1995.

³⁹⁹ Questionnaire about universal service. European Commission. DG XIII. Brussels, 20 September 1995

⁴⁰⁰ Argumentaire on Universal Service. European Commission. DG XIII. A1. Brussels, 9 October 1995.

basic services that could not be available or accessible without such obligations. That means that, in Europe, it must be limited to the provision of the voice telephony service.

- Obligatory Services: such as leased lines or mobile communications. In these cases, regulatory intervention must be limited to guaranteeing availability and not so much accessibility (because such services are usually provided to specialized or business users and not to domestic users).

- Information Society Services: such as on-line databases and applications in education or health. In these cases, regulatory activity, at the present time, must be limited to guaranteeing public access to such services, for example in schools, hospitals and libraries. Any future extension of the universal service that includes new telecommunications services must be carried out as a response to a high level of penetration in the residential sector.

Member States will be free to extend the minimum requirements of the universal fixed telephony service for all Europe, providing the universal availability of certain services and public access to others. The cost of such services may not be financed with the national universal service funds nor through other mechanisms that depend on direct contributions from competitors.

This clearly shows that everything had already been put down in writing and decided upon at the start of October 1995.

However, the consultation took place from September to November 1995 and, after it was completed, on 13th March 1996 the Commission published a long Communication⁴⁰¹ with the results and proposing the following conclusions:

- The universal service would be limited to voice telephony. The service obligations would be detailed in the ONP Directive on Voice Telephony, in accordance with the Full Competition Directive.
- A clear framework had to be established for the calculation of costs and financing of the universal service. The financing framework would be established in the ONP Directive on Interconnection and the Full Competition Directive
- The evolution and affordability of the universal service would have to be monitored closely.
- Since it was a dynamic concept, there ought to be an analysis of the possibility of expanding the contents of the universal service in the future.
- The Commission planned to analyse the evolution of the universal service before 1st January 1998.

The annexes attached to this document included interesting information about the state of telecommunications in the European Union at that time, with plenty of statistical data.

In its conclusions, the Commission outlined the procedure that would be used to define the details of the universal service obligations. In this regard, it mentioned the Directives applying the ONP to Voice Telephony and Interconnection, and also the Directive on Full Competition. It is worth remembering that the first two Directives would be issued by the Council and Parliament, while the latter one would be a Commission Directive, in accordance with article 90 (currently Art. 106) of the Treaty.

However, the Commission did not wish to leave the responsibility for defining the scope of the universal scope in the hands of the Parliament and Council and it decided to take part in the process.

⁴⁰¹ COM(96) 73. Universal service for telecommunications in the perspective of a fully liberalised environment - An Essential Element of the Information Society Brussels 13 March 1996

So on 13 March 1996, the same day that it published the Communication with the results of the universal service consultation, the Commission also adopted Directive 96/19⁴⁰² regarding the establishment of full competition in the telecommunications sector. This Directive established the following:

Without prejudice to the harmonization by the European Parliament and the Council in the framework of ONP... the universal service obligations... shall:

(a) apply only to undertakings providing public telecommunications networks;

(b) allocate the respective burden to each undertaking according to objective and non-discriminatory criteria and in accordance with the principle of proportionality.

The same Commission Directive provided the following definitions:

“public telecommunications network, means a telecommunications network used inter alia for the provision of public telecommunications services

public telecommunications services, means a telecommunications service available to the public.”

Months later, in November 1996, the Commission published a Communication⁴⁰³ for the Member States that established the principles for the creation of the national systems used to fund the universal service, which clearly stated the criteria to be applied, as required to approve the proposals received from Member States.

Once the frame of reference for developing the universal service had been established, Directive 98/10 on Voice Telephony and Directive 97/33 on Interconnection would specify the details for its application.

4.4.- The Universal Service after 1998.

After analysing how the scope of the universal service changed throughout the Telecommunications strategies of 1993 and 1995, it is worth explaining how it was established after full competition came into force.

The following legal rules regulated the universal service obligations after 1998:

- Commission Directive 96/19 regarding Full Competition
- Directive 98/10/EC of the European Parliament and of the Council on the application of ONP to voice telephony⁴⁰⁴
- Directive 97/33 of the of the European Parliament and of the Council on ONP in Network Interconnection⁴⁰⁵

⁴⁰² Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets. *OJ L 74, 22 March 1996. P. 13*

⁴⁰³ COM(96) 608. Assessment Criteria for National Schemes for the Costing and Financing of Universal Service in telecommunications and Guidelines for the Member States on Operation of such Schemes. Brussels 27 November 1996

⁴⁰⁴ Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment. *OJ L 101. 1 April 1998. P. 24.*

⁴⁰⁵ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). *OJ L. 199, of 26 July 1997. P. 32*

This section summarises the contents of each of these regulations, although if you are interested, you should consult the original documents.

As mentioned in the previous section, in the Full Competition Directive the Commission limited the types of telecommunications networks to which universal service obligations would be applied to public telecommunications networks. So any other type of network would be exempt from this obligation.

The ONP Directive regarding Voice Telephony defined the Universal Service as follows:

“universal service: means a defined minimum set of services of specified quality which is available to all users independent of their geographical location and, in the light of specific national conditions, at an affordable price;”

The Directive also defined the quality aspects for the application of the universal service in the case of voice telephony, in relation to:

- Availability of services
- Financing systems
- Network connection and telephone service access offering
- Telephone directory services
- Public payphones

Finally, the ONP Directive regarding Interconnection completed the scene for the application of the universal service. There follow the most important aspects of Article 5 of this Directive.

“Article 5. Interconnection and universal service contributions

1.- Where a Member State determines, in accordance with the provisions of this Article, that universal service obligations represent an unfair burden on an organization, it shall establish a mechanism for sharing the net cost of the universal service obligations with other organizations operating public telecommunications networks and/or publicly available voice telephony services. Member States shall take due account of the principles of transparency, non-discrimination and proportionality in setting the contributions to be made. Only public telecommunications networks and publicly available telecommunications services as set out in Part 1 of Annex I may be financed in this way.

2.- Contributions to the cost of universal service obligations if any may be based on a mechanism specifically established for the purpose and administered by a body independent of the beneficiaries, and/or may take the form of a supplementary charge added to the interconnection charge.

Therefore, the universal service obligations would only affect fixed telephony networks and services, the scope of which networks was specified in Part I of Annex I of the Directive, which considered that:

“The fixed public telephone network: The fixed public telephone network means the public switched telecommunications network which supports the transfer between network termination points at fixed locations of speech and 3,1 kHz bandwidth audio information, to support inter alia:

- Voice telephony

- *facsimile Group III communications, in accordance with ITU-T Recommendations in the 'T-series',*
- *voice band data transmission via modems at a rate of at least 2 400 bit/s, in accordance with ITU-T Recommendations in the 'V-series'*

Finally, Annex III of this Directive included guidelines for calculating the costs of the universal service obligations.

As for the future of the universal service, article 22 of the Directive stated that the contents and scope of the universal service obligations would be reviewed before 31st December 1999.

5.- CONCLUSIONS

After telecommunications had been run for a century as a monopoly, the transition to free competition was bound to involve adopting corrective measures in order to avoid unwanted effects from appearing and help the Member States with less developed networks to cope with the changes derived from the new Community regulations under the best possible conditions.

This Chapter has outlined the set of measures (which were not always coherent) that the European Institutions adopted from 1987 onwards in order to address the problems that arose as telecommunications became more important and the path to free competition began to be trod.

Underlying these courses of actions was the idea that the starting point in the race to free competition in telecommunications was not the same either in all the regions or for all users. Thus, if bringing free competition to this sector was the price to pay for achieving the development of the Information Society and, with it, attaining the goals of growth, competitiveness and employment in the European Union, it was fully justified to try to guarantee the conditions required for this situation to redound to the benefit of the majority.

And experience shows that these actions can only be taken by public authorities, such as the Administrations of the Member States and their Regions, in the past, at the present and in the future.

The last four Chapters have fully addressed the most important period for the definition of the Telecommunications Policy of the European Union, which took place during 1987 and 1998 and allowed the orderly introduction of free competition in the sector.

CHAPTER 9

**FIRST REVIEW OF TELECOMMUNICATIONS
POLICY**

PERIOD 1999 - 2005



CHAPTER 9

FIRST REVIEW OF TELECOMMUNICATIONS POLICY. PERIOD 1999 - 2005

1.- INTRODUCTION

The aim of this Chapter is to analyse the Telecommunications Policy review process carried out between 1999 and 2005.

As highlighted in previous chapters, the Directives adopted by the Parliament and Council indicated that in 1999 the Commission should begin a process analysing the situation created after the implementation of full competition and formulate proposals it considered relevant, which it did.

It was the first review of telecommunications regulatory framework that tried on the one hand to consolidate the package of Directives, by means of which the Commission had liberalised the sector and, on the other, adapt the set of Directives through which the Parliament and Council had harmonised Member State legislation.

This process also made it possible to broaden the horizon of what had been up until then the European Union Telecommunications Policy trying to add as far as possible to the new strategy the consequences of the technological and functional convergence of infrastructures and services in the telecommunications and audiovisual sectors. From this point on what had been known as the Telecommunications Policy would be called the Electronic Communications Policy.

Firstly, the objectives and review process of the electronic communications regulatory framework are summarised.

Secondly, there is an analysis of the impact of the review on the liberalisation process in the sector.

Thirdly, the definition of the new harmonisation Directives of national laws is studied.

Fourthly, changes in the standardisation policy of telecommunications equipment and services are looked at.

Fifthly, free competition corrective measures adopted after 1998 are reviewed.

Finally, other aspects of Electronic Communications Policy introduced that coincide with the sector's review process in the sector started in 1999 are commented upon.

2.- DEFINITION OF NEW REGULATORY FRAMEWORK

2.1.- Background

As analysed in previous Chapters, the transition process from monopolies to free competition was included in a package of Directives adopted over a long period of around ten years between 1987 and 1998. This European regulatory framework enabled Member States to adopt their own telecommunications laws in order to commence the new phase after 1998.

With regard to the Liberalisation process, the procedure followed by the Commission had been continually and gradually modifying its Directive 90/388 in order to include each and every aspect that was going to be liberalised. Although there was little left to liberalise, the text of the Directive that had been corrected on numerous occasions needed to be consolidated even if it was only to guarantee its understanding.

With regard to the Harmonisation process, the Directives adopted had been prepared without any previous experience that would make it possible to predict their results and more time had been spent thinking of how to avoid a possible abuse of the dominant position of incumbent operators than in the competition, of whom there was no experience. Furthermore, some provisions were scattered in various Directives such as the universal service obligations.

It was evident that a review of the content of the Directives adopted was needed in this case in order to consolidate legislative texts and deal with new aspects related to the sector's working, all of which would have been impossible initially.

With regard to the standardisation process for terminal equipment, the situation was going to change radically as shown in the analysis later on in this Chapter. The process for adopting Common Technical Regulations with respect to the inter-working of terminal equipment was about to be abruptly cut short in favour of the decisions of free competition operators. Only public health standards were going to be required of telecommunications terminals, as with any other electronic equipment.

Free competition corrective measures were also going to have to adapt to the new situation in the sector and the rest of the circumstances that characterised the economic and social situation of the European Union. The future structuring of the universal service and positioning of the Structural Funds 2000-2006 package were also going to affect free competition telecoms.

It finally needs to be mentioned that once the European Union had finished adopting the first Regulatory Framework, it began looking at the need for tackling other important aspects for the sector and focusing on the preparation of what could become a true Telecommunications Policy. The convergence process with the audiovisual sector, management of the radio spectrum and evolution of mobile communications are matters that were looked at systematically after 1998.

It should be added that the Commission has been publishing an annual report on the implementation process of telecommunications regulatory framework in the European Union's different Member States. These documents of undoubted interest are available to the reader⁴⁰⁶.

⁴⁰⁶ Implementation of the Regulatory Framework in the Members States website.
http://ec.europa.eu/information_society/policy/ecommlibrary/communications_reports/annualreports/previousyears/index_en.htm, visited 8/9/2010.

2.2.- Summary of the Telecoms Regulatory Framework review process.

As is habitual in Community actions, the Directives that resulted in the Harmonisation process, referred to in the previous section, indicated in 1999 that the Commission should carry out an assessment of the situation arising from the application of the new regulatory framework, prepare a report and make new legislative proposals, if necessary. By way of example, the text from Article 23 of the Licences Directive⁴⁰⁷ has been reproduced; the rest of the Directives refer to the review process in similar terms.

Article 23

Review procedures

Before 1 January 2000, the Commission shall prepare a report to be submitted to the European Parliament and Council and to be accompanied, where appropriate, by new legislative proposals. The report shall include an assessment, on the basis of the experience gained, of the need for further development of the regulatory structures as regards authorizations, in particular in relation to the harmonization of the procedures and the scope of individual licences, to other aspects of harmonization and to trans-European services and networks. The report shall also include proposals with a view to consolidating the various committees existing in Community telecommunications legislation.

According to the mandate received, the Commission published a Communication⁴⁰⁸ in November 1999, on the eve of the Helsinki European Council, in which it looked at what was called the 1999 review of the Communications Sector and began a period of consultation in the sector to this end. After the beginning of the review process, what had been called Telecommunications would become known as Electronic Communications. The Commission's proposals focused on condensing all the legislation developed up until then in a reduced set of new Directives.

With regard to regulations on Liberalisation, the Commission suggested adopting a new Directive that would consolidate and simplify the Service Directive and the other five modifying it.

With regard to regulations on Harmonisation, the Commission suggested reconsidering all the legislation developed and summarising it in five new Directives: a Framework Directive and another four on Licences, Interconnection, Universal service and Data protection.

With regard to Standardisation, no comments were made in the document since the problem had been resolved several months earlier with the new Directive referred to later on.

It needs to be remembered that barely two years had passed since the adoption of the previous regulatory framework. Member States had made a major effort to prepare their Laws and Regulations which came into effect in 1998 and it did not appear that many of them were prepared to enthusiastically welcome a new regulatory change which would force them to alter their legislation.

The solution firstly consisted in obtaining a favourable declaration from the European Council and then including the review of the regulatory framework amongst the objectives of the eEurope initiative for the development of the Information Society. And when the Commission wants something, it knows very well how best to proceed.

⁴⁰⁷ 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 licences in the field of telecommunications services. OJ L 117, 7 May 1997.

⁴⁰⁸ COM(1999) 539. Towards a new framework for electronic communications infrastructure and associated services. The 1999 Communications review. Brussels, 10 November 1999.

The Presidency Conclusions of the Lisbon European Council⁴⁰⁹ of March 2000 are as follows:

11. The European Council calls in particular on:

- *the Council and the European Parliament to conclude as early as possible in 2001 work on the legislative proposals announced by the Commission following its 1999 review of the telecoms regulatory framework; the Member States and, where appropriate, the Community to ensure that the frequency requirements for future mobile communications systems are met in a timely and efficient manner. Fully integrated and liberalised telecommunications markets should be completed by the end of 2001;*

In line with the above, in between the Lisbon and Santa Maria da Feira European Councils, the Commission published in April 2000, a new Communication⁴¹⁰ with the results of the consultation on the review process that would lead it to preparing the proposals for the new Directives.

From this point on the Commission was able to begin presenting its proposals of new Directives to the Council and Parliament which would deal with:

- Common regulatory framework for networks and services
- Authorisation of networks and services
- Access to electronic communication networks and their interconnection
- Universal service and user rights
- Processing of personal data and protection of privacy

Likewise, the Commission announced its intention to adopt a new Directive which would consolidate and broaden the content of Directives that steered the telecoms sector towards free competition.

Consequently, and so that no doubt remained, the Commission included these objectives in the Action Plan⁴¹¹ of the eEurope initiative that would be approved in the Santa Maria da Feira European Council⁴¹² in June 2000. The initial plan was to adopt the new package of Directives during 2001, but the process could not be finalised until September 2002. Finally this proposal was approved by the Telecommunications Council of Ministers meeting in October 2000⁴¹³.

3.- LIBERALISATION AFTER 1998

3.1.- Frame of reference and history

As broadly analysed in Chapter 5 of this book, the Commission made use of the powers granted to it by the Treaty in its article 86 (current article 106) adopting Directive 90/388 in 1990 which led to the beginning of the liberalisation of telecommunications services, in particular value-added services.

⁴⁰⁹ Presidency conclusions. Lisbon European Council . 23–24 March 2000

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm, visited 27/10/2010

⁴¹⁰ COM(2000)239. The results of public consultation on the 1999 Communications review and orientations for the new regulatory framework. Brussels, 26 April 2000.

⁴¹¹ eEurope 2002. An Information society for all. Action Plan. Brussels, 4 June 2000.

http://ec.europa.eu/information_society/eeurope/i2010/docs/2002/action_plan/actionplan_en.pdf, visited 27/10/2010

⁴¹² Presidency conclusions. Santa Maria da Feira European Council. 119-20 June 2000.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en0.htm, visited 27/10/2010

⁴¹³ 2293 Council meeting. Telecommunications. Luxembourg, 3 October 2000. Press release

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/trans/11712.en0.html, visited 27/10/2010.

Over the next few years the opening up of the market began to encompass the rest of the services and also infrastructures to achieve the coming into effect of full competition in 1998. The process followed by the Commission had been successively adopting new Directives to include a total of five, which altered the 1990 Directive and broadened its sphere of application.

It was therefore necessary to consolidate this aspect of the electronic communications regulatory framework legislatively, making the most of this opportunity to clarify other aspects for which the Commission had powers in accordance with said article 86 (current article 106) of the Treaty.

Consequently, in July 2000, the Commission published its draft Directive⁴¹⁴ on competition in electronic communications networks and services markets. Despite the fact that this proposal was published on the same day as the rest of the proposals for the Directives that were going to constitute the new regulatory framework, the Commission prudently and astutely waited to adopt its Liberalisation Directive until the Council and Parliament had adopted the new package of Harmonisation Directives, just in case it had to indicate something they might have left out.

For the sake of consistency with the structure followed in previous Chapters of this book, it is firstly worth analysing the content of the Directive on the competition in networks and services markets which consolidates the liberalisation process; although in reality it was the last to be adopted. If the reader would rather follow the evolution of events chronologically, they can always reread this section when they have finished section 4 of this chapter.

3.2.- Directive on Competition in networks and services markets.

On 16th September 2002 the Commission adopted Directive 2002/77 on competition in electronic communications networks and services markets⁴¹⁵, confirming the telecommunications liberalisation process.

This document's prologue is highly illustrative of the Commission's objectives when adopting the Directive. Here it is possible to read the opportunity of consolidating the old Directive 90/388 and its changes in a single legal instrument, as well as the need to clarify certain aspects that could be interpreted in several ways by the previous regulatory framework.

It should be noted that article 86 (current article 106) of the Treaty authorised the Commission to adopt Directives in order to guarantee that services of a general interest were subject to competition rules without prejudice to the missions entrusted to them. This is important to bear in mind when analysing the content of the Directive.

In its article 1, the Directive includes definitions of electronic communications networks and services commented upon in Chapter 2, and which subsequently replaced the term Telecommunications when referring to this European Policy.

Article 2 refers to the exclusive and special rights for electronic communications networks and services, clarifying the free competition framework in the sector.

Article 3 refers to vertically integrated public companies that supply electronic communications networks and calls upon States to ensure that the situation does not favour their own activities.

⁴¹⁴ Notice by the Commission concerning a draft Directive on competition in the markets of communications services. Brussels, 12 July 2000. OJ C 92, 27 March 2001.

⁴¹⁵ Commission Directive 2002/77, of 16 September 2002, on competition in markets of electronic communications networks and services. OJ L 249. 19 September 2002. P. 21

Article 4 refers to radio frequency use rights and asks Member States to make sure that transparency criteria are applied in their assignment to operators.

Article 5 eliminates exclusive rights in the publication of telephone directory services.

Article 6 refers to universal service obligations and complements everything provided for in Directive 2002/22 governing them. In this rather touchy article the Commission calls for objectivity and transparency for the set of rules adopted in the distribution of the costs of the universal service obligations and Member States have to inform the Commission of the set of rules imposed. As already mentioned, the Commission does not like to miss anything.

Article 7 refers to satellites and article 8 to cable-television networks. Both articles include and clarify provisions from previous Directives on this media.

The rest of the articles of the Directive are derogatory and procedural in their nature and are completed with the information included in their annex.

It is a Directive that consolidates and clarifies the free competition framework in the electronic communications networks and services already defined in 1998.

4.- HARMONISATION AFTER 1998

4.1.- Frame of reference and history

The consultation process that the Commission had begun in November 1999⁴¹⁶, referred to previously, aroused major interest in the sector with more than 200 replies received from the sector's players. The Commission used these replies to prepare a new Communication⁴¹⁷ summarising the results of this consultation and announcing a presentation of proposals for Directives in order to prepare the sector's new regulatory framework.

The updating of the package of Directives harmonising telecommunications laws in Member States arose from an interest in simplifying procedures for sector regulation, in particular those imposed on incumbent operators to avoid any possible abuse of their dominant position in the market.

These were ordinary Directives adopted by the Parliament and Council as a result of which the Commission had to prepare and submit the proposals as established in the Treaty and Community practice. As will be analysed below, the Commission presented a first package of proposals in July 2000, immediately after the Santa María de Feira Council, resulting in the beginning of the discussion process.

In the Gothenburg meeting⁴¹⁸ held the 15-16 June 2001, the European Council referred to this review process in the following terms:

Telecoms package

⁴¹⁶ COM(1999) 539. Towards a new framework for electronic communications infrastructure and associated services. The 1999 Communications review. Brussels, 10 November 1999.

⁴¹⁷ COM(2000)239. The results of public consultation on the 1999 Communications review and orientations for the new regulatory framework. Brussels, 26 April 2000.

⁴¹⁸ Presidency conclusions. Göteborg European Council. 15-16 June 2001

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en1.pdf, visited 27/10/2010

39. *Substantial progress has been made on the legislative proposal making up the telecoms package. Every effort should be made by Council and the European parliament to ensure its final adoption in line with Lisbon conclusion before the end of 2001.*

Finally, in April 2002, the final text of the Harmonisation Directives of the new electronic communications regulatory package was adopted.

The process for adopting each of the Directives making up the new regulatory framework of European Union electronic communications will be looked at in the next few sections. Interested readers will be able to find all the documents on the definition of this regulatory framework in the archives⁴¹⁹ that the Commission keeps on Internet (as long as it keeps them!).

4.2.- Local loop regulation

The telecommunications networks local loop unbundling process is one of those episodes that highlight the skilful combination between planning and improvisation. If it were not for the fact that this is not the appropriate place for further comment, it could be said that this is one of those memorable *ex post* planning episodes that euro-decision-makers occasionally provide. It should be pointed out though that nothing here is being held against unbundling the local loop or euro-decision-makers.

The coming into effect of full competition in 1998 which was going to bring with it an avalanche of investments in telecommunications infrastructures has not resulted in the sector being liberalised in vain; the upshot is that not everything that was expected to happen did happen. New operators must have thought that it was better trying to live off the income from transmission infrastructure built during the monopoly era, particularly with regard to the *last mile*, in other words the local loop. Unfortunately, at present some operators still continue with this parasitic attitude.

Such a stance is not at all surprising. What is not understandable though is why such a position should take European Institutions by surprise after ten years of long and detailed preparation of its Telecoms Policy. Maybe the expectations generated by the Internet bubble, which were considerable during the first few months of 2000, helped precipitate this episode.

The Commission quickly detected the problem anyway and reported it in its Communication of November 1999, resulting in the beginning of the consultation process for the regulatory framework review. In order to resolve it, the Commission suggested adopting a Recommendation. Apparently, the Commission's proposal produced a response in the sector and confirmed their interest in it. The Communication of 24th April 2000, in which the Commission presented the results of the consultation process, included the proposal to adopt a Recommendation on opening the local loop belonging to historic operators to the competition.

Since the investment in infrastructures for reaching subscribers' premises did not appear anywhere, it was thought that the best option would be for new operators to use historic operators' infrastructures, as was established in article 4 of Interconnection Directive 97/33⁴²⁰:

⁴¹⁹ Archive of documents of the 1999 Regulatory review. <http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/review99/review99.htm>, visited 27/10/2010

⁴²⁰ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). OJ L 199. 26 July 1997. P. 32.

Article 4. Rights and obligations for interconnection

... ..

2. Organizations authorized to provide public telecommunications networks and publicly available telecommunications services as set out in Annex I which have significant market power shall meet all reasonable requests for access to the network including access at points other than the network termination points offered to the majority of end-users.

And in order to clarify things, the Commission also adopted a Communication⁴²¹ on 24th April 2000 specifically dedicated to the local loop which, after reviewing technical and regulatory aspects related to it in detail, concluded that competition rules were applicable to the unbundled access to the local loop and that any negative response by dominant operators to opening it up to competitors could be considered as an abuse of their dominant position.

In line with the above, barely a month later in May 2000, the Commission adopted a Recommendation on unbundled access to the local loop⁴²² in which it urged Member States that had not already done so to proceed with regulating the opening up of this part of the telecommunications infrastructure to the competition.

However, this non-binding provision could not have been considered sufficient as only two months later, together with the package of proposals of new Directives that were going to define the future regulatory framework, the Commission slipped in a forceful Regulation proposal⁴²³ from Parliament and Council on this matter.

The use of a Regulation in the telecommunications regulatory process is not at all common and it would appear to be the first time in which it has been used, before dealing with the problem of the pricing of roaming services now under discussion. A Regulation is a legal act of immediate application and does not need to be incorporated as such in the laws of Member States for its observance. As the Commission had been entrusted to show, the legal framework adopted up until that point included the obligation of offering unbundled access to the local loop to the competition even though this matter was the subject of discussion. Someone was clearly needed to resolve the matter and say “obey”.

With unusual speed, the Council and Parliament adopted the Regulation⁴²⁴ on the local loop that was published in the Official Journal on 30th December 2000 clearing up all remaining doubts on this matter.

4.3.- Directive on the electronic communications regulatory framework

The first thing the Commission tackled in the review process was the definition of what the new electronic communications regulatory framework had to be.

⁴²¹ COM(2000) 237. Unbundled access to the local loop. Enabling the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed internet. Brussels, 26 April 2000.

⁴²² Commission Recommendation 2000/417, of 25 May 2000 on unbundled access to the local loop: Enabling the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed internet. OJ L 156. 29 June 2000. P. 44

⁴²³ COM(2000) 394. Proposal for a Regulation of the European Parliament and of the Council on unbundled access to the local loop. Brussels, 12 July 2000.

⁴²⁴ Regulation 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop. OJ L 336. 30 December 2000. P. 4

In the previous package of Directives, the regulatory framework for the Telecommunications sector had been defined rather verbosely and needed to be reconsidered. Furthermore, the old ONP Framework Directive 90/387 had long been redundant, in particular once the liberalisation process had finished.

Consequently, in July 2000, the Commission presented a proposal for a Directive⁴²⁵ on the sector's new regulatory framework.

The Commission was particularly interested, amongst other things, in specifying the role of the National Regulatory Authorities – NRA, their functions, obligations and missions since they were responsible for the application of the new regulatory framework of the Member States.

Likewise, the Commission tried to clearly state the NRA's intervention criteria in the markets and procedures for declaring companies with significant power in the market. The Commission was also intensifying the review of the regulation of other aspects on the use of scarce resources such as radio spectrum and numbering.

After the reactions caused by the proposal, in particular the proposals for modifications received from the European Parliament, in July 2001 the Commission presented a new modified Directive proposal,⁴²⁶ which made it possible to continue with the discussion process until the final adoption in April 2002.

One of the main discrepancies between the Commission, Parliament and Council centred on the Commission's supervision procedure in the measures adopted by the Member States when applying the new regulatory framework which in the first drafts appeared in Article 6 and which in the final text of the Directive appears in Articles 6 and 7.

It should be remembered that already at that time the Commission had abandoned its old aim of creating what might have been called the European Regulatory Authority, referred to in previous Chapters. Member States had clearly stated that both the adoption of the regulatory framework in their territory and the arbitration of its application were parts of national sovereignty they were not prepared to renounce. The result was that the European Regulatory Authority project was never mentioned again.

However, the Commission, obsessed with controlling the activities of Member States, fought hard not to give up what it considered was its duty to supervise the activities of the States in this field, always in accordance with its task of monitoring the completion of internal market objectives.

The initial aim of the Commission to supervise and authorise all of the movements of the National Regulatory Authorities was limited to just a few assumptions described in Article 7 of the Directive, mainly market analysis procedures, the setting of obligations linked to interconnection, the definition of the universal service scope and anything affecting exchanges between the Member States, nothing trivial as the reader can see. Further discussion is provided of the effects of said Article 7 of this Directive later on.

Finally, in April 2003 the Parliament and Council adopted the Directive⁴²⁷ on the common regulatory framework for electronic communications networks and services which was subsequently going to be called the Framework Directive, the careful analysis of which is recommended to the reader.

⁴²⁵ COM(2000) 393. Proposal for a Directive on a common regulatory framework for electronic communications networks and services. Brussels, 12 July 2000

⁴²⁶ COM(2001)380. Amended proposal for a Directive on a common regulatory framework for electronic communications networks and services. Brussels, 4 July 2001

⁴²⁷ Directive 2002/21, 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) . OJ L 108. 24 April 2002. P. 33

It needs to be indicated that in order to assist the Commission in matters related to the content of this Directive in Article 22, the Communications Committee⁴²⁸ was set up and has been carrying out its activities ever since.

One important difference between the new regulatory framework and the previous one lies in the criteria used for the intervention of National Regulatory Authorities in companies that are considered to have significant weight in the market.

In the previous regulatory framework the definition appeared in Directive 97/33⁴²⁹ on interconnection in the terms set out below. Amongst other things, Article 4 stated the following:

*“Article 4
Rights and obligations for interconnection*

3. An organization shall be presumed to have significant market power when it has a share of more than 25 % of a particular telecommunications market in the geographical area in a Member State within which it is authorized to operate.”

The new Framework Directive referred to establishes a new mechanism based on the analysis of the situation of specific markets and the reasoned decision of when and how actions should be taken. Articles 14, 15 and 16 of the Directive clearly establish the procedure to be followed by National Regulatory Authorities, always under the Commission’s supervision in accordance with aforementioned Article 7.

The Directive also refers to the obligations that Member States have to bear in mind the Commission's Directives on relevant markets suggested for analysis. In May 2001 the Commission⁴³⁰ published a first draft of guidelines, with the final text published in the Official Journal⁴³¹ in July 2002.

4.4.- Recommendation on relevant markets

Later, in February 2003, the Commission would adopt a Recommendation⁴³² with its annex indicating the already well known eighteen telecommunications, wholesale and retail services reference markets which the Commission recommended be analysed by the Member States.

Table 9.1 features the list of Relevant Markets proposed by the Commission.

⁴²⁸ COCOM. Communications Committee website

http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/comm_committee/index_en.htm, visited 8/9/2010.

⁴²⁹ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). OJ L 199. 26 July 1997. P 32.

⁴³⁰ COM(2001) 175. Commission working document. Proposed new regulatory framework for electronic communications networks and services. Draft guidelines for market analysis and the calculation of significant market power. Brussels, 28 March 2001.

⁴³¹ Commission guidelines for market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services. OJ C 165. 11 July 2002.

⁴³² Commission Recommendation 2003/311, of 11 February 2003 on relevant product and service market within the electronic communications sector susceptible of an *ex ante* regulation in accordance with the Directive 2002/21/CE of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. OJ L 114. 8 May 2003. P. 45

TABLE 9.1	
RELEVANT MARKETS PROPOSED BY THE COMMISSION	
Retail level	
1	Access to the public telephone network at a fixed location for residential customers.
2	Access to the public telephone network at a fixed location for non-residential customers.
3	Publicly available local and/or national telephone services provided at a fixed location for residential customers.
4	Publicly available international telephone services provided at a fixed location for residential customers.
5	Publicly available local and/or national telephone services provided at a fixed location for non-residential customers.
6	Publicly available international telephone services provided at a fixed location for non-residential customers.
7	The minimum set of leased lines
Wholesale level	
8	Call origination on the public telephone network provided at a fixed location.
9	Call termination on individual public telephone networks provided at a fixed location.
10	Transit services in the fixed public telephone network.
11	Wholesale unbundled access to metallic loops and sub-loops for the purpose of providing broadband and voice services.
12	Wholesale broadband access.
13	Wholesale terminating segments of leased lines.
14	Wholesale trunk segments of leased lines.
15	Access and call origination on public mobile telephone networks.
16	Voice call termination on individual mobile networks.
17	The wholesale national market for international roaming on public mobile networks.
18	Broadcasting transmission services, to deliver broadcast contents to end users.

After the coming into effect of the new regulatory framework in 2002, the Commission published a Communication⁴³³ in February 2006 containing its report on the measures adopted by the Member States in the regulation process of electronic communications markets according to Article 7 of the Framework Directive⁴³⁴. A working document accompanied the Communication on the Commission's services⁴³⁵ detailing the situation in each of the relevant markets in the different Member States. It should be said that the name of this Communication is not perhaps the most appropriate since it could

⁴³³ COM(2006) 28, on Market Review under the EU Regulatory framework. Brussels, 6 February 2006.

⁴³⁴ Article 7 procedures website.

http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/eu_consultation_procedures/index_en.htm, visited 8/9/2010.

⁴³⁵ SEC(2006) 86. Annex accompanying the Communication on Market Review under the EU Regulatory framework. Brussels, 6 February 2006.

be confused with the traditional annual reports on the implementation of new regulatory framework in the Member States.

In the Communication, the Commission explained in detail the procedure in Article 7 of the Framework Directive and indicated the Internet site where public information on the documents sent by the Member States to the Commission according to the procedure in Article 7 of the Framework Directive could be found.

4.5.- Authorisation Directive

Another of the aspects looked at in depth in the new regulatory framework is the procedure to be followed by a company in order to become a telecoms operator. In the previous regulatory framework this procedure was governed by Directive 97/13⁴³⁶ which established different procedures for awarding individual licences and general authorisations.

In May 2000, the Commission presented a first Directive proposal⁴³⁷ to the Parliament and Council explaining why it was trying to carry out a drastic simplification of the procedure necessary for becoming a telecoms operator.

The Commission's proposal basically consisted of replacing the previous procedures with a simple declaration by the operator in return for which it would receive a general Authorisation to act as an operator for all telecoms services, having to accept the conditions previously imposed by the Member States for each of these services.

In this document the Commission included other aspects on the assignment of radio frequencies for mobile services and tackled the thorny issue of administrative charges which the operators had to pay to the administration to be entitled to provide telecoms services.

The foolish, irresponsible and shameful episode, which took place during 2000 and nearly cost the future of more than one operator, of the payments of millions for licences for the rendering of third-generation – 3G, mobile telephony services needs to be remembered, together with the disparities between the criteria applied by different Member States and the envy, distrust, and inappropriate remarks by governments and opposition parties which this episode provoked.

As a result of the report issued by the Parliament, the Commission presented a second Directive proposal⁴³⁸ in July 2001 which made it possible to continue with the institutional discussion process until an agreement was reached on the final text of Authorisation Directive 2002/20⁴³⁹, which would finally be adopted in April 2002.

As expected, the Directive replaced previous procedures with a simple general authorisation for the provision of electronic communications networks and services, establishing that a simple notification from the interested undertaking to the National Regulatory Authority would suffice as an application. The Directive also determined the minimum set of rights and obligations for electronic communications operators.

⁴³⁶ 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 licences in the field of telecommunications services. OJ L 117. 7 May 1977. P. 1

⁴³⁷ COM(2000) 386. Proposal for a Directive on the authorisation of electronic communications networks and services. Brussels, 12 July 2000.

⁴³⁸ COM(2001) 372. Amended proposal on the authorisation of electronic communications networks and services, Brussels, 4 July 2001.

⁴³⁹ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002, on the authorisation of electronic networks and services. (Authorisation Directive) OJ L 1008, 24 April 2002. P. 21

The final text of the Directive proposal calls for sincerity from Member States when setting future administrative charges and rates for the use of radio frequencies, which is quite a lot to ask.

4.6.- Directive on Access and Interconnection

In July 2000, the Commission also presented a proposal for a Directive on access to, and interconnection of electronic communications networks⁴⁴⁰ reviewing many of the aspects governed by Directive 97/33⁴⁴¹.

In its proposal the Commission dealt with aspects related to the interconnection of networks and operator resources.

As with the rest of the Directives after the first Parliament report, the Commission presented a second Directive proposal⁴⁴², which after mandatory discussions was finally adopted as Directive 2002/19⁴⁴³ (Access Directive) in April 2002, together with the rest of those in the package.

The content of the Access Directive is not very controversial since it virtually covers the provisions in the 1997 Interconnection Directive. It also covers specific aspects related to unbundling and access to the local loop not provided for in the previous Directive.

However, a significant aspect should be pointed out which undoubtedly represents the most important innovation introduced in this new regulatory text, i.e. broadcasting and television service distribution networks.

Looking at the access concept defined in the Directive helps to illustrate this:

Article 2

Definitions

(a) "access" means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop), access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems, access to number translation or systems offering equivalent functionality, access to fixed and mobile networks, in particular for roaming, access to conditional access systems for digital television services; access to virtual network services;

It is undoubtedly an action consistent with the new electronic communications definition beyond traditional voice and data telecommunications.

⁴⁴⁰ COM(2000)384. Proposal for a Directive on access to, and interconnection of, electronic communications networks and associated facilities. Brussels, 12 July 2000.

⁴⁴¹ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997, on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) OJ L. 26 July 1997. P 32

⁴⁴² COM(2001) 369. Amended proposal for a Directive on access to, and interconnection of, electronic communications networks and associated facilities. Brussels, 4 July 2001

⁴⁴³ Directive 2002/19, 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). OJ L 108. 24 April 2002. P. 7.

4.7.- Universal Service Directive

Ten years after the first Community regulations on universal service obligations it is undoubtedly one of the most sensible and useful legacies left by the Authorities responsible for telecommunications management at the time. Universal service rights, and of course the GSM system, are amongst the best legacies from the monopoly era.

Consequently, within the matters being analysed in the review process framework, the Commission presented a new Directive proposal⁴⁴⁴ in July 2000 on universal service and user rights.

Universal service telecommunications obligations had been included in Directive 97/33 on interconnection and in Directive 98/10⁴⁴⁵ on voice telephony, while the rest of the users' rights appeared in different Directives from the 1998 package.

It was a slightly more ambitious Directive proposal than its predecessors which is perhaps why its negotiation took a little longer. As a result, after the options received from the Parliament, the Commission presented a second Directive proposal⁴⁴⁶ in September 2001.

Finally, in April 2002, the Council and Parliament adopted the new Directive 2002/22 on universal service and users' rights⁴⁴⁷.

The Universal Service Directive mainly covered the following aspects:

- Universal service obligations
- Regulatory controls of undertakings with significant market power for pricing, providing leased lines and regulation of public services.
- The rights and interests of end users with regard to contracts, quality of service, network integrity, operator support services, single European emergency number (112), number portability and the interoperability guarantee of consumer equipment used for digital television reception.

As the reader will already be aware, the Directive establishes the scope of the universal service with regard to access from a fixed location in the following terms:

“Article 4

Provision of access at a fixed location

1. Member States shall ensure that all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location are met by at least one undertaking.

2. The connection provided shall be capable of allowing end-users to make and receive local, national and international telephone calls, 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.”

⁴⁴⁴ COM(2000)392. Proposal for a Directive on universal service and users' rights relating on electronic communications networks and services. Brussels, 12 July 2002.

⁴⁴⁵ Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment. OJ L 101. 1 April 1998. P. 24.

⁴⁴⁶ COM(2001) 503. Amended proposal of Directive on universal service and users' rights relating on electronic communications networks and services. Brussels 14 September 2001

⁴⁴⁷ 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). DO L 108. 24 April 2002. P. 51

In order to proceed with the review of the Directive's scope, Article 15 states the review procedure with the Commission being bound to carry it out for the first time within a two-year period.

4.8.- Privacy and Electronic Communications Directive

The processing of personal data in the telecommunications sector had been included in Directive 97/66⁴⁴⁸ which adapted the provisions in Directive 95/46⁴⁴⁹ on personal data processing.

With the passing of time and as a result of the broadening of the scope of application of this European Policy to electronic communications, the Directive had to be adapted, with the Commission then presenting a Directive proposal⁴⁵⁰ in July 2000.

In this case the matter was not that controversial as a result of which the Commission did not have to present a second Directive proposal like in cases commented on in previous paragraphs. Finally, in July 2002 the Parliament and Council adopted the new Directive 2002/58 on personal data processing and privacy protection in the electronic communications sector⁴⁵¹.

It was going to be called the Privacy and electronic communications Directive and would be the last Directive in the harmonisation package of the new regulatory framework in the absence of the adoption by the Commission of its Directive on competition in networks and services markets, already analysed in section 3 of this Chapter.

The Directive covers a series of aspects related to protecting the privacy of users of electronic communication services in areas such as security, communications confidentiality, itemised billing and unsolicited communications.

Attention should be drawn to the explicit mention the Directive makes of its effect on terminals used by users. The following is highlighted in the text from Article 14 of the Directive:

“Article 14

Technical features and standardisation

1. In implementing the provisions of this Directive, Member States shall ensure, subject to paragraphs 2 and 3, that no mandatory requirements for specific technical features are imposed on terminal or other electronic communication equipment which could impede the placing of equipment on the market and the free circulation of such equipment in and between Member States.

2. Where provisions of this Directive can be implemented only by requiring specific technical features in electronic communications networks, Member States shall inform the Commission in accordance with the procedure provided for by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services(9).

⁴⁴⁸ Directive 97/66/CE of 15 December 1997, of the European Parliament and of the Council concerning the processing of personal data and the protection on privacy in the telecommunications sector. DO L 24. 30 January 1998. P. 1

⁴⁴⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L. 24 November 1995. P 31.

⁴⁵⁰ COM(2000)385. Proposal of a Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector. Brussels, 13 July 1997. DO C 365. 19 December 2000. P 223.

⁴⁵¹ Directive 2002/58, 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). OJ L 201. 31 July 2002. P. 37

3. *Where required, measures may be adopted to ensure that terminal equipment is constructed in a way that is compatible with the right of users to protect and control the use of their personal data, in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC of 22 December 1986 on standardisation in the field of information technology and communications(10).”*

The aim was to maintain consistency with Directive 99/05 which consolidated strategic change in the standardisation policy of telecoms equipment to be commented on later in this chapter.

4.9.- Radio Spectrum Decisions.

The profusion and advance of mobile communications services had revealed the importance of radio spectrum and, therefore, the interest in everything related to its management and rationalisation, with it going on to form part of the strategic aspects of the European Union's Electronic Communications Policy, as will be analysed in detail later in this chapter.

By way of advance notice of what the reader will have an opportunity to analyse in detail later, the Commission had long been wanting, together with the creation of a European Regulatory Authority for telecommunications, to centralise at European level the management of radio spectrum which would result in Member States explicitly renouncing this part of their sovereignty.

With this purpose, at the end of 1998, the Commission published the Green Paper on radio spectrum initiating a consultation process⁴⁵² on the policy that should be followed for radio spectrum publishing in which, amongst other things, it asked whether Member States would be prepared to cede the management of spectrum to another Community institution in order to better guarantee its use. Naturally, Member States clearly said “no, thank you”⁴⁵³.

As neither of these possibilities were accepted by the Member States, it was necessary to resort to coordination solutions.

Consequently, the aforementioned Framework Directive⁴⁵⁴ devoted its Article 9 to the management of radio frequencies and also stated, amongst other things, the following:

“Article 9

Management of radio frequencies for electronic communications services

1. Member States shall ensure the effective management of radio frequencies for electronic communication services in their territory in accordance with Article 8. They shall ensure that the allocation and assignment of such radio frequencies by national regulatory authorities are based on objective, transparent, non-discriminatory and proportionate criteria.

2. Member States shall promote the harmonisation of use of radio frequencies across the Community, consistent with the need to ensure effective and efficient use thereof and in accordance with the Decision No 676/2002/EC (Radio Spectrum Decision).”

⁴⁵² COM(98) 596. Green Paper on Radio spectrum policy. Brussels, 9 December 1998

⁴⁵³ COM(99) 538. Next Steps in Radio Spectrum Policy - Results of the Public Consultation on the Green Paper Brussels, 10 November 1999.

⁴⁵⁴ Directive 2002/21, 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) . OJ L 108. 24 April 2002. P. 33

The aim of this section is to refer to the aforementioned Radio Spectrum Decision as a basic part of the new regulatory framework.

The process began two years before, after the fiasco of the radio spectrum Green Paper, with the presentation by the Commission of a Decision proposal⁴⁵⁵ aiming to establish a common policy for radio spectrum management. The reader should remember that a Decision is a legal Community act of direct application and specific content, as a result of which it does not need be transposed in the laws of Member States as in the case of Directives.

Decision 676/2002⁴⁵⁶ on a regulatory framework for radio spectrum policy in the European Community was adopted on 7 March 2002 together with the package of Directives of the new electronic communications regulatory framework.

The contents of the Decision can be summarised by saying that the European Union accepted that the coordination of radio spectrum policy would be carried out by the committee procedure⁴⁵⁷. As the reader will probably know, committee procedure is a procedure governed by article 202 of the EC Treaty (current article 290) by means of which the Council can delegate to the Commission the coordination of certain Member States' policies and for which purpose the Commission is assisted by an ad hoc Committee comprised of representatives from the Member States.

Finally, the contents of the Decision are dedicated to the creation of the Radio Spectrum Committee⁴⁵⁸ and starting the coordination mechanism necessary for achieving the objectives set.

The solution adopted could not have completely satisfied the Commission who considered the scope of the Parliament and Council Decision insufficient, as a result of which it decided to complement it with its own new Decision⁴⁵⁹ resulting in the creation of the Radio Spectrum Policy Group^{460,461}. All of the Member States that were going to have a consultative role for the Commission would be represented in this Group. The reader should not be worried that the public budget for trips covers that and a lot else besides.

5.- TELECOMMUNICATIONS STANDARDISATION POLICY AFTER 1998

5.1.- Standardisation in Terminal Equipment

As analysed in Chapters 4 and 7, the standardisation of telecoms terminal equipment and mutual recognition of conformity of its certification had been one of the pillars of Telecoms Policy from when it was formulated at the beginning of the 1980s.

The principle of this Community action was based on the need to create a single market for terminal equipment, as a result of which it was considered necessary to promote the development of European Telecommunications Standards and their pre-eminence over old standards in Member States, as well

⁴⁵⁵ COM(2000) 407. Proposal for a Decision of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the European Community. Brussels, 12 July 2000.

⁴⁵⁶ Decision 676/2002/CE of the European Parliament and of the Council of 7 March 2002, on a regulatory framework for radio spectrum policy in the European Community (Radio spectrum decision). OJ L 108. 24 April 2002. P 1

⁴⁵⁷ Committee procedure. European Glossary. http://europa.eu/scadplus/glossary/comitology_en.htm, visited 8/9/2010.

⁴⁵⁸ Radio Spectrum Committee. http://ec.europa.eu/information_society/policy/ecom/committees_working_groups/index_en.htm#rsc, visited 8/9/2010.

⁴⁵⁹ Commission Decision 622/2002 of 26 July 2002. establishing a Radio Spectrum Policy Group. OJ L 198. 27 July 2002. P. 49

⁴⁶⁰ Radio Spectrum Policy Group. http://ec.europa.eu/information_society/policy/ecom/committees_working_groups/index_en.htm#rspg, visited 8/9/2010.

⁴⁶¹ Radio Spectrum Group website <http://rspg.groups.eu.int/>, visited 27/10/2010

as adopt Common Technical Regulations – CTR which meant they would have to be complied with throughout the entire European Community. The CTR⁴⁶² adopted in the European Union affected the obligatory nature of the observance of both technical standards on health protection and those that guaranteed the inter-working of terminals with the telecommunications network.

A series of Directives were therefore adopted starting with Directive 91/263 and its subsequent modifications. This process continued to be improved once free competition had been implemented with the adoption of Directives⁴⁶³, ⁴⁶⁴, ⁴⁶⁵, which continued to elaborate on the initial idea.

However, things had started to change as full competition approached.

The Commission has opened the discussion in 1996 when, in a Communication⁴⁶⁶ referred to in Chapter 7, it outlined the difficult balance between standardisation and free competition, although it may have been a bit too soon to tackle and resolve this problem.

The problem to be solved was very simple to tackle:

- Did it make sense in a full competition environment to continue to impose the observance of obligatory technical standards – CTR, to guarantee the inter-working of terminals with networks?
- Was this the Administrations' task or was it down to the operators to take decisions they considered opportune? If so
- What should the function of Public Administrations be with regard to terminal equipment after the coming into effect of free competition?

These questions were easy to answer:

- After the coming into effect of full competition operators should be free to adopt all decisions on the inter-working of terminals with their networks.
- In this context, the role of Public Administrations should simply be to demand that terminal equipment complies with the essential requirements on health protection and people's security, and little else.

This resulted in the implementation of the Commission's machinery with the presentation of a first Directive proposal⁴⁶⁷ in June 1997 which was widely debated and gave rise to a modified proposal⁴⁶⁸ which the Commission adopted in March 1998.

The final result was the adoption by the Parliament and Council of Directive 99/5⁴⁶⁹ on radio and terminal equipment which established a radical change in Standardisation Policy, orthodox like a few,

⁴⁶² Common Technical Regulations. <http://ec.europa.eu/enterprise/sectors/rtte/documents/standards/>, visited 8/9/2010.

⁴⁶³ Directive 98/13/CE of the European Parliament and of the Council, of 12 February 1998, relating to telecommunications terminal equipment and satellite earth station equipment including the mutual recognition of their conformity. OJ L 74. 12 March 1998. P. 1.

⁴⁶⁴ Directive 98/34/CE of the European Parliament and of the Council, of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regulation. OJ L 204. 21 July 1998. P 37

⁴⁶⁵ Directive 98/48/CE of the European Parliament and of the Council, of 20 July 1998, amending Directive 98/34/CE laying down a procedure for the provision of information in the field of technical standards and regulation. OJ L 217, 5 August 1998. P. 18

⁴⁶⁶ COM(96) 353. Standardization and the global information society. Brussels, 19 July 1996

⁴⁶⁷ COM(97) 257 Proposal for a European Parliament and Council Directive on connected telecommunications equipment and the mutual recognition of the conformity of equipment. OJ C 248. 14 August 1997. P. 4

⁴⁶⁸ COM(98) 176 Amended proposal for an European Parliament and Council Directive on connected telecommunications equipments and the mutual recognition of conformity of equipment. OJ C 141. 6 May 1998. P 9.

⁴⁶⁹ Directive 1999/5 of the European Parliament and of the Council, of 9 March 1999, on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity. OJ L. 7 April 1999. P 10.

which the European Union had maintained since the adoption of the New Approach in 1983. Nothing was going to be like before.

The reader would better understand this by directly reading articles 3 and 4 of the Directive, the most significant parts of which are reproduced below.

“Article 3

Essential requirements

1. The following essential requirements are applicable to all apparatus:

(a) the protection of the health and the safety of the user and any other person, including the objectives with respect to safety requirements contained in Directive 73/23/EEC, but with no voltage limit applying;

(b) the protection requirements with respect to electromagnetic compatibility contained in Directive 89/336/EEC.

2. In addition, radio equipment shall be so constructed that it effectively uses the spectrum allocated to terrestrial/space radio communication and orbital resources so as to avoid harmful interference.

3. In accordance with the procedure laid down in Article 15, the Commission may decide that apparatus within certain equipment classes or apparatus of particular types shall be so constructed that:

(a) it interworks via networks with other apparatus and that it can be connected to interfaces of the appropriate type throughout the Community; and/or that

(b) it does not harm the network or its functioning nor misuse network resources, thereby causing an unacceptable degradation of service; and/or that

(c) it incorporates safeguards to ensure that the personal data and privacy of the user and of the subscriber are protected; and/or that

(d) it supports certain features ensuring avoidance of fraud; and/or that

(e) it supports certain features ensuring access to emergency services; and/or that

(f) it supports certain features in order to facilitate its use by users with a disability.

Article 4

Notification and publication of interface specifications

1. Member States shall notify the interfaces which they have regulated to the Commission insofar as the said interfaces have not been notified under the provisions of Directive 98/34/EC. After consulting the committee in accordance with the procedure set out in Article 15, the Commission shall establish the equivalence between notified interfaces and assign an equipment class identifier, details of which shall be published in the Official Journal of the European Communities.

2. Each Member State shall notify to the Commission the types of interface offered in that State by operators of public telecommunications networks. Member States shall ensure that such operators publish accurate and adequate technical specifications of such interfaces before services provided through those interfaces are made publicly available, and regularly publish any updated specifications. The specifications shall be in sufficient detail to permit the design of telecommunications terminal equipment capable of utilising all services provided through the corresponding interface. The specifications shall include, inter alia, all the information necessary to allow manufacturers to carry out, at their choice, the relevant tests for the essential requirements applicable to the

telecommunications terminal equipment. Member States shall ensure that those specifications are made readily available by the operators.”

After the coming into effect of this Directive, operators would have to establish the functional characteristics of terminals to be used in their networks, with the compatibility of these terminals with similar networks and services offered by their competition depending on them.

Promoting user fidelity through the terminal was now a reality and UMTS was going to be the first new service in which this would be tested.

The reader can find more information on the web page the Commission has devoted to this matter⁴⁷⁰.

5.2.- Standardisation in the 2002 Directives package

The package of Directives of the new Electronic Communications Regulatory Framework adopted in 2002 deals with the issue of technical standards within the context of the new situation in the sector.

One of the keys appears in one of the items of Framework Directive 2002/21. This is outlined below:

- 30. Standardisation should remain primarily a market-driven process. However there may still be situations where it is appropriate to require compliance with specified standards at Community level to ensure interoperability in the single market....*
- 31. Interoperability of digital interactive television services and enhanced digital television equipment, at the level of the consumer, should be encouraged in order to ensure the free flow of information, media pluralism and cultural diversity. ...*

And in the Directive's articles the matter is summed up as follows:

“Article 17

Standardisation

1. The Commission, acting in accordance with the procedure referred to in Article 22(2), shall draw up and publish in the Official Journal of the European Communities a list of standards and/or specifications to serve as a basis for encouraging the harmonised provision of electronic communications networks, electronic communications services and associated facilities and services. ...

2. Member States shall encourage the use of the standards and/or specifications referred to in paragraph 1, for the provision of services, technical interfaces and/or network functions, to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users. ...

3. If the standards and/or specifications referred to in paragraph 1 have not been adequately implemented so that interoperability of services in one or more Member States cannot be ensured, the implementation of such standards and/or specifications may be made compulsory under the procedure laid down in paragraph 4, to the extent strictly necessary to ensure such interoperability and to improve freedom of choice for users.

⁴⁷⁰ Radio and Telecommunications terminal equipment site
http://ec.europa.eu/enterprise/sectors/rtte/index_en.htm, visitado 8/9/2010.

In addition, in Universal Service Directive 2002/22 there is reference to the technical standards in the supply of leased lines in the following terms:

“Article 18

Regulatory controls on the minimum set of leased lines

1. Where, as a result of the market analysis carried out in accordance with Article 16(3), a national regulatory authority determines that the market for the provision of part or all of the minimum set of leased lines is not effectively competitive, it shall identify undertakings with significant market power in the provision of those specific elements of the minimum set of leased lines services in all or part of its territory in accordance with Article 14 of Directive 2002/21/EC (Framework Directive). The national regulatory authority shall impose obligations regarding the provision of the minimum set of leased lines, as identified in the list of standards published in the Official Journal of the European Communities in accordance with Article 17 of Directive 2002/21/EC (Framework Directive), and the conditions for such provision set out in Annex VII to this Directive, on such undertakings in relation to those specific leased line markets.”

However, the freedom of operators with regard to terminals is maintained, as stated in Directive 2002/58 on data protection:

“Article 14

Technical features and standardisation

1. In implementing the provisions of this Directive, Member States shall ensure, subject to paragraphs 2 and 3, that no mandatory requirements for specific technical features are imposed on terminal or other electronic communication equipment which could impede the placing of equipment on the market and the free circulation of such equipment in and between Member States.”

In short, the new package of Directives continues consider it right to impose the obligatory observance of technical standards in the supply of leased lines, reserves the right to do this in order to guarantee the interoperability in new services and reaffirms that it is not necessary to intervene whatsoever in terminal equipment as these decisions are taken by operators.

The Official Journal has not published much in the way of lists of standards⁴⁷¹ according to the provisions of article 17 of the Framework Directive.

6.- CORRECTIVE MEASURES AFTER 1998

6.1.- General Framework

Once the free market had been introduced in the telecoms sector it was clear that any public intervention that might be advisable or necessary should scrupulously obey competition rules; this was established in the Treaty and made clear in the new regulatory framework Directives.

However, the establishment of free competition revealed the need to continue to act from the responsibility of the Public Administrations to spread the benefits of the Information Society through

⁴⁷¹ List of standards and/or specifications for electronic communications networks, services and associated facilities and services (interim issue). OJ C 331. 31 December 2002. P. 32

availability and access to electronic communications networks and services and prevent what has begun to be called the digital divide.

The following sections will attempt to analyse some of the main instruments that were available to Public Administrations during this period.

Three types of actions considered of interest are analysed: universal service in the services strategy framework which is of general interest, the strategy for developing broadband and the role of structural funds in the development of telecommunications infrastructures.

6.2.- Universal Service and Services of General Interest

It has previously been stated that universal service rights and obligations is considered one of the most sensible and useful legacies of Telecoms Administrations during the monopoly era.

When, in the middle of the 1990s, the European Union was debating how to combine the market's interests with those of citizens in rendering services of general interest⁴⁷², Member States, the Parliament and Commission agreed to specify these rights for telecommunications through the establishment of universal service obligations.

Maybe readers experts in telecommunications matters will be interested in finding out more about the European Union's approach in Services of General Interest. If so, the aim here is to provide a summary of the situation to them.

When in 1995 the Commission presented the Directive proposal⁴⁷³ on Interconnection and Universal Service to the Parliament and Council, the Community hardly dealt with services of general interest. The Maastricht Treaty was in force which dealt with the matter in a clear and precise manner; the only mention that the Treaty made of services of general interest appeared in article 90 (currently article 106) which stated the following:

Article 90

- 1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.*
- 2. 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.*
- 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.*

⁴⁷² COM(96) 90. Services of General Interest. Brussels 11 September 1996. OJ C 281. 26 September 1996. P. 3

⁴⁷³ COM(95) 545. Proposal for a European parliament and Council Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). Brussels 19 July 1995. OJ C 313. 24 November 1995. P. 7.

This was the context in which telecommunications universal service obligations were defined.

However, the interest in the Europe of Citizens evident after the approval of the Treaty on European Union in 1992, made it necessary to better define their rights, in particular those that were considered unquestionably basic. Consequently, the Cannes European Council⁴⁷⁴ of June 1995 provided the first backing to this:

“1.7. The European Council reiterates its concern that the introduction of greater competition into many sectors in order to complete the internal market should be compatible with the general economic tasks facing Europe, in particular balanced town and country planning, equal treatment for citizens, -including equal rights and equal opportunities for men and women - the quality and permanence of services to consumers and the safeguarding of long-term strategic interests.”

One solution was to have the European Council's wish appear in the Treaty and it was the right time, since the work of the Intergovernmental Conference for the preparation of the Treaty of Amsterdam which would be signed in October 1997 and come into effect in May 1999 was about to commence.

As a result, the Commission adopted a Communication⁴⁷⁵ in 1996 called “Services of General Interest in Europe” aimed at the Intergovernmental Conference which was preparing the next reform of the Treaties to come into force as the Treaty of Amsterdam. After declaring in this text that “*services of general interest are at the heart of the European model of society*”, the Commission proposed that it be added to article 3 of the Treaty, which defines the Community's actions, a section worded in the following terms:

*“(u) A contribution to the promotion of the **services of general interest**.”*

It would have been good but the Member States considered that it was too much and decided to reduce the treatment proposed by the Commission, agreeing a new specific article on this matter; this was initially Article 7 D (currently Article 14), the content of which is as follows:

“Article 14

*Without prejudice to Articles 73, 86 and 87, and given the place occupied by **services of general economic interest** in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions”*

The reader should not forget that the Treaty only refers to services of general **economic** interest and says nothing about services of general interest, which the Commission made a distinction between in its 1996 Communication.

From this moment on it was necessary to begin to decide how European Union actions on these matters would be developed.

⁴⁷⁴ Presidency Conclusions. Cannes European Council. 26-27 June 1995.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00211-C.EN5.htm, visited 27/10/2010

⁴⁷⁵ COM(96) 90. Services of General Interest in Europe. Brussels 1 September 1996. OJ C 281. 26 September 1996. P 3

Following the logic of the Community procedure, the Lisbon European Council⁴⁷⁶, in the section on “*Economic reforms for a complete and fully operational internal market*”, invited the Commission to deal with this matter in the following terms:

19. The European Council considers it essential that, in the framework of the internal market and of a knowledge-based economy, full account is taken of the Treaty provisions relating to services of general economic interest, and to the undertakings entrusted with operating such services. It asks the Commission to update its 1996 communication based on the Treaty.”

Following the Council’s guidelines, the Commission adopted a new Communication⁴⁷⁷ in September 2000 in which it planned and defined its strategy in the following terms:

*57. Both this political statement and the changes currently under way point to the need for a pro-active stance on general interest services, which incorporates and goes beyond the approach based on the Single Market. In this vein, the Commission, in partnership with the national, regional and local levels, will continue to promote a European perspective on **general interest services** for the benefit of citizens on three fronts: by making the most of market opening; by strengthening European co-ordination and solidarity; and by developing other Community contributions in support of services of general interest.*

This Communication reviewed the following services considered of general economic interest: electronic communications, postal services, radio and television transport, and included the following definitions:

ANNEXE II: DEFINITION OF TERMS

Services of general interest

This term covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.

Services of general economic interest

This is the term used in Article 86 of the Treaty and refers to market services which the Member States subject to specific public service obligations by virtue of a general interest criterion. This would tend to cover such things as transport networks, energy and communications.

Services of general interest were also included in The Charter of Fundamental Rights of the European Union⁴⁷⁸, which the Presidents of the European Parliament, Council and Commission signed and proclaimed on 7 December 2000 on the occasion of the Nice European Council. Its article 36 says the following:

*“Article 36. Access to **services of general economic interest***

*The Union recognises and respects access to **services of general economic interest** as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.”*

⁴⁷⁶ Presidency Conclusions. Lisbon European Council. 23-24 March 2000.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm, visited 27/10/2010

⁴⁷⁷ COM(2000) 580 Services of general Interest in Europe. Brussels 20 September 2000

⁴⁷⁸ The Charter of Fundamental Rights of the European Union.

http://www.europarl.europa.eu/charter/default_en.htm, visited 27/10/2010

The reader is likely to be reaching the conclusion that neither article 16 of the Treaty nor article 36 of the Charter of Fundamental Rights are mere declarations of intentions which require clarification.

Following Community procedure, the Commission periodically prepared Communications on the situation of services of general interest, COM(2001)598⁴⁷⁹ COM(2002)280⁴⁸⁰, COM(2002)331⁴⁸¹, COM(2002)636⁴⁸², which any interested reader who might be thinking that the matter had reached a complete deadlock should read. Meanwhile, in 2002, the new aforementioned Telecommunications Universal Service Directive was adopted.

There was a change in the situation when at the Barcelona European Council⁴⁸³ in March 2002 the possibility of preparing a proposal for a Framework Directive on services of general interest was noted and the Commission was urged to present a report before the end of that year. In accordance with this mandate, the Commission prepared a Communication COM (2002) 689⁴⁸⁴ in which it announced its intention to prepare a Green Paper on this matter, with this duly occurring.

In May 2003, the Commission published the Green Paper on Services of General Interest⁴⁸⁵ and started a consultation process in the sector on actions to be taken. It should be highlighted that this consultation process was coordinated by the Secretary-General of the European Commission⁴⁸⁶ and of course the DG Internal Market.

From the comments received on the content of the Green Paper, the Commission prepared a report⁴⁸⁷ and in May 2004 published the White Paper on Services of General Interest⁴⁸⁸ which was the subject of intense debate during 2005.

The conclusion reached by the Commission in this document was that the usefulness of preparing a Framework Directive on Services of General Interest remained unclear, although it was worthwhile to keep studying it. It seemed appropriate to continue with sector legislation that had been developed throughout this entire process with this situation being documented in successive reports published by the Commission during 2004⁴⁸⁹ and 2005⁴⁹⁰.

In summary, after more than ten years squabbling the Member States and European Union Institutions had not been able to include a worthwhile mention of services of general interest in the Treaty or adopt a Framework Directive that covered the basic rights and duties on this matter. It reached the conclusion that the best policy was to continue acting with minor legislative acts, i.e. through sector legislation. And it had taken the European Union ten years to reach this conclusion.

The reader will see that this paragraph commences with the opinion that it was lucky for citizens that the Telecommunications Administrations did not want to eliminate monopolies without leaving the people a legacy as estimable as the right to the telecommunications universal service.

⁴⁷⁹ COM(2001) 598. Report to the Laeken European Council, Services of general Interest. Brussels, 17 October 2001.

⁴⁸⁰ COM(2002) 280. Report on the status of work on the guidelines for state aid and services of general economic interest. Brussels, 5 June 2002

⁴⁸¹ COM(2002) 331. A methodological note for the horizontal evaluation of services of general economic interest. Brussels, 18 June 2002.

⁴⁸² COM(2002) 636. Report on the state of play in the work of guidelines for the state aid services of general economic interest. Brussels, 27 November 2002.

⁴⁸³ Presidency Conclusions, Barcelona European Council 15-16 March 2002

⁴⁸⁴ http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/71025.pdf, visited 27/10/2010

⁴⁸⁵ COM(2002) 689. Status of the work on the examination of a proposal for a Framework Directive on Services of general Interest. Brussels, 4 December 2002.

⁴⁸⁶ COM(2003) 270. Green Paper on Services of General Interest. Brussels, 21 May 2003.

⁴⁸⁷ Services of General Interest

⁴⁸⁸ http://ec.europa.eu/services_general_interest/index_en.htm, visited 27/10/2010.

⁴⁸⁹ SEC(2004) 326. Report on the Public consultation on the Green Paper of Services of General Interest. Brussels 15 March 2004

⁴⁹⁰ COM(2004) 374. White Paper on Services of General Interest. Brussels 12 May 2004

⁴⁸⁹ SEC(2004) 866. 2004 Report. Horizontal evaluation of the performance of network industries providing services of general economic interest. Brussels, 23 June 2004.

⁴⁹⁰ SEC(2005) 1781. Horizontal evaluation of the performance of network industries providing services of general economic interest.

6.3.- Broadband Infrastructure Initiatives. Actions in the eEurope 2005 context

The end of the review of the telecoms regulatory framework coincided with the launch of the eEurope 2005 initiative in 2002. By then the limitations of existing infrastructure and the moderate interest of new operators in investing in the development of other more advanced infrastructures had become apparent.

Simply put, it had become clear that it was no longer possible to continue to rely on living off the use of telecommunications infrastructures developed during the monopoly era, and that new operators were not showing much interest in investing massively in the development of other more advanced infrastructures, in particular at that time with the sector in difficulty.

Incumbent operators were experiencing difficulties with the undercapitalization resulting from the payment of huge amounts to public administrations to obtain UMTS licences, while new operators, still with very low penetration rates in the market, did not appear to be in the best conditions to invest in infrastructures that did not provide them with immediate profitability.

It had become apparent that not only was public intervention necessary to promote the development of new broadband infrastructures but also to encourage their use so that difficult circumstances which the sector was experiencing would not slow down the development process started a few years earlier.

It seemed that the Commission, and in particular Member States, had begun to recognise their enormous error in encouraging the payment by operators of huge amounts for UMTS licences. Naturally, this was an error they were never going to admit.

The Commission raised this problem in a report on the evolution of the eEurope 2002 initiative⁴⁹¹ presented to the Barcelona Council⁴⁹² in March 2002, with the Council outlining the problem in the following terms:

“40.- Further progress is hended. For the next phase, the European Council:

- *Attaches priority to the widespread availability and use of broadband networks throughout the Union by 2005 and the Development of Internet protocol IPv6.*
- *Calls on the Commission to draw up a comprehensive 2005 Action plan, to be presented in advance of the Seville European Council, focusing on the abovementioned priorities and the security of networks and information, eGovernment, eLearning, eHealth and eBusiness.”*

Consequently, when drafting the proposal for the new eEurope 2005 initiative⁴⁹³, the Commission had to include the European Council's opinions and clearly reflect them in the document with an action proposal for this:

“Proposed Actions:

Broadband connection. Member States should aim to have broadband connections for all public administration by 2005. Since broadband services can be offered on different technological platforms, national and regional authorities should not discriminate between technologies when purchasing connections (using open binding procedures, for exemple)”

⁴⁹¹ COM(2002) 62. eEurope Benchmarking Report. Brussels, 5 February 2002.

⁴⁹² Presidency Conclusions. Barcelona European Council. 15-16 March 2002.

⁴⁹³ http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/71025.pdf, visited 27/10/2010

⁴⁹³ COM(2002) 263. eEurope 2005. An Information Society for all. Brussels, 28 May 2002.

The next step in the Electronic Communications Policy was the presentation of a Communication⁴⁹⁴ in which the Commission assessed activities carried out and indicated the following steps:

“This Communication does not launch new policies. It reminds Member States of the need to complete rapidly the process of defining and implementing the actions already planned and complementing these where necessary. Concretely, governments should aim to:

(i) the full, effective and timely implementation of the new regulatory framework for electronic communications to create and maintain a competitive environment that offers incentives to innovate, invest, and improve the quality of the services offered.

(ii) encourage the use of electronic communication technologies through broadband and multi-platform access, as outlined in the eEurope 2005 Action Plan, to improve public services and, ultimately, to reorganise business and administrative processes to increase productivity and growth.”

And when referring to broadband it added:

“3.1 The development of broadband services

... ..

Broadband provides important new options in terms of the quality of services delivered. Distance education (using e-learning), access to government services (e-government), healthcare (e-health), entertainment, videoconferencing, e-commerce, etc. become more practical and often feasible only through the high speed provided by broadband access. Realising the full benefits will also require reorganisation of business and administrative processes and the upgrading of skills. The adoption of these services into our daily life, and the opening of new markets, can improve quality of life, increase productivity and stimulate innovation.

... ..

In many rural and remote regions, geographical isolation and low density of population can make the cost of upgrading telephone lines to broadband capability unsustainable. Here, the Structural Funds can be used to increase infrastructure availability. As the mid-term review of Structural Funds programs will take place in 2003, this would provide an opportunity for Member States to give greater emphasis to this priority on the basis of an assessment of the regional needs.

... ..

The development of broadband services constitutes an important source of revenue growth both for fixed line communication companies and cable operators who are facing stagnating demand for their other services. Increases in broadband connections also generate significant demand for specific equipment, benefiting manufacturers.

The combination of economic and societal interest in the development of high-speed connections has led many governments to take specific actions to encourage its deployment. Many Member States have elaborated specific 'broadband strategies'.

In order to move this process forward, the Commission specified the following in the document:

“By Spring 2003, the Commission will provide Member States with guidelines on criteria and modalities of implementation of Structural Funds in support of the electronic communications sector, notably broadband fixed and wireless infrastructure.”

⁴⁹⁴ COM(2003) 65. Electronic Communications. The road to the knowledge economy. Brussels, 11 February 2003

The Commission tried with some difficulty to promote its strategy for developing broadband mainly through the power of the word and the convincing nature of its documents, as is often the case when it does not have powers or budgets. However, in the 2003 report on the situation in the Telecoms Sector⁴⁹⁵, published in November 2003, the Commission confirmed the unpromising reality of the situation.

7.- OTHER ASPECTS OF ELECTRONIC COMMUNICATIONS POLICY AFTER 1998

7.1.- General Framework

Throughout the book there has been an insistence on differentiating the Telecommunications Policy of specific aspects that make up the Telecommunications Regulation, i.e. the need to identify the aims of each of its resources.

It needs to be remembered that this task is normally complex, in particular in the European Union's case since pedagogic skills are not one of the many Commission's virtues. This, however, is not necessarily a bad thing as it leaves scope for adding value to its enormous amount of work.

As analysed in previous Chapters, between 1977 and 1986 the European Telecommunications Policy was of an exclusively industrial nature in order to promote the creation of a single market in this sector managed as a monopoly.

It has also been made clear that between 1987 and 1998 the European Union's Telecommunications Policy consisted almost exclusively of the preparation of regulatory framework required for the arrival of free competition in the sector to create the sensation that once monopolies had disappeared, the market would take control of the situation making Public Administration intervention unnecessary.

It was really after the entry of competition when what could be called a European Union Telecommunication Policy began to take shape, making it possible to go beyond a simple concern for regulation of the sector. This is what is analysed in the following sections focusing on aspects related to radio spectrum, mobile communications and convergence in electronic communications.

7.2.- Radio Spectrum

Within the framework of the Electronic Communications Policy analysis process it is worth commenting on the European Union's policy with regard to radio spectrum management. It is evident that radio spectrum as a scarce resource and as the basis of mobile communications represents a strategic element which must fall within these Community actions.

The management and assignment of radio spectrum is the clear jurisdiction of Member States. Traditionally, European countries have coordinated their decisions on radio spectrum within the framework of the European Conference of Postal and Telecommunications Administrations – CEPT. This activity is carried out by following the directives of the International Telecommunication Union – ITU.

⁴⁹⁵ COM(2003) 715. Report on the implementation of the EU electronic communications regulatory package. Brussels 19 November 2003.

The actions of European institutions with regard to radio spectrum have been limited to the adoption of three Directives in the harmonisation framework of national actions on mobile communications⁴⁹⁶. As will be seen later, these actions were welcome.

As mobile communications started to gain importance in the free competition framework, radio spectrum became the focal point of the European Union's strategy. As we commented previously at the end of 1998, the Commission began a consultation process⁴⁹⁷ on the policy that should be followed for radio spectrum in which, amongst other things, it asked whether States would be prepared to cede the management of spectrum to another Community institution in order to better guarantee its use. Naturally, Member States clearly refuse⁴⁹⁸.

The Commission's proposals were based on the idea that centralised management would help to better exploit radio spectrum possibilities. However, it needs to be taken into account that the management of spectrum, in particular the awarding of licences for its use and the setting of rates or financial compensation which its users have to provide to public funds, are important elements of any national telecommunications policy.

The negative response of Member States to renouncing their sovereignty in managing radio spectrum led to the Commission settling for implementing a mechanism for its coordination.

Framework Directive 2002/21 covers aspects on radio spectrum matters in its Article 9 which is entitled "*Management of radio frequencies for electronic communication services*" in which it reminds Member States of their obligation to efficiently manage its use, as well as harmonise their laws with those of the Community. Likewise, the Directive does not object to companies that are awarded use of spectrum bands from transferring their rights to third parties.

In addition, the Council adopted a Decision⁴⁹⁹ in March 2002 on radio spectrum policy with its Article 1 stating, amongst other things, the following:

"Article 1. Aim and scope

1. The aim of this Decision is to establish a policy and legal framework in the Community in order to ensure the coordination of policy approaches and, where appropriate, harmonised conditions with regard to the availability and efficient use of the radio spectrum necessary for the establishment and functioning of the internal market in Community policy areas such as electronic communications, transport and research and development (R & D)."

For the time being the management of spectrum will remain the exclusive responsibility of the Member States whose decisions are coordinated, at Community level, through the Radio Spectrum Committee⁵⁰⁰ and Radio Spectrum Policy Group^{501,502}, the creation of which has already been mentioned.

⁴⁹⁶ COM(98) 559. The implementation and functioning of the mobile communication frequency Directive, Brussels, 9 October 1998

⁴⁹⁷ COM(98) 596. Green Paper on Radio spectrum p. Brussels, 9 December 1998

⁴⁹⁸ COM(99) 538. Next Steps in Radio Spectrum Policy - Results of the Public Consultation on the Green Paper Brussels, 10 November 1999.

⁴⁹⁹ Decision 676/2002 of the European Parliament and of the Council, of 7 March 2002, on regulatory framework for radio spectrum policy on the European Community. (Radio spectrum Decision) OJ L 108. 24 April 2002.

⁵⁰⁰ Radio Spectrum Committee. http://ec.europa.eu/information_society/policy/ecom/committees_working_groups/index_en.htm#rsc, visited 8/9/2010.

⁵⁰¹ Radio Spectrum Policy Group. http://ec.europa.eu/information_society/policy/ecom/committees_working_groups/index_en.htm#rspg, visited 8/9/2010.

⁵⁰² Radio Spectrum Group website <http://rspg.groups.eu.int/>, visited 8/9/2010.

Without any doubt whatsoever, it can be said that the management of radio spectrum has finally gone on to form part of the European Union's Telecommunications Policy.

7.3.- Mobile Communications. Third generation systems.

After the success of the GSM system, the European Union, with the consent of Member States, operators and manufacturers, implemented its unfortunate strategy for developing and implementing the third-generation mobile communications system.

The history of third-generation – 3G, communication systems started in the International Telecommunication Union framework. The aim was to develop a worldwide mobile communications system for both terrestrial communications and through satellites that had similar features to the fixed systems.

The decision to reserve frequencies in the 2 GHz bands was adopted at the World Administrative Radio Conference (WARC) of the ITU, which took place in Torremolinos, in al-Andalus, Spain, in 1992. This resulted in the beginning of the work of the Study Groups to define the System which was given the name International Mobile Telecommunications 2000 – IMTS 2000⁵⁰³. The main aim of the ITU was to specify radio transmission technologies which would enable the inter-working of different third-generation systems able to be prepared.

For its part the ETSI started the development of European standards in the framework defined by the ITU. The system was called Universal Mobile Telecommunications System (UMTS). The ETSI's action was not the only one and the conclusion was soon reached that the efforts of different standardisation organisations working in the same field should be concentrated. In 1998 the project known as the 3rd Generation Partnership Project (3GPP⁵⁰⁴) was initiated, integrating the work of the ETSI.

Only in March 2000 the ETSI announced the publication of the first package of specifications which was going to enable the final setting of the characteristics of the systems the industry was already developing.

At the time the European Union had already explicitly abandoned the possibility of adopting Common Technical Regulations for terminals in which it would require the observance of functional technical standards, not just ones related to health and user protection, in line with Directive 99/5 referred to previously.

In this context, the activities of European institutions designed to harmonise different systems that could implement the third-generation mobile communications system in the European Union were, as will be shown, far less decided than those carried out in the GSM case. The final decision was in the hands of the operators.

In 1997 the Commission had begun a consultation process on the development of UMTS in the European Union⁵⁰⁵ and presented its conclusions⁵⁰⁶ several months later. The sector showed unusual interest in accelerating the process of awarding licences for this new system.

⁵⁰³ International Telecommunications Union. IMTS. <http://www.itu.int/imt/index.html> , visited 8/9/2010.

⁵⁰⁴ 3rd Generation Partnership Project. <http://www.3gpp.org/> , visited 8/9/2010.

⁵⁰⁵ COM(97) 217. on the further development of mobile and wireless communications - Challenges and choices for the European Union.- Brussels. 29 May 1997.

⁵⁰⁶ COM(97) 513. Strategy and policy orientations with regard to the Further development of mobile and wireless communications (UMTS) - Out come of the public consultation and proposals for creating a favourable environment. Brussels, 15 November 1997.

As a result of the Commission's proposal, the Parliament and Council settled the matter and adopted a Decision⁵⁰⁷ in December 1998 requesting Member States to adopt the necessary measures to enable the coordinated and gradual introduction of UMTS services in their territory no later than 1st January 2002 and create an authorisation system for UMTS by 1st January 2000.

The pan-European nature of the system meant that it was at the mercy of events. Member States were therefore asked to encourage organisations providing UMTS networks to negotiate cross-border roaming agreements with each other to ensure seamless Community-wide service coverage.

In its Decision, the Parliament and Council entrusted the Commission with matters related to technical standards and asked them to adopt all the measures necessary, if acting in cooperation with the ETSI, in order to promote a common, open standard for the rendering of UMTS services compatible throughout Europe that would respond to the market's needs. As a result, it should take into consideration the need to present a common standard to the ITU that would form one of the possible options of the IMT-2000 worldwide recommendation of the ITU. The absolute lack of conciseness in the mandate is apparent for all to see.

It is clear the situation was completely different to that at the time of the implementation of GSM. The success of mobile communications and the Internet as well as the euphoria surrounding liberalisation of the sector were being felt. Everyone wanted UMTS *here and now* despite knowing full well that the technical specifications development process was going to take its time and run the risk of being delayed. This in fact did happen and the process was delayed.

It is not known whether this was down to the dazzling influence of the Internet bubble or the evil effects of millennium omens, but at the end of 1999 Member States, rashly and very greedily, implemented the processes for awarding licences. Operators took up positions and started to pay astronomical amounts for future licences with the risk of causing a financial crisis in the sector. And the crisis duly followed.

It is worth analysing this process closely, although it should be remembered that the market failed dismally on the first major occasion it had to demonstrate its ability to self-regulate the working of the telecoms sector. The lesson therefore needs to be learned.

The Commission's next action was in February 2001 on the eve of the Stockholm European Council when it published a Communication⁵⁰⁸ in which, like a mere observer, as if nothing important had happened in the process, without any criticism of what had occurred and, it seems, with a bit of cynicism, stated in an unmoved manner the worrying situation in the sector and third-generation mobile communications, encouraging interested parties to bear with it and show their confidence in the future. At the same time it glimpsed the prospect of aid from the Framework Programmes for Research and Technological Development budget, naturally within the framework of the eEurope strategy.

In time the problem was solved and around 2005 operators started to offer third-generation mobile communications services regularly; nobody at that time was talking about UMTS.

7.4.- The Commission's concerns for mobile communications.

The delay in implementing third-generation mobile systems gave rise to unusual and feverish activity in the European institutions who revealed their concern for the situation.

⁵⁰⁷ Decision n° 128/1999/CE of the European Parliament and of the Council, of 14 December 1998 on the coordinated introduction of a third generation mobile and wireless communication system (UMTS) in the Community. OJ L 17, 22 January 1999. P. 1

⁵⁰⁸ COM(2001) 141. Introduction of third generation of mobile communications in the European Union. State of play and the way forward. Brussels, 20 March 2001

The Stockholm European Council⁵⁰⁹ of March 2001 echoed the problem and, referring to activities for developing the Knowledge Society, concluded the following:

“36. To that end:

... ..

the Commission will work together with the Council towards a supportive policy framework for third-generation mobile communications within the Union, including agreement on a regulatory framework for radio spectrum policy as well as broadband networks. The Commission is also invited to examine the effect of third-generation licensing on European competitiveness and the advancement of the ICT field;

One year later at the Barcelona European Council of March 2002, the spring Council, which normally deals with new technology issues, tackled this matter once again and provided the problem with a new dimension:

“41.- Technological convergence affords all business and citizens new opportunities for access to the Information Society. Digital television and third generation mobile communications (3-G) will play a key role in providing widespread access to interactive services.

The European Council accordingly:

- *Calls upon the Commission and the Member States to foster the use of open platforms to provide freedom of choice for access to applications and services of the Information Society, notably through digital television, 3G mobile and other platforms that technological convergence may provide in the future; and to sustain their efforts towards the introduction of 3G mobile communications.*
- *Invites the Commission to present at the Seville European Council a comprehensive analysis of the remaining barriers.....*

While it seemed that a solution for 3G mobile communications situation was in the pipeline, Convergence came onto the scene; although this matter will be looked at later.

In line with the mandate received from the Barcelona European Council, the Commission presented a new Communication⁵¹⁰ in June 2002 on the eve of the Seville European Council on third-generation mobile services. This Communication appeared while the package of Directives for the new regulatory framework was being fully discussed and it was clear that the Commission was trying to pass a few messages including one which revealed the conclusions of this Communication:

“The Commission intend. To use the new regulatory framework in electronic communications to work together with the national administration to develop new harmonised approach to licensing and attribution of rights to use radio spectrum for new licences and other wireless applications.”

However, the Commission had already dealt with the problem in its Communication in which it presented the eEurope 2005 initiative⁵¹¹.

⁵⁰⁹ Presidency Conclusions. Stockholm European Council. 23-24 March 2001

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.%20ann-r1.en1.html , visited 27/10/2010.

⁵¹⁰ COM(2002) 301. Towards a full roll-out of third generation mobile communications. Brussels, 1 June 2002.

⁵¹¹ COM(2002) 263. eEurope 2005: An information society for all - An Action Plan to be presented in view of the Sevilla European Council, 21/22 June 2002. Brussels, 28 May 2002.

As part of the strategy implemented by the Commission, the creation of a High Level Group on mobile communications which included an emergency strategy proposed in the final phase of the Prodi Commission's mandate and which was called "Quick Start"⁵¹² should be mentioned. It was never talked about again becoming integrated in the growth and jobs proposals⁵¹³ launched by the new Barroso Commission after 2004. The ability of the European Commission, in confusing moments, to conceal the nature of the situation or do what best suits it at any given time needs to be recognised. They really are geniuses!

The initiative of the High Level Group on mobile communications led to the creation of the technology platform for mobile communications (eMobility⁵¹⁴), whose main objective was to secure participation in the Seventh Framework Programme for Research and Technological Development for 2007-2013.

In February 2004, the Commission once again dealt with 3G mobile communications in the Communication COM(2004) 61⁵¹⁵ prepared for the spring European Council being held in Brussels in March of that year. The Commission took another look at the analysis of the situation in this Communication.

This sequence continued with the Communication COM(2004) 447⁵¹⁶ in June 2004 on broadband mobile services in which the Commission would present the central points of its mobile communications policy, which the reader should consult.

The analysis of European actions in this field may be complex but no more so than the institutions themselves are making in their documents, the contents of which this book attempts to explain to the reader. They are all words at the end of the day.

7.5.- Convergence in electronic communications. First proposals on Convergence in 1998

The introduction of digital technology has meant that the convergence between voice and data telecommunications networks and services and those of radio and television is now a reality. This circumstance has been of fundamental strategic importance in defining the scope of the European Union's Electronic Communications Policy.

This section will attempt to analyse the evolution of the European Union strategy on convergence in electronic communications, which might be of interest to the reader too.

Things began in December 1997 on the eve of the coming into effect of full competition in the telecoms sector. As a possible consequence of the successful results obtained in the regulatory development of telecommunications, the Commission dealt with the problem of analysing the possibility of finding regulatory convergence between the voice and data telecommunications sectors with the audiovisual sector, all within the framework of the incipient Information Society.

It should be added that at that time the responsibility for Telecommunications and the Information Society belonged to the then Directorate-General XIII while the responsibility for Audiovisual Policy was that of Directorate-General X, responsible for Cultural Policy. It should also be remembered that at that time the European Union's Audiovisual Policy centred on three basic points: The development

⁵¹² COM(2003) 690. A European Initiative for growth. Brussels, 21 November 2003.

⁵¹³ Growth and jobs. European Commission. . http://ec.europa.eu/archives/growthandjobs_2009/, visited 8/9/2010.

⁵¹⁴ Platform eMobility <http://www.emobility.eu.org/>, visited 27/10/2010.

⁵¹⁵ COM(2004) 61. Connecting Europe at high speed. Recent developments in the sector of electronic communications. Brussels, 3 February 2004

⁵¹⁶ COM(2004) 447. Mobile Broadband services. Brussels, 30 June 2004

of audiovisual contents through the MEDIA programme⁵¹⁷, the development and use of television standards and signals⁵¹⁸ and the development of television without frontiers⁵¹⁹.

The procedure followed by the Commission was to begin a consultation period in the sector for which it published a Communication in December 1997 called the Green Paper on Convergence⁵²⁰.

Although in principle this action was supposed to be developed jointly between the Directorate-Generals involved, it clearly came from the telecommunications side. After stating the basic importance of the problem in this document, convergence was defined as follows:

“The term convergence eludes precise definition, but it is most commonly expressed as:

- *the ability of different network platforms to carry essentially similar kinds of services, or*
- *the coming together of consumer devices such as the telephone, television and personal computer.”*

The document also stated:

“This Green Paper represents a step on the way to securing the benefits of convergence for European social and economic development. The June Communication, setting out the results of the public consultation, will allow political positions to be taken by the European Parliament, the Council of Ministers, the Economic and Social Committee and the Committee of the Regions, and for clear objectives for future policy to be established.

This Green Paper initiates a new phase in the European Union’s policy approach to the communications environment. As such it represents a key element of the overall framework put in place to support the development of an Information Society. It builds on the current strengths of the frameworks for telecommunications (launched by the landmark 1987 Green Paper on telecommunication) and for media (established by various Community legislative initiatives). This Green paper builds on these achievements, and offers all interested parties an opportunity to comment on the future shape of regulation, in the post-1998 communications environment, in the sectors affected by convergence.

This first step is intended to pave the way for the development of an appropriate regulatory environment which will facilitate the full achievement of the opportunities offered by the Information Society, in the interests of Europe and its citizens as the 21st century begins.

The document raised a series of questions and indicated that if the conclusion was reached that it was necessary to analyse the possibility of modifying the regulatory framework in light of the trends leading towards convergence, the following options would be available:

“Option 1: Build on current structures

⁵¹⁷ MEDIA Programme. http://ec.europa.eu/culture/media/index_en.htm, visited 8/9/2010.

⁵¹⁸ Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals. OJ L 281. 23 November 1995. P 51

⁵¹⁹ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. OJ L 2002. 30 July 1997. P. 60.

⁵²⁰ COM(97) 623. Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation. Towards an Information Society Approach. Brussels, 3 December 1997.

Option 2: Develop a separate regulatory model for new activities, to co-exist with telecommunications and broadcasting regulation

Option 3: Progressively introduce a new regulatory model to cover the whole range of existing and new services”

The first option would be to continue to work with existing definitions, recognising that these remain valid for the majority of services offered and to extend, where appropriate, the principles underpinning current regulation, whilst adapting the way in which it is applied to take account of the specific characteristics of the “new” services.

The second option might be the creation of a separate category of “new” services to co-exist with existing definitions.

The third option would be the adaptation of current definitions used in telecommunications, and/or broadcasting to reflect current trends and developments.

The document’s annex to Green Paper on Convergence including a summary of the regulatory framework for the two sectors involved.

The problem was easy to explain but difficult to solve judging by the evolution of events.

From the replies received, the Commission published a working document⁵²¹ in July 1998, launching a second public consultation in the sector based on the content of this document.

In March 1999 the Commission published a new Communication⁵²², with which it finally closed the consultation process on convergence. This document was adopted in what must have been one of the last meetings of the Santer Commission College of Commissioners before their resignation. The Commission stated the following in this document:

“Next Steps

The present Communication brings to a close the consultation process associated with the Convergence Green Paper. The Commission now intends to draw on this process to develop proposals for action on regulatory reform. Such proposals will be underpinned by a coherent set of regulatory principles which will be the subject of a forthcoming Communication. Following the approach emerging from the consultation, the proposals will cover:

- reforms in the regulation of infrastructure and associated services will be proposed as part of the 1999 Communications Review, a process already foreseen in current community telecommunications legislation ;*
- those in the regulation of content services will be covered either by adjustments to existing legislation at an appropriate time, or by the introduction of new measures.*

A number of flanking actions in both content and infrastructure areas are also foreseen. Actions relating to content include :

- Verification of the transposition and actual application by the Member States of the second Directive on Television without Frontiers*

⁵²¹ SEC (98) 1284. Working document of the commission summary of the results of the public consultation on the green paper on the convergence of the telecommunications, media and information technology sectors; areas for further reflection. Brussels 29 July 1998

⁵²² COM(1999) 108. The Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation. Results of the Public Consultation on the Green Paper. Brussels, 10 March 1999.

- *Proposal on measures for the promotion, production and distribution of European works in the audio-visual sector (MEDIA III programme)*

Actions relating to infrastructure include :

- *Report on the implementation of Directive 95/47/EC on the use of standards for the transmission of television signals and verification of the transposition of this Directive by the Member States, and an assessment of the need to amend the Directive.*
- *Communication on the public consultation on the radio spectrum Green Paper.”*

Although it is not known to which Communication the Commission was referring, it is possible to guess. What is certain is that it is possible for the reader to deduce from the text reproduced that the Audiovisual Policy was going to continue its course and the Telecommunications Policy was going to begin the review period planned. It seems that the Communication to which the Commission was referring was the one to be published a few months later, resulting in the beginning of the telecommunications regulatory framework review process referred to on several occasions in this Chapter.

The Prodi Commission continued to keep telecommunications and audiovisual separate. Telecommunications Policy remained in the DG Information Society while Audiovisual Policy became the responsibility of DG Education and Culture.

It was clear that convergence was only going to be fixed in infrastructures and not in services.

7.5.- Convergence between digital television and mobile communications in the 2002 Directives package

When the Commission began the consultation process on future regulatory framework in 1999, it looked at the convergence problem once again and the need to find a solution. The best example was the use after then of the term Electronic Communications instead of Telecommunications, as commented on several times throughout this book.

The result was the introduction of a series of provisions in the 2002 package of Directives, not too extensive, which made it possible to move forward in the process, in particular in the Access Directive⁵²³ in which access conditions to television and digital radio services are determined in its Annex I.

As indicated previously, the Barcelona European Council⁵²⁴ of March 2002 echoed the importance of the convergence of digital TV and mobile communications and in its point 41 addressed the Commission in the following terms:

“41.calls upon the Commission and the member States to foster the use of open platforms to provide freedom of choice to citizens for access to applications and services of the Information Society, notable through digital television, 3G mobile and other platforms that technological convergent may provide in the future; and to sustain their efforts towards the introduction of 3G mobile communications.

⁵²³ Directive 2002/19, of the European Parliament and of the Council, of 7 March 2002 on access to, and Interconnexion of, on electronic communication networks and associated facilities. (Access Directive). OJ L. 108. 24 April 2002. P. 7

⁵²⁴ Presidency Conclusions. Barcelona European Council. 15-16 March 2002

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/71025.pdf, visited 27/10/2010.

The reader will note that interest in convergence was suddenly focused on specific aspects related to convergence between digital television and mobile communications which is where all the technological and economic expectations of the sector were placed.

In accordance with the Council's mandate, the Commission adopted a Communication⁵²⁵ in June 2002 entitled: Towards a full roll-out of third-generation mobile communications. Although this was not fully within the European Council's jurisdiction, it did make it possible to salvage the situation by dealing with a matter of interest.

With things as they were, the Seville European Council⁵²⁶ asked the Commission for the report again, requesting it in Barcelona in the following terms:

“54.- ... invites the Commission to report back to the Copenhagen European Council on this issues and on the remaining barriers to open platforms in digital television and third generation mobiles communications,”

Neither was the Commission able to present this report to the Copenhagen European Council which took place in December 2002, but it did begin a public consultation⁵²⁷ around this time on convergence which would last until February 2003. As usual, after the replies received from the sector⁵²⁸, the Commission published its conclusions in its Communication COM(2003) 410⁵²⁹ of July 2003. This document dealt with fundamental aspects that made it possible to focus the problem and which are worth analysing in detail in order to understand them better.

The Council Meeting of Telecommunications Ministers of November 2003⁵³⁰ echoed the situation described by the Commission in its Communication COM(2003) 410 on obstacles for general access to digital television and third-generation mobile communications services and asked the Commission to carry out a public consultation.

Up until then Community institutions had simply raised the problem without finding a solution to it.

7.6.- The Interoperability of Interactive Digital TV services

One specific aspect of convergence is the interoperability of interactive digital television services, the analysis of which will be dealt with in this section. It will firstly be necessary to review European strategy on digital television in order to better understand the situation.

In 1999 the Commission had also looked at the problem of transition to digital television in its Communication COM(1999) 657⁵³¹ on audiovisual policy in the digital era.

⁵²⁵ COM(2002) 301. Towards a full roll-out of third generation of Mobile communications. Brussels, 11 June 2002.

⁵²⁶ Presidency Conclusions. Sevilla European Council. 21-22 June 2002.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72638.pdf, visited 27/10/2010.

⁵²⁷ Commission staff working document on barriers to widespread access to new services and applications of information society through open platforms in digital television and third generation mobile communications.

⁵²⁸ List of comments on the commission staff working document on "Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications", submitted in response to the public consultation

http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/barriers_to_widespread_access/index_en.htm, visited 8/9/2010.

⁵²⁹ COM(2003) 410. On the barriers to widespread access to new services and applications on the information society through open platforms in digital television and third generation of mobile communications. Brussels, 9 July 2003.

⁵³⁰ 2543 Council meeting. Transport, telecommunications and energy. Brussels, 20 November 2003.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/trans/77963.pdf, visited 27/10/2010.

⁵³¹ COM(1999) 657 Principles and guidelines for community's audiovisual policy in the digital age. Brussels 14 December 1999.

It was in 2003 when the Commission, in its Communication COM(2003) 541⁵³² on the transition to digital broadcasting, fully covered the transition from analogue to digital television urging Member States to publish their national strategies in this field, a matter it would return to in 2005 in its Communication COM(2005) 204⁵³³ on the acceleration of the transition from analogue to digital broadcasting. This document includes the dates 2010 and 2012 for carrying out what is known as the “switchover”.

Within such a context, the strategy of the interoperability of digital television and one of the basic aspects which is technical standards is considered in this document.

As analysed previously in this Chapter when referring to Standardisation Policy, Article 18.3 of Framework Directive 2002/21 tackled the problem of regulating the interoperability of digital television allowing the Commission to impose the use of technical standards if the market was not able to do so voluntarily.

Consequently, in order to adopt a decision on this matter, the Commission carried out the public consultation⁵³⁴ of March 2004 on interoperability in digital TV services. As is customary, the Commission published a new Communication⁵³⁵ in July 2004 with the result of the consultation together with a working document attached⁵³⁶.

In its document on public consultation, the Commission concluded that the imposition of compulsory standards in line with Article 18.2 of the Framework Directive was not justified and agreed to monitor the situation’s development. Likewise, the Commission proposed the creation of a Working Group to analyse this matter, in particular the application of MHP specifications⁵³⁷ (Media Home Platform), proposed by the DVB project⁵³⁸ (Digital Video Broadcasting). The Commission announced that it would monitor the situation in 2005.

The Council of Telecommunications Ministers seconded the proposals of the Commission in a document of conclusions adopted in its meeting on 9 December 2004⁵³⁹.

The Commission published a new Communication⁵⁴⁰ in February 2006 in which it reported on the evolution of the digital television interoperability situation in 2005 and restated in its conclusions that it did not consider the imposition of compulsory standards appropriate, making a series of coordination proposals with the participation of Member States and the sector in order to promote the voluntary adoption of open standards that would guarantee the interoperability of interactive digital television services in the European Union.

This was therefore the situation of the main aspects on convergence when the second review of the 2005 Electronic Communications Policy began, all of which will be analysed in the following chapter.

The reader might ask what had happened with convergence. The opinion here is almost nothing.

⁵³² COM(2003) 541. On the transition for analogue to digital broadcasting. Brussels, 17 September 2003

⁵³³ COM(2005) 204. On accelerating the transition from analogue to digital broadcasting. Brussels, 24 May 2005.

⁵³⁴ SEC(2004) 346. Commission staff working paper on interoperability of digital interactive television services. Brussels 18 March 2003.

⁵³⁵ COM(2004) 541. On interoperability of digital interactive television services. Brussels, 30 July 2004.

⁵³⁶ SEC(2004) 1028 Commission staff working paper on interoperability of digital interactive television services. Brussels 30 July 2004.

⁵³⁷ MHP Media Home platform website <http://www.mhp.org/>, visited 8/9/2010.

⁵³⁸ DVB Digital Video Broadcasting project website <http://www.dvb.org/>, visited 8/9/2010.

⁵³⁹ Press release. 2629th Council meeting. Transport, telecommunications and energy. Brussels, 9-10 December 2004.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/trans/83037.pdf, visited 27/10/2010.

⁵⁴⁰ COM(2006) 37. On reviewing the interoperability on digital interactive television services pursuant the Communication COM(2004) of 30 July 2004. Brussels, 2 February 2006

7.7.- Group of European Telecommunications Regulators

This analysis of this stage of the Electronic Communications Policy of the European Union needs to be completed by commenting on the Group of European Telecommunications Regulators.

The reader is reminded that the Commission had managed to achieve that the Harmonisation Directives adopted before 1998 would make mention of a possible European Regulatory Authority for Telecommunications, leaving its possible taking into consideration for later.

The Commission therefore commissioned a study in order to analyse the viability of this proposal. The final study report⁵⁴¹ of more than 250 pages was published in October 1999 on the eve of the beginning of the review process referred to here and concluded by saying that there was no consensus on the Commission's proposal to create a European Telecommunications Regulator, as a result of which the consultants recommended that the Commission settle for intensifying the coordination of Telecommunications Regulatory Authorities in the Member States, which is what they did.

The Commission adopted a Decision⁵⁴² on this matter resulting in the creation of the European Regulators Group for electronic communications networks and services, as a consultative group within the Commission and linked to the Member States' Regulatory Authorities.

In 2004, the Commission adopted a new Decision⁵⁴³ which altered the scope of the previous one in order to allow the participation in debates of representatives from candidate countries.

Since then the Group has been developing its functions and advising the Commission, with its work available online⁵⁴⁴.

The Commission would need to be aware of the Member States' commitment to their functions, responsibilities and prerogatives according to the Treaty and its respective Constitutions. With regard to telecommunications, the Commission tried three times to obtain the voluntary surrender of some of these powers and was met with a no on all three occasions. The first time was in 1992 when it proposed mutual recognition of telecommunications licences, the second time in 1998 when it proposed the centralisation of radio spectrum's management powers and the third in 1999 in the proposal to create an Electronic Communications Regulatory Authority commented on above. And it is in the equilibrium between sovereignty and supranationality where the true essence of the European Union lies.

8.- CONCLUSIONS

As analysed in this chapter the electronic communications regulatory framework review process was carried out to schedule and in 2002 the new package of Directives was adopted as well as other legal acts which the Member States had to incorporate in their laws before the middle of 2003.

As indicated in previous sections, it was between 1999 and 2005 when the European Union started to prepare an Electronic Communications Policy which went beyond the adoption of a relevant regulatory framework so that it could be incorporated in Member States' laws.

⁵⁴¹ Eurostrategies /Cullen International. Final Report on the possible added value of European Regulatory Authority for Telecommunications. Prepared for the European Commission. October 1999.

⁵⁴² Commission Decision 2002/267/CE, of 29 July 2002, establishing the European Regulators Group for electronic communications networks and services. OJ L 200. 30 July 2002. P. 38

⁵⁴³ Commission Decision 2004/641/CE of 14 September 2004, amending Decision 2002/267 establishing the European Regulators Group for electronic communications networks and services. OJ L 293. 16 September 2004. P. 30

⁵⁴⁴ European Regulators Group <http://erg.eu.int>, visited 8/9/2010.

From the Commission came a broadening in the field of activity of the Electronic Communications Policy to cover certain aspects resulting from the provisions in the 2002 package of Directives, such as the coordination of radio spectrum actions or the adoption of decisions relating to the interoperability of new services. In these cases the Commission acted according to the provisions of the current regulatory framework.

However, together with the above are other aspects in the European Union's Electronic Communications Policy in which the Commission's proposals only arise from the importance of the matter and their interest in being present in it. These are namely mobile communications proposals which, in the absence of a regulatory framework justifying them, are nothing more than good intentions.

It is possible to say something like this about the use of the term Convergence. With regard to this, the aim has been to start the book by clarifying in Chapter 2 its meaning and the present situation according to current regulatory framework. This Chapter has also attempted to explain the specific activities on the convergence objectives that appear in the regulations adopted from 1999-2005.

However, the reader should be aware that the term Convergence remains both profuse and vague in the Commission's documents, helping to create an environment of hopeful confusion that provides little clarity and understanding of the European Union's Electronic Communications Policy.

But also the Directives of the 2002 package set a date for their reconsideration. During 2005, the Commission was going to begin a new review of the electronic communications regulatory framework, the evolution of which will be looked at in the next Chapter.

CHAPTER 10
THE SECOND REVIEW OF THE ELECTRONIC
COMMUNICATIONS POLICY
PERIOD 2005 - 2010



CHAPTER 10

THE SECOND REVIEW OF THE ELECTRONIC COMMUNICATIONS POLICY. PERIOD 2005-2010

1.- INTRODUCTION

The purpose of this chapter is to analyze the Electronic Communications Policy review process launched in 2005 under the provisions of the package of Directives of 2002 and concluded with the approval of the Modified Regulatory Framework in late 2009.

Almost a decade after the introduction of full competition it may be said that the Electronic Communications sector was entering a phase of maturity. Consequently, the European institutions embarked on a new review of this Community Policy not so much to carry out in-depth reviews of the Regulatory Framework in force as to elaborate on those strategic issues which enable to broaden their objectives.

The Chapter starts by summarising the reference framework of which this review forms part. Then it analyses the Regulatory Framework review process from 2005 to 2010.

Finally, it briefly covers certain aspects of the Audiovisual Services Policy status and its possible convergence with the Electronic Communications Policy.

2.- REFERENCE FRAMEWORK

2.1.- Strategic Aspects of the 2005 Review

The Directives in the 2002 package stipulated that in 2005 the Commission had to report on the progress of the Electronic Communications Regulatory Framework, and that was exactly what it did. As we will see in the following sections, the new Barroso Commission, which had started work at the end of 2004, carried out the mandate in the context of its new objectives.

It must be pointed out that within the new structure of the Community executive, the responsibility for Information Society Policy and Audiovisual and Media Policy fell to the same member of the Commission, in this case Commissioner Vivian Reding, who was responsible for Audiovisual and Media Policy in the Prodi Commission. This measure was going to guarantee the adoption of common approaches to both policies which had until then evolved independently. This must undoubtedly be the policy convergence referred to in the i2010 strategy which we will discuss later.

Meanwhile, progress in technology and services was starting to fulfil the convergence forecasts which had been predicted as early as 1997.

As such, the new review process was to centre around two key factors, firstly updating the traditional Electronic Communications Policy, and secondly, trying to find regulatory solutions for the new audiovisual services. In this context, the term convergence was going to continue to hang around.

The declaration of principles concerning the Commission's future policy was defined in the i2010 strategy for Information Society development.

2.2.- Electronic Communications Policy review process in the i2010 Strategy

As we have stated on previous occasions, following the introduction of free competition in this sector, the European Union's Electronic Communications Policy became part of its Information Society Development Policy.

Exactly as happened in 2000 with the eEurope 2002 initiative, the Commission announced the launch of the Electronic Communications Regulatory Framework review process in the June 2005 Communication⁵⁴⁵,⁵⁴⁶ announcing its new i2010 strategy⁵⁴⁷ for the development of the Information Society

The i2010 strategy defined the following objectives for the period 2006-2010:

Objective 1: A Single European Information Space offering affordable and secure high bandwidth communications, rich and diverse content and digital services.

Objective 2: World class performance in research and innovation in ICT by closing the gap with Europe's leading competitors.

Objective 3: An Information Society that is inclusive, provides high quality public services and promotes quality of life

The activities related to the Regulation concern Objective 1 above, and in this respect the Commission announced the following kinds of action to be performed:

*“The **digital convergence of information society and media services, networks and devices** is finally becoming an everyday reality: ICT will become smarter, smaller, safer, faster, always connected and easier to use, with content moving to three-dimensional multimedia formats.*

*Proactive policies are needed to respond to the fundamental changes in technology. Digital convergence requires **policy convergence** and a willingness to adapt regulatory frameworks where needed so they are consistent with the emerging digital economy.*

.....

*Digital convergence calls for a **consistent system of rules for information society and media**. In this area, the internal market is governed by a wide set of rules covering e.g. audiovisual media, digital television, on-line trading, intellectual property rights and support measures for the creation and circulation of European content*

...

*A key element of the renewed Lisbon partnership for growth and jobs, i2010 **will build towards an integrated approach to information society and audio-visual media policies in the EU.***

.....

⁵⁴⁵ COM(2005) 229. i2010 – A European Information Society for growth and employment. Brussels, 1 June 2005

⁵⁴⁶ SEC(2005) 717. i2010 – A European Information Society for growth and employment. Extended Impact Assessment. Brussels, 1 June 2005

⁵⁴⁷ i2010 Website http://ec.europa.eu/information_society/eeurope/i2010, visited 7/9/2010.

In summary, the i2010 agenda on the Single European Information Space will accelerate the economic pay-off from digital convergence by the following measures:

Review the electronic communications regulatory framework (2006), including defining an efficient spectrum management strategy (2005)

Create a consistent internal market framework for information society and media services by

- modernising the legal framework for audio-visual services, starting with a Commission proposal in 2005 for revising the Television Without Frontiers Directive*
- analysing and making any necessary adaptations to the community acquis affecting information society and media services (2007)*
- actively promote fast and efficient implementation of the existing and updated acquis governing the information society and media services*

Continued support for the creation and circulation of European content

Define and implement a strategy for a secure European Information Society (2006)

Identify and promote targeted actions on interoperability, particularly digital rights management (2006/2007)

It was, then, quite clear what the Commission's priorities were going to be in this new phase:

- Review the electronic communications regulatory framework (2006), including defining an efficient spectrum management strategy (2005)*
- Modernise the legal framework for audio-visual services, starting with a Commission proposal in 2005 for revising the Television Without Frontiers Directive*

In line with the aforementioned approach, the Commission launched, on the one hand the Electronic Communications regulatory framework review process just as it had been planned, and on the other, it renewed the actions it had been carrying out in the Audiovisual sector.

The following sections analyse the status of these two elements.

3.- THE 2005 ELECTRONIC COMMUNICATIONS REGULATORY FRAMEWORK REVIEW PROCESS

3.1.- Summary of the 2002 Electronic Communications Regulatory Framework.

As analysed in the previous Chapter, the Electronic Communications Regulatory Framework adopted in 2002⁵⁴⁸ consisted of the following regulations:

1. The Commission Directive consolidating the liberalisation process

- Commission Directive 2002/77, on competition⁵⁴⁹**

⁵⁴⁸ European Commission. EU Policy and Regulations http://ec.europa.eu/information_society/policy/ecommm/current, visited 7/9/2010.

2. The Parliament and Council Directives amending those concerning the harmonisation of national telecommunications legislations.
 - Directive 2002/21 on the regulatory framework⁵⁵⁰
 - Directive 2002/19 on access and interconnection⁵⁵¹
 - Directive 2002/20 on authorisation⁵⁵²
 - Directive 2002/22 on universal service⁵⁵³
 - Directive 2002/58 on privacy and electronic communications⁵⁵⁴
3. The Commission Recommendation on markets.
 - Commission Recommendation on electronic communication markets⁵⁵⁵.
4. The radio spectrum decisions
 - Decision 676/2002 on a regulatory framework for the radio spectrum policy⁵⁵⁶
 - Commission Decision 622/2002 on the Radio Spectrum Policy Group⁵⁵⁷.

3.2.- 2002 Regulatory Framework follow-up mechanisms

The 2002 Directives package stated that the Commission should examine the implementation of the Directives and report back to the European Parliament and Council a maximum of three years after the implementation date, in other words, during 2005, and that is what it did.

It must be pointed out that the Universal Service Directive also stated that the Commission had to embark on an evaluation of the scope of the universal service within just two years of the implementation date in July 2003, which the Commission also fulfilled.

The Decision on the Radio Spectrum also stipulated that the Commission should report back to the Parliament and Council on the activities carried out and the measures adopted in relation to the contents of this Decision on an annual basis.

As was customary, the Commission published the reports concerning the status and progress of the process of implementing the new Regulatory. Up until 2004, the aforementioned reports were published in the closing months of the year, but from 2005-2006 onwards, the Commission decided to

⁵⁴⁹ Commission Directive 2002/77 of 16 September 2002 on competition in the markets for electronic communications networks and services. OJ L 249, 17 September 2002. P. 21

⁵⁵⁰ Directive 2002/21 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). OJ L 108, 24 April 2002. P. 33

⁵⁵¹ Directive 2002/19 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). OJ L 108, 24 April 2002. P. 7

⁵⁵² Directive 2002/20 of the European Parliament and of the Council, of 7 March 2002, on the authorisation of the electronic communications networks and services. (Authorisation Directive). OJ L 108, 24 April 2002. P. 21

⁵⁵³ Directive 2002/22 of the European Parliament and the Council, of 7 March 2002, on universal service and users' rights relating to the electronic communications networks and services. (Universal service Directive) OJ L 108 24 April 2002. P. 51

⁵⁵⁴ Directive 2002/58, of the European parliament and of the Council, of 12 July 2002, concerning of processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). OJ L 201, 31 July 2002. P. 37

⁵⁵⁵ Commission Recommendation (2003/311) of 11 February 2003, on relevant product and service markets within the electronic communications sector susceptible of *ex ante* regulation in accordance with Directive 2002/21/CE of the European parliament and of the Council on a common regulatory framework for electronic communications networks and services. OJ L 114, 8 May 2003. P.45.

⁵⁵⁶ Decision 676/2002/CE of the European Parliament and the Council, of 7 March 2002, on a regulatory framework for radio spectrum policy on the European Community (Radio spectrum Decision). OJ L 108, 24 April 2002. P.1

⁵⁵⁷ Commission Decision 622/2002, of 26 June 2002, establishing a Radio Spectrum Policy Group. OJ L 198, 27 July 2002. P 49

publish them in February with the aim of enabling them to act as working documents for the European Council spring session which is usually held in March each year and tackles topics relating to the Information Society. These Reports and those published previously, are available on the Commission web page⁵⁵⁸.

Table 10.1 summarises the follow-up mechanisms established in the 2002 regulatory framework.

Regulation	Review	Committee
Commission Directive 2002/77 on competition	None scheduled	
Directive 2002/21 on the regulatory framework (Framework)	Art. 7. The Commission can submit observations on reference market regulatory measure projects and where appropriate urge the ANR to cancel the project	Communications Committee ⁵⁵⁹
	Art. 25. First periodic report to Parliament and Council, within 3 years (July 2006)	
Directive 2002/19 on access and interconnection (Access)	Art. 17. First periodic report to Parliament and Council, within 3 years (July 2006)	Communications Committee
Directive 2002/20 on authorisation (Authorisation)	Art. 16. First periodic report to Parliament and Council, within 3 years (July 2006)	Communications Committee
Directive 2002/22 on universal service (Universal Service)	Art. 15. First review of the scope of universal service, within 2 years (July 2005)	Communications Committee
	Art. 36. First periodic report to Parliament and Council, within 3 years (July 2006)	
Directive 2002/58 on privacy and electronic communications (Privacy)	Art. 18. First periodic report to Parliament and Council, within 3 years (July 2006)	
Recommendation on markets (Markets)	Periodic review, of compliance with Article 15 of the Framework Directive	
Decision 676/2002 on the radio spectrum (radio spectrum)	Art. 9. The Commission will report back to Parliament and Council annually concerning the activities carried out and measures adopted	Radio Spectrum Committee ⁵⁶⁰
Commission Decision 622/2002 on the Radio Spectrum Policy Group	Art. 1. A radio spectrum policy consultative group is to be set up	Radio Spectrum Policy Group ⁵⁶¹

3.3.- The Public Consultation of June 2006.

The review of the Regulatory Framework for Electronic Communications began through the launch of a public consultation to the sector, as usual. To this end, the Commission published a document⁵⁶² requesting the sector's opinion on the following generic aspects:

⁵⁵⁸ Implementation of the Regulatory Framework in the Members States website.

http://ec.europa.eu/information_society/policy/ecomm/library/communications_reports/annualreports/previousyears/index_en.htm, visited 7/9/2010.

⁵⁵⁹ COCOM. Communications Committee website

http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/comm_committee/index_en.htm, visited 7/9/2010.

⁵⁶⁰ RSC. Radio Spectrum Committee website

http://ec.europa.eu/information_society/policy/ecomm/committees_working_groups/index_en.htm#rsc, visited 7/9/2010.

⁵⁶¹ RSPG. Radio Spectrum Policy Group website <http://rspg.groups.eu.int/>, visited 7/9/2010.

- Strengths and weaknesses of the current regulatory framework
- Degree of objectives met
- Impact
- Points for improvement
- Contribution of the regulatory framework to the Lisbon objectives

According to Commission documents, in Table 10.2 we have summarized the main aspects of each of the 2002 package directives that the Commission itself found that there could be reviewed.

Table 10.2		
ELEMENTS ON WHICH THE COMMISSION IS FOCUSING THE TELECOMMUNICATIONS REGULATORY FRAMEWORK CONSULTATION		
Regulation	Main contents	Aspect to analyse
Commission Directive 2002/77 on competition	Free competition	
Directive 2002/21 on the regulatory framework (Framework)	<ul style="list-style-type: none"> • Regulatory authorities • Consolidation of the internal market • Undertakings with significant market power • Radio spectrum • Technical rules and interoperability • Committees 	<ul style="list-style-type: none"> • Procedures set out in article 7 of the Framework Directive • Aspects related to the single market • Spectrum management • Technical rules and interoperability • Institutional aspects and committees
Directive 2002/19 on access and interconnection (Access)	<ul style="list-style-type: none"> • Interconnection • Access • Committees 	<ul style="list-style-type: none"> • Regulation of competition and access
Directive 2002/20 on authorisation (Authorisation)	<ul style="list-style-type: none"> • Authorisations • Operators' rights and duties 	<ul style="list-style-type: none"> • Authorisations and rights to use scarce resources
Directive 2002/22 on universal service (Universal Service)	<ul style="list-style-type: none"> • Universal service obligations • Public service obligations • Leased lines • Users' rights 	<ul style="list-style-type: none"> • Scope of universal service • Leased lines • Consumer protection and citizens' rights
Directive 2002/58 on the protection of privacy (Privacy)	<ul style="list-style-type: none"> • Privacy and security 	<ul style="list-style-type: none"> • Privacy and security
Recommendation on markets (Markets)	<ul style="list-style-type: none"> • Reference markets proposal 	<ul style="list-style-type: none"> • Convergence and technological development
Decision 676/2002 on the radio spectrum (radio spectrum)		<ul style="list-style-type: none"> • Spectrum management

⁵⁶² European Commission. Call for input on the forthcoming review of the EU regulatory framework for electronic communications including review of the Recommendation on relevant markets. Brussels, 25 November 2005. http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/past/index_en.htm#review, visited 7/9/2010.

As expected, the Commission published the responses received from the sector⁵⁶³.

The public consultation itself was launched in June 2006 and was implemented through a Commission Communication⁵⁶⁴ and two associated Commission Staff Working Documents⁵⁶⁵ ⁵⁶⁶. The Commission opened the process of public consultation on the future of the Regulatory Framework for Electronic Communications, which developed until 27 October 2006. In the Communication, the Commission stated that "Electronic communications continue to be a success story for the EU" and summed up the approach by stating that "the current regulatory framework has produced considerable benefits, but it needs attention in a number of areas to remain effective for the coming decade."

The two main areas for change posed by the Commission were:

- On the one hand, the application to electronic communications of the Commission's policy approach on spectrum management, as set out in its Communication⁵⁶⁷ of September 2005. On this approach, more details will be provided in next chapter when we address the radio spectrum policy.
- On the other, the reduction of the procedural burden associated with the reviews of market susceptible to ex-ante regulation.

Besides the two aforementioned areas, the Communication identified other changes aimed at consolidating the single market, strengthening consumers and user interests, improving security and removing outdated provisions. These changes, as argued in the following sections, proved to be not as accessories, in particular those related to consolidating the single market. Indeed, the Commission noted that "an internal European market for electronic communications and for radio equipment is not yet a reality" and proposed a series of measures, among which was to reach an agreement on a common approach to authorization that would allow a coordinated deployment of services, e.g. satellite communication services. Anyway, when the Commission submitted the results of public consultation, it became clear the sort of mechanisms that the Commission was thinking on.

3.4.- The 2007 Reform Proposals.

In November 2007, almost a year after of public consultation closing, the Commission published a Communication⁵⁶⁸ to report on the outcome of the review and to explain the main changes proposed by the Commission for the Regulatory Framework. These proposals became known as "the 2007 Reform Proposals." The details of the Commission's proposals were contained in three Communications and the associated Impact Assessment⁵⁶⁹. Two Communications contained Proposals for amending the 2002 Directives, specifically a Proposal to amend the Framework/ Authorization/ Access Directives⁵⁷⁰ and a Proposal to amend the Universal Service Directive⁵⁷¹, respectively. The

⁵⁶³ European Commission. Responses to the Call for input on the forthcoming review of the EU regulatory framework for electronic communications website http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/review/index_en.htm, visitado 7/9/2010.

⁵⁶⁴ COM(2006) 334. Review of the EU Regulatory Framework for electronic communications networks and services. Brussels, 29 June 2006.

⁵⁶⁵ SEC(2006) 816. Review of the EU Regulatory Framework for electronic communications networks and services. Proposed changes. Brussels, 28 June 2006.

⁵⁶⁶ SEC(2006) 817. Review of the EU Regulatory Framework for electronic communications networks and services. Impact assessment. Brussels, 28 June 2006.

⁵⁶⁷ COM(2005) 411. A Forward-looking radio spectrum policy for the European Union - Second annual Report. Brussels, 6 September 2005.

⁵⁶⁸ COM(2007)696. Report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services in accordance with Directive 2002/21/EC and summary of the 2007 reform proposals. Brussels, 13 November 2007.

⁵⁶⁹ SEC(2007) 1472. Impact assessment. Accompanying document to [...]. Brussels, 13 November 2007.

⁵⁷⁰ COM(2007) 697. Proposal for a Directive of the European Parliament and of the Council 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 services, and 2002/20/EC on the authorisation of electronic communications networks and services. Brussels, 13 November 2007.

third Communication⁵⁷² contained a Proposal for a Regulation establishing the European Electronic Communications Market Authority (EECMA).

The Commission listed 12 policy proposals, which grouped into three groups, each corresponding to a Proposal for a Directive or Regulation:

- Better regulation aimed at achieving competitive electronic communications, which included simplifying the regulation and new legislation on the radio spectrum.
 - Within the policy proposals for regulation simplification, the following ones are noteworthy:
 - Reducing the list of relevant markets from 18 to 7, which was to materialize in December 2007 after reviewing the 2002 Recommendation on relevant markets which had started in June 2006.
 - The introduction of functional separation as complementary and unique remedy to tackle persistent competition problems.
 - Regarding radio spectrum policy, the reform was aimed at:
 - Removing unnecessary restrictions on spectrum use by strengthening the principles of technology and service neutrality.
 - Improving access to spectrum by encouraging licence-free spectrum use and allowing secondary trading.
 - Establishing a more coordinated and efficient system for authorization of wireless systems with a pan-European potential or with a substantial cross-border dimension.
- Connecting with citizens, which included proposals for: (1) consumer protection, such as improving the transparency of information provided by operators or allow the National Regulatory Authorities (NRA) impose minimum requirements for the quality of services, (2) eAccessibility and (3) strengthening the security of networks and services, and user privacy.
- Completing the single market for electronic communications, which included the creation of the EECMA Authority. The Authority would (1) bring together the NRA who had met in the ERG ("European Regulators Group"), whose functioning to date was qualified by the Commission as "loose cooperation", and (2) constitute "a more efficient, more authoritative and more accountable system." This group of proposals also included strengthening the independence and enforcement powers of the NRAs.

3.5.- The codecision procedure.

With the adoption of the Proposals for a Directive and the Proposal for a Regulation by the Commission, the European Parliament and the Council followed the respective codecision procedures, as described in Article 251 (now Article 294) of the Treaty.

⁵⁷¹ COM(2007) 698. Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks, 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 consumer protection cooperation Brussels, 13 November 2007.

⁵⁷² COM(2007) 699. Proposal for a Regulation of the European Parliament and of the Council establishing the European electronic communications market authority Brussels, 13 November 2007.

The first step was the adoption of an Opinion by the European Parliament in September 2008, which endorsed the Proposals, while adding one hundred and twenty-six amendments. The European Parliament's position differed for each of the three Proposals.

- As regards the Proposal for a Directive amending the Universal Service and Privacy Directives, the Parliament proposed no substantial change.
- As regards the Proposals for a Directive amending the Framework, Access and Authorization Directives, the Parliament's position was more critical. This position was expressed in two crucial points:
 - The Rapporteur of the Committee on Industry, Research and Energy, responsible for raising the Report to the Plenary, stated that "Spectrum, like other natural resources (sun, water, air), is a public good; market mechanisms, whilst constituting effective tools to derive optimal economic value (private and public), are not able alone to serve the general interest and provide public goods indispensable for achieving an information society for all." The position of the European Parliament in this regard became crystal clear.
 - The second was to improve consistency of regulation to which the Commission proposed both the creation of the Authority EECMA and the expansion of Commission supervisory powers of the solutions proposed by the NRA. In this case, the Rapporteur stated that "The current balance of power between the Commission ('guardian' of markets definition and significant market power designation) and NRAs (responsible for implementation at local level) has worked reasonably well."
- Finally, as regards the Proposal for a Regulation establishing the Authority, the Rapporteur of the Committee on Industry, Research and Energy was especially critical, as she felt that the creation of the Authority would only add bureaucracy, which contravened the principles of subsidiarity, and that the absorption of ENISA as part of the creation of the Authority was difficult to understand. As an alternative, she proposed the creation of the Body of European Regulators in Telecommunications (BERT). The Body would retain the functions proposed for the Authority but without becoming an Agency, and would draw on good practice from ERG Group.

Based on the Commission's Reform Proposals and the European Parliament's Opinion at first reading, the Council adopted a political agreement in November 2008, fostered by the work of the Slovenian and French Presidencies in 2008. This agreement would provide a basis for a Common Position adopted in February 2009. The Common Position was passed with the abstention of Sweden, the UK and the Netherlands:

- Regarding the proposals for spectrum management of the Framework Directive, the Council accepted it, but not the need for further harmonization measures in the Authorisation Directive.
- Regarding the Authority, the Council opposed its creation and proposed, instead, creating a new entity called the Group of European Regulators Group in Telecomms (GERT).

Meanwhile, the Commission adopted its amended Proposal in November 2008 based on the European Parliament Opinion First Reading and the European Economic and Social Council and the Committee of Regions Opinions. The three amended Proposals^{573 574 575} contained no explanatory note, but

⁵⁷³ COM(2008) 724. Amended proposal for a Directive of the European Parliament and of the Council 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 services, and 2002/20/EC on the authorisation of electronic communications networks and services. Brussels, 6 November 2008.

⁵⁷⁴ COM (2008) 723. Amended proposal for a Directive of the European Parliament and of the Council Amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks, Directive 2002/58/EC concerning the processing of

directly the list of amendments accepted, partially accepted or not accepted. Regarding the Authority, the Commission stated that " The Commission can accept in principle that a body should be established which departs from the Authority as originally proposed [...]. The Commission proposes to create the Body of European Telecoms Regulators."

Upon reception of the Common Position, the European Parliament adopted an opinion at second reading on May 6, 2009, in which:

- Regarding the radio spectrum policy, the Rapporteur reaffirmed that "Member States [should] remain primarily in charge of spectrum management."
- Regarding the creation of the Body, already proposed in its opinion in first reading, the tasks and organization of the body were restated.

Finally, the Commission adopted a Communication⁵⁷⁶ in July 2009, where it modified its Proposal in line with the amendments adopted by Parliament at its plenary session on May 6, 2009. Such amendments to the Common Position had been negotiated with the Council.

3.6.- The approval of the Modified Regulatory Framework and its implementation.

The new Regulatory Framework of 2009 was finally adopted on November 25, 2009 and it comprised the "Better Regulation"⁵⁷⁷ and "Citizens' Rights"⁵⁷⁸ Directives and the Regulation establishing the Body of European Regulators for Electronic Communications (BEREC)⁵⁷⁹. The Modified Regulatory Framework—as the European Commission named it—entered into force on the day following its publication in the Official Journal of the EU, that is, on December 19, 2009.

Its implementation would take place mainly by three steps: the transposition of Directives into the law of the 27 Member States, the implementation of the BEREC and the Review.

Regarding the former, the Directives provided that Member States would adopt and publish by 25 May 2011 the laws, regulations and administrative provisions necessary to comply with the Directives. On the second, as seen in the previous section, the 2002 Regulatory Framework had given birth to the European Regulators Group (ERG, Decision 2002/627/EC). In the 2007 Reform Proposals, the Commission proposed the creation of the European Market for Electronic Communications (EECMA, COM (2007) 699), as a way to complete the internal market for electronic communications. Nevertheless, the opposition of the European Parliament and Council resulted in that the 2009

personal data and the protection of privacy in the electronic communications sectors and Regulation (EC) No 2006/2004 on consumer protection cooperation. Brussels, 6 November 2008.

⁵⁷⁵ COM (2008) 720. Amended proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority. Brussels, 5 November 2008.

⁵⁷⁶ COM(2009) 420. Opinion of the Commission pursuant to Article 251(2), third subparagraph, point (c) of the EC Treaty, on the European Parliament's amendments to the Council's Common Position regarding the Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services amending the proposal of the Commission pursuant to Article 250 (2) of the EC Treaty. Brussels, 29 June 2009.

⁵⁷⁷ 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 authorisation of electronic communications networks and services. OJ L 337 of 18 December 2009, P. 37.

⁵⁷⁸ 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. OJ L 337, of 18 December 2009. P. 11

⁵⁷⁹ Regulation (EC) No 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. OJ L 337 of 18 December 2009. P. 1

Regulatory Framework mandated the creation of the Body of European Regulators Electronic Communications (BEREC, Regulation 1211/2009).

The Regulation entered into force 20 days after its publication in the Official Journal of the EU. On January 28, 2010, the BEREC was established and on May 31, 2010, the Council approved that the Office of BEREC would be based in Riga. In early 2010, BEREC published the "Work Programme 2010" for public consultation.

Regarding the third point, the new Framework did not modified the articles on the review procedures. Thus, the time periods specified in the 2002 Framework should apply, so that the first Review report should be submitted to the European Parliament and the Council within three years, i.e. by the end of 2012.

3.7.- Summary of the Modified Regulatory Framework.

In this section, the main changes that the "Better Regulation" and "Citizens' Rights" Directives introduced on the 2002 Regulatory Framework are summarised. The interested reader is invited to consult the consolidated version of the Regulatory Framework compiled by the DG Information Society and Media services and published in 2010, without normative value⁵⁸⁰.

"Better Regulation" Directive

As we noted, the "Better Regulation" Directive—referred to simply as "the Directive" in the following paragraphs—introduced amendments in the Framework, Authorisation and Access Directives.

The Framework Directive established a harmonised framework for the regulation. In particular, it laid down the tasks of NRAs and established a set of procedures to ensure the harmonised implementation of this framework across the EU.

Chapter II, National Regulatory Authorities, draw the institutional architecture of Regulatory Framework, which had been based on the balance between NRAs and the Commission. The Directive includes in Article 3 the charge to the Member States to endow NRA with "adequate financial and human resources", which had been a concern during the codecision procedure. It also incorporates the BEREC within this institutional architecture, urging the NRA to support and take into account the BEREC, while forcing the Commission to take into account the opinion of the BEREC in the notification procedures under Article 7.

Chapter III, Tasks of NRAs, contains the Regulatory principles, such as the promotion of competition, the development of the internal market and the promotion of the interests of citizens, and the Regulatory powers of the Member States in respect of issues like radio frequency management or co-location of network elements. In this chapter, the Directive introduces the principle of flexible use of those frequency bands available for electronic communications services, subject to restrictions only when they are justified and bearing in mind that the restrictions being in force shall be reviewed within five years from May 2011.

The directive inserts a new Chapter IIIa, Security and Integrity of networks and services. In the chapter, Member States are entrusted to ensure that operators take appropriate security and integrity measures on the networks and services, and ENISA is entrusted to adopt technical implementing measures with a view to harmonising the above measures, based on the notifications of a breach of security or loss of integrity from the NRAs.

⁵⁸⁰ European Commission, "Regulatory Framework for electronic Communications in the European Union. Situation in December 2009. doi: 10.2759/24096.

Finally, Chapter IV, General Provisions, defines the basics of market definition and analysis, and of standardisation and harmonisation. In the chapter, the Directive, as regards the procedure for the definition of markets (Art. 15), describes the role of BEREC in the publication of the Recommendation on relevant markets by the Commission. In addition, it inserts an Article 21a instructing Member States to notify the rules on penalties applicable to infringements of national provisions implementing the Modified Regulatory Framework.

The Authorisation Directive aimed at harmonising and simplifying authorisation rules and conditions in order to facilitate the provision of electronic communications. It was based on the principle that this provision could only be subjected to a general authorization. The Directive, while keeping the principle of general authorisation regime, introduces a number of modifications to comply with the political agreements reached during the codecision procedure. In particular, the Directive requires Member States that the rights of use for radio frequencies are granted through not only open, transparent and non-discriminatory procedures, but also objective and proportionate, thus attempting to eliminate unnecessary barriers (Art. 5). It also requires that the procedure that Member States should follow when they decided to limit the number of frequency licenses be followed also if they decide to extend the duration of existing licenses (Art. 7). And it finally adds, within the obligation of providing information by the operators to the NRA, that information necessary to ensure efficient spectrum use (Art. 11).

Finally, the Access Directive defined the rights and obligations of operators and undertakings seeking interconnection and/or access to their networks or associated facilities. Such obligations should result from the market analysis carried out in accordance with the provisions of the Framework Directive. These obligations were contained in Chapter III, Obligations on operators and market review procedures, and were the obligations of transparency, non-discrimination, accounting separation, those relating to access to resources, and price control and cost accounting (Arts. 9 to 13). Basically, the Directive adds the obligation (Art. 13a) of functional separation, when the existing obligations have failed to achieve effective competition. And it provides the details for the procedure and content of the proposal submitted by the NRA to the Commission. With regard to the obligations relating to access to resources (Art. 12), it is interesting to note how the directive reflected the debate on Next Generation Access Networks, which we will deal in the next chapter. Indeed, the Directive provides that the assessment by the NRAs on whether to impose such obligations shall, in addition to what is considered in the 2002 Directive, (1) in relation to the facility owner's initial investment, take into account of any public investment made, and (2) in relation to the need to safeguard competition in the long term, pay "particular attention to economically efficient infrastructure based competition."

"Citizens Rights" Directive

The "Citizens' rights Directive"—in the following paragraphs, referred to simply as "the Directive"—basically introduced amendments to the Universal Service Directive and the Directive on Privacy.

The Universal Service Directive aims to “ensure the availability throughout the Community of good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of endusers are not satisfactorily met by the market”(Article 1).

In Chapter II, Universal service obligations, the Directive lists those obligations, namely the provision of access at a fixed location and provision of telephone services (Article 4), directory enquiry services and directories (Article 5), public pay telephones (Article 6), measures for disabled end-users (Article 7) and the affordability of tariffs (Article 9). It also establishes the powers of the NRA in the control of expenditure (Article 10), quality of service (Article 11), costing (Article 12) and financing (Article 13) of universal service obligations, which were virtually unchanged during the Review of the Regulatory Framework. Article 15 establishes the procedure for reviewing the scope of universal service.

Chapter III, Regulatory controls, was significantly reduced, on the understanding that all obligations on operators, although having significant market power, should no longer be imposed directly through

the Directives but imposed by NRAs under the general procedure of market review set out in the Framework Directive.

Chapter IV, End-user interest and rights, was the part of the Universal Service Directive that extended the most during the Review of the Framework. So it was with the minimum content of contracts for subscribing to services providing connection to a public communications network (Art. 20), with the publication of comparable information on prices by operators and third parties for the sake of transparency (Art. 21); with the publication of information on quality of service (Art. 22), which was extended by providing NRA with authority to set minimum quality of service requirements; with emergency services (Art. 26), which became unconditional committed to provide information on the location of people; and with the change of provider (Article 30), which reduced to one working day the delay for number activation.

Finally, the Directive on Privacy and electronic communications aims to "ensure an equivalent level of protection [...] the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community."(Art. 1). Recall that the general legislation on protection of personal data and was already harmonised by Directive 95/46/EC.

The Directive on Privacy is not structured into chapters, but enumerates articles addressing relevant aspects of security and confidentiality: the security of data processing (Art. 4), for which the Directive introduces a notification procedure for personal data breaches at the national level and the request to ENISA to ensure consistency in implementing security measures; the processing of traffic data (Art. 6); the itemised billing (Art. 7); the identification of the calling and connected line (Art. 8); the processing of location data (Art. 9); and unsolicited communications (Art. 13), for which the Directive strengthens users protection, by asking Member states to lay down rules on penalties applicable to negligent providers.

3.8.- The Review of the Recommendation on relevant market

Another basic element of the Regulatory Framework review process we are referring to is that concerning the review of the Electronic Communications Markets.

As stated in the previous Chapter, as part of the 2002 Regulatory Framework, the Commission introduced a Recommendation⁵⁸¹ concerning the relevant markets which should be taken into consideration by the Member States. In line with article 15 of the Framework Directive, the scope of this Recommendation should be periodically reviewed.

With this in mind, in February 2006, the Commission published a Communication⁵⁸² on the market review process which was accompanied by a bulky annexe⁵⁸³ summarising the situation of each of the relevant markets in every Member State of the European Union.

In June 2006, the Commission launched a Public Consultation process, which closed in October of that year. The Commission submitted, as part of this process, a working paper⁵⁸⁴ which contained a draft Recommendation and a justification for the new list of relevant markets. The new list reduced the

⁵⁸¹ Commission Recommendation 2003/311, of 11 February 2003 on relevant product and service markets within electronic communications sector susceptible of *ex ante* regulation in accordance with Directive 2002/21/CE of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. OJ L 114, 8 May 2003. P. 45

⁵⁸² COM(2006) 28. Market review under EU regulatory framework. Consolidating the internal market of electronic communications. Brussels, 6 February 2006

⁵⁸³ SEC(2006) 86. Annexes accompanying the Communication COM(2006) 28 on Market Reviews under the EU Regulatory Framework - Consolidating the internal market for electronic communications. Brussels, 6 February 2006.

⁵⁸⁴ SEC(2006) 837. Public Consultation on a Draft Commission Recommendation 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 communication networks and services (Second edition). Brussels, 28 June 2006

number of markets compared to the 2003 Recommendation list and, as we have seen, would be incorporated as an element of the 2007 Reform Proposals. What was not yet clear at this time for the Commission was how to deal with the regulation, if necessary, of the networks that came to be called New Generation Access Networks (NGAs). Although the Commission relegated this matter to future revisions of the Recommendation, it should address this specific issue in 2008, as discussed in the next chapter, by means of a specific Recommendation.

In December 2007, the Commission adopted the Recommendation on relevant markets⁵⁸⁵, accompanied by an explanatory note⁵⁸⁶, consisting of the updated working paper that had been submitted to Public consultation. As to how to address the NGA regulation, the Commission had made progress in understanding the problem, but it had not come up with a proposal for a solution. And in relation to future reviews of the Recommendation, it kept being subject to Article 15 of the Modified Framework Directive.

3.9.- Regulation on international roaming

The European Commission's interest in roaming-related issues is long established and dates back to the start of 2000 as the reader will probably know. The DG Competition, as part of its *anti-trust* activities has persistently followed the evolution of this service⁵⁸⁷.

At the beginning of 2000, the Commission launched a Consultation process concerning roaming services, the results of which were made public at the end of that same year⁵⁸⁸.

It was to continue talking about this subject and about the high prices of roaming services until 2006 when the Commission had no choice but to echo the discontentment of the users and make the situation clear by publishing information about the prices charged by the different operators on the Internet⁵⁸⁹.

At the same time, the Commission launched a series of Public Consultations aimed at securing the approval of a European Regulation to regulate tariffs for this service.

It must be remembered that the wholesale international roaming market was one of the relevant markets included by the Commission in the list of eighteen which were suggested to the Member States in its 2003 Recommendation⁵⁹⁰, specifically the seventeenth: *17.- The domestic wholesale international roaming market on public mobile telephony networks*. Nevertheless, the Commission proposal went much further given that it sought to tackle the regulation of the retail roaming market, which was not in any way planned.

⁵⁸⁵ Commission Recommendation of 17 December 2007 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 [notified under document number C(2007)5406]. OJ L 344, 28 December 2007. P. 65.

⁵⁸⁶ SEC(2007)1483. Accompanying document to the Commission Recommendation 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 (Second edition). Brussels, xxx.

⁵⁸⁷ Sector Inquiries. Roaming <http://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/roaming/index.html>, visited 7/9/2010.

⁵⁸⁸ European Commission. DG Competition. Working document on the initial Finding of the sector inquiry into mobile Roaming charges. http://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/roaming/working_document_on_initial_results.pdf, visited 7/9/2010.

⁵⁸⁹ European Commission. International Roaming tariffs http://ec.europa.eu/information_society/activities/roaming/index_en.htm, visited 7/9/2010.

⁵⁹⁰ Commission Recommendation 2003/311, Of 11 February 2003 on relevant product and service markets within electronic communications sector susceptible of ex ante regulation in accordance with Directive 2002/21/CE of the European Parliament and of the Council on a common regulatory framework for electronic communications network and services. OJ L 114, 8 May 2003. P. 45 http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_114/l_11420030508en00450049.pdf

The first consultation took place in February 2006, as a result of which the Commission published a document⁵⁹¹ containing the results of the opinions received and proposing a solution consisting of the Parliament and Council's future adoption of a Regulation that would permanently resolve the issue for which the sector's opinion was once again being asked. The Commission proposed that the tariffs for roaming services be put on the same level as national and international calls.

The Commission proposal followed the procedural steps used to achieve the local loop unbundling. The Commission argued that there was sufficient legal basis to do it given that it was a measure aimed at developing the internal market stipulated in article 14 (now Art. 26) of the Treaty as established in article 95 (now Art. 114) of the same text.

On this occasion, the Commission met with the opposition of the operators who considered a substantial part of their business to be at risk, and of certain Regulatory Authorities in the Member States which considered that it interfered with their authority. However, the Commission did, as could be expected, have the users' approval.

In July 2006, the Commission adopted the Proposal for a Regulation⁵⁹², accompanied by a corresponding Impact Assessment⁵⁹³, which was forwarded to the Parliament and the Council for discussion and approval, following the associated co-decision procedure.

The Regulation⁵⁹⁴ was published in the Official Journal in June 2007. It was established, firstly, a maximum average wholesale charge that the operator of a visited network may levy from the operator of a roaming customer's home network, and secondly, a retail rate, called Eurotariff, any roaming call could not exceed. These maximum rates would be applicable from August 30, 2007, with further declines within one and two years.

The Regulation itself set to expire on June 30, 2010, while instructing the Commission to review the operation of Regulation and report to Parliament and the Council by December 30, 2008. More specifically, the Regulation stated where to focus in this review. In addition to following the evolution of prices of voice communication services, the Review would follow the tariffs for data services "including SMS and MMS, and shall, if appropriate, include recommendations regarding the need to regulate these services". Finally, it would assess whether "there is need to extend the duration of this Regulation". So the Commission showed their cards with regard to what might be called the second battle of *roaming*.

As planned, the Commission prepared the review of Regulation through, *inter alia*, benchmarking reports produced by the ERG Group. So, the Commission launched a Public Consultation in May 2008, while making public a study on data roaming services that would be published in June 2008. In September 2008, the Commission adopted a Communication⁵⁹⁵ which comprised the results of the Consultation and the Proposal for a Regulation⁵⁹⁶ amending the 2007 Regulation, enclosing a corresponding Impact Assessment⁵⁹⁷. In the Communication, the Commission noted the broad support received for its three goals: the extension of voice regulation beyond 2010, regulation of SMS

⁵⁹¹ Second phase of consultation on a proposal for Regulation on mobile roaming services in the single market. Brussels 2 April 2006 http://ec.europa.eu/information_society/activities/roaming/regulation/archives/2nd_phase/index_en.htm, visited 7/9/2010.

⁵⁹² COM(2006) 382. Proposal for a Regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community and amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services. Brussels xxx

⁵⁹³ SEC(2006) 926. Executive Summary - Impact assessment of policy options in relation to a Commission proposal for a Regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community. Brussels, 12 June 2006.

⁵⁹⁴ Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/E. OJ L 171 of 20 June 2007. P. 32.

⁵⁹⁵ COM(2008) 579. Outcome of the review of the functioning of Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC. Brussels, 23 September 2008.

⁵⁹⁶ COM(2008) 580. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services. Brussels, 23 September 2008.

⁵⁹⁷ SEC(2008) 2490. Summary of the impact assessment. Brussels, 23 September 2008.

roaming, especially wholesale, and regulation of data roaming services. The Commission's proposals for each of these objectives were: to extend voice wholesale and retail regulation until 2013, with progressive reduction of the maximum rates, regulation of SMS roaming at wholesale and retail levels, and introducing a wholesale safeguard mechanism to combat bill shock for data roaming service and a maximum average wholesale.

The Regulation⁵⁹⁸ amending the 2007 Regulation was published in the Official Journal in June 2009 and gathered the Commission's proposals. This time, the Regulation was extended for two years and it set out the review process, which should be undertaken by the Commission by June 2011 and which left open the possibility that, as a result of the review, other regulatory remedies, in addition to price control, may be used. Note how the Commission, being the only occasion when it acts as a true Regulatory Authority, seems to give forceful example to the NRAs.

3.10 .- The review of the scope of Universal Service.

This review process has been carried out under the provisions of the Universal Service Directive, although in the last stage, the scope of debate has been extended, as shown below.

Indeed, Article 15 of Universal service Directive stated that the Commission must periodically review the scope of the universal service and requested that the first review take place within two years of the Directive's implementation date which was 25th July 2003.

In accordance with the above, in May 2005, the Commission began the Directive revision process; particularly that concerning the scope of the Universal Service sector for which it published a Communication⁵⁹⁹ which started a consultation process with the sector. The Communication was accompanied by a working document on Commission services⁶⁰⁰ which completed its contents.

Following considerable analysis of the situation, the Commission raised the following questions in its Communication:

“Comments are invited on, inter alia, the following longer-term issues:

- (a) Taking into account existing and expected technological developments, should universal service at some point in future separate the access to infrastructure element from the service provision element and address only access to the communications infrastructure, on the grounds that competitive provision of services, (e.g., telephone service provided using Voice over IP) will ensure their availability and affordability?*
- (b) In as much as consumers are increasingly mobile while using communications services, should universal service continue to address access at a fixed location, or should it address access at any location (including access while on the move)?*
- (c) With widespread affordable access to mobile communications, the demand for public payphones is declining. Is it still appropriate to include provisions on public payphones, and as they are currently conceived, within the scope of universal service?*

⁵⁹⁸ Regulation (EC) No 544/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services. OJ L 167 of 29 June 2009. P. 12.

⁵⁹⁹ COM(2005) 203 On the Review of the Scope of Universal Service in accordance with Article 15 of Directive 2002/22/EC.

⁶⁰⁰ SEC(2005) 660. Review of the Scope of Universal Service in accordance with Article 15 of Directive 2002/22/EC.

- (d) *In view of the competitive provision of directory enquiry services in many countries, for how long will there be a need to keep directories and directory enquiry services within the scope of universal service?*
- (e) *Taking into account the complexity of the ever evolving communications environment as described above, and noting the challenges presented to date for existing universal service provision, it is likely that advanced services will bring both benefits and new difficulties for users with disabilities. Should special measures for such users in the context of universal service provision be further harmonised at EU level?"*

Where funding is concerned the Commission raised the following issues:

- (a) *Is a universal service funding scheme an appropriate means to address the objective of social inclusion in a competitive communications environment?*
- (b) *Is funding from general taxation a viable alternative?*

The Commission received numerous opinions⁶⁰¹ from various financial and social agents, as is often the case in this sort of process. Consequently, in April 2006, the Commission published another Communication⁶⁰² in which it summarised the results of the above mentioned consultation.

In accordance with the responses received, the Commission concluded by saying that:

"4. COMMISSION POSITION

The Commission considers that the public consultation has provided widespread support for the preliminary position taken in the Communication of May 2005, and that no new rationale has emerged to change the conclusion that neither mobile nor broadband communications fulfils the conditions of the Universal Service Directive for inclusion in the scope of universal service. The Commission recognises that the review was limited in scope, as commented on by some respondents. However, the Commission is bound in this respect by the criteria for this review laid down in the Universal Service Directive... "

As regards mobile services, evidence demonstrated that the open and competitive markets allowed widespread affordable access for consumers. As regards broadband services, the EU as a whole did not meet the criterion of use of the service by a "majority of consumers"—6.5% actual take-up per head of population. Broadband had not yet become necessary for normal participation in society, such that lack of access implied social exclusion.

Thus, the Commission insisted on the preliminary conclusions outlined in the Communication of May 2005. Nevertheless, the Commission acknowledged that the Review had been limited in scope, which claimed to be that laid out by the provisions of Article 15, and that the longer-term issues would be discussed within the overall Review of Regulatory Framework due to start through 2006.

The Second Review was initiated by the Commission through the adoption of a Communication⁶⁰³ issued on September 2008. It invited all interested parties to express their views during 2009. The Communication set up two major objectives:

⁶⁰¹ List of comments on the Communication "On the Review of the Scope of Universal Service in accordance with Article 15 of Directive 2002/22/EC", COM (2005)203, submitted in response to the public consultation. http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/past/index_en.htm#universal_service, visited 7/9/2010.

⁶⁰² COM(2006) 163. Report regarding the outcome of the review of the scope of the universal service in accordance with article 15-2 of the Directive 2002/22/CE. Brussels 7 April 2006.

⁶⁰³ COM(2008) 572. Second periodic review of the scope of universal service in electronic communications networks and services in accordance with Article 15 of Directive 2002/22/EC. Brussels, 25 September 2008.

- To carry out the second periodic review of the scope of Universal Service.
- To reflect on the role of universal service in meeting wider challenges at European level, in particular ensuring access to broadband.
-

Regarding the first objective, the Commission still concluded that mobile did not qualify for inclusion in the Universal Service obligations. In the case of broadband, network coverage was already very high, being available on average for 90% of the EU population and the adoption of broadband access was approaching the threshold of use by a majority of consumers, being that 36% of households were using broadband Internet in 2007. Therefore it recommended keeping track of the situation.

Regarding the second objective, the Commission raised the question whether universal service at EU level was an appropriate tool to advance broadband development and, if so, when and how it should be invoked, or whether other EU policy instruments—and, in such case, which ones—would be more efficient. As an example of the degree of complexity involved by this issue, read carefully the following questions posed by the document:

“How might an extended USO [Universal Service Obligations] fit into an overall policy to ensure that “broadband for all” becomes a reality, including a regulatory framework stimulating the competitive provision of widely available services, the application of structural funds, regional open access fibre network schemes and demand stimulation measures such as subsidies for purchase of subscriber equipment, training or awareness raising? What are the advantages and disadvantages of using the universal service mechanism as opposed to other policy instruments for implementing a “broadband for all” policy? What would be the likely impact on stakeholders, social and territorial inclusion, employment, competition, investment, innovation and competitiveness?”

It was not until March 2010 when the Commission opened the Public Consultation⁶⁰⁴ announced in the 2008 Communication. In the questionnaire associated to the Public Consultation, the second objective is reinforced, given the commitment of the Competitiveness Council of March 2009 to achieve 100% coverage of broadband between 2010 and 2013. La Comisión cerró la Consulta Pública el 7 de junio de 2010 y anunció que publicaría una Comunicación resumiendo los principales puntos del debate y, en su caso, proponiendo las propuestas legislativas necesarias para actualizar la Directiva de Servicio Universal. The Commission closed the Public Consultation on 7 June 2010 and announced it would publish a Communication summarising the main points of discussion and, where appropriate, proposing the necessary legislative proposals to update the Universal Service Directive.

4.- THE REGULATORY FRAMEWORK FOR AUDIOVISUAL SERVICES.

Although this book does not seek to analyse the European Union Audiovisual Policy in any depth⁶⁰⁵, we believe that it is necessary to discuss certain aspects of it, particularly those which refer to its convergence with the Electronic Communications Policy. In order to follow the contents of this section better we recommend that the reader goes over what was said concerning Convergence in section 3 of Chapter 2 of this book once again.

4.1.- Reference framework

Interest in the convergence of the Audiovisual Policy with the Electronic Communications Policy was a subject that had already arisen in 1997 on the eve of the introduction of full competition, as summarised in Chapter 7 of this book.

⁶⁰⁴ Consultation on universal service principles in e-communications:

http://ec.europa.eu/information_society/policy/ecomms/library/public_consult/universal_service_2010/index_en.htm, visited 7/9/2010.

⁶⁰⁵ European Commission. Audiovisual and media Policies: http://ec.europa.eu/comm/avpolicy/index_en.htm, visited 7/9/2010.

In this context, in 1999, the Commission published a Communication⁶⁰⁶ containing the beginnings of what was to be its future Audiovisual Policy. In this document, the Commission referred to the incipient convergence process and accepted the principle of independent regulatory frameworks for infrastructures and content as had been concluded following consultations derived from the 1997 Green Paper on Convergence⁶⁰⁷.

Where convergence of infrastructures is concerned, the issue was permanently settled both in the Directives in the 1998 package and those reviewing the 2002 Electronic Communications policy. Where content convergence is concerned, since then the Commission has been referring continuously to this subject.

In 2003, the Commission published a new document⁶⁰⁸ summarising the future of the regulatory policy in the audiovisual sector in which it once again refers to convergence.

Finally, in the i2010 strategy on the Information Society, the Commission made a new reference to advisability in the following terms:

“Create a consistent internal market framework for information society and media services”

One of the proposed actions would involve:

“modernising the legal framework for audio-visual services, starting with a Commission proposal in 2005 for revising the Television Without Frontiers Directive”

As such, it is appropriate to analyse the status of the modernisation of the legal framework proposed by the Commission, briefly analysing the progress of the Television without frontiers Directive.

4.2.- The proposal for a new Directive on Audiovisual Media Services. Evolution of the Television without frontiers Directive.

When the technical resources for broadcasting television, particularly cable and satellite, enabled programmes to cross the borders of European Community countries, the Council had to adopt Directive 89/552⁶⁰⁹ ordering the Member States to refrain from hindering the broadcasting of programmes from other Member States in their country. The legal basis for this Directive was the right to free movement of the services listed in the Treaty. This Directive came to be known as the television without frontiers Directive for obvious reasons, although its objective was much more far-reaching.

As planned, five years after adopting the Directive, it was reviewed at length, until finally in 1997, the Parliament and Council adopted a new Directive 97/37⁶¹⁰ on television without frontiers which amended that of 1989. The context had changed given the imminent liberalisation of Telecommunications and the development of the Information Society which was obviously included in the Directive’s preamble.

⁶⁰⁶ COM(1999)657. Principles and guidelines for the Community’s audiovisual policy in the digital age. Brussels, 14 December 1999.

⁶⁰⁷ COM(1997) 363. Green Paper on the convergence of the telecommunications, media and information technology sectors and the implication for regulation. Brussels, 3 December 1997.

⁶⁰⁸ COM(2003) 784. The future of the European audiovisual policy. Brussels 15 December 2003.

⁶⁰⁹ Council Directive 89/552/CE on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities. OJ L 298. 17 October 1989. P. 23

⁶¹⁰ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. OJ L 202. 30 July 1997. P. 60

However, what this new Directive was mainly aiming to cover were the relationships between the Member States and what were known as the “television broadcasting bodies” within its jurisdiction, rather than the specific issues of television without frontiers which had already been resolved by the 1989 Directive.

The 1997 Directive also referred to the limit on exclusive programmes and television advertising; it was in this Directive that tobacco advertisements were banned from television and it says curious things such as that there can be no advertising during the broadcasting of religious services.

The aforementioned Directive set out the Commission’s obligation to report back on the progress of the aspects it was dealing with every two years, which it has been doing. The reader may read the Reports on the web page created for that purpose⁶¹¹.

It is worth paying attention to the Commission’s 2002 report⁶¹² which suggests embarking on a modernisation process for the aforementioned Directive in accordance with the work plan contained in its Annex.

This process undoubtedly formed part of the development objectives of the Information Society, even if it is surprising that the document does not mention either the Lisbon Strategy or the eEurope initiative even once, and only mentions convergence in passing. At that time responsibility for the Audiovisual Policy and the Information Society Policy were divided in the European Commission. The good old Commission!

Proposals, consultations and studies followed the Commission Report during what came to be known as the television without frontiers Directive modernisation process, until 2005 when the Commission submitted its proposal for a Directive^{613, 614, 615} to the Parliament and Council to amend, for the second time, Directive 89/552 which was still known as television without frontiers but was now going to cease to be called by that name and possibly become known as the Audiovisual media services Directive

It must be said that this name change was no coincidence and the name “audiovisual media services” will replace that of “television broadcasting programmes” which currently features in the Directive. The problems of television without frontiers have definitely been resolved.

Contrary to the above, this document explicitly mentions the new i2010 strategy and convergence, which was to be expected after both responsibilities, Information Society and Audiovisual Media, have been assigned to the same member of the Commission.

Where the text of the proposal for a Directive is concerned, it is worth highlighting the definition given of audiovisual media services:

“audiovisual media service” means a service as defined by Articles 49 and 50 [current Arts. 56 and 57] of the Treaty the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council”

⁶¹¹ Reports on the application of Directive 89/552/EEC. Television without frontiers
http://ec.europa.eu/comm/avpolicy/reg/tvwf/implementation/reports/index_en.htm, visited 7/9/2010.

⁶¹² COM(2002) 778. Fourth report from the Commission on the application of Directive 89/552/ "television without frontiers". Brussels, 6 January 2003.

⁶¹³ COM(2005) 646. Proposal for a Directive amending the Council Directive 89/552. Brussels 13 December 2005.

⁶¹⁴ SEC(2005) 1625/2 Annex to the proposal of Directive amending Council Directive 89/552

⁶¹⁵ SEC(2005) 1626/2 Annex to the proposal of Directive amending Council Directive 89/552

It is clear that the future audiovisual media services Directive will enable the basic principles of television to be applied to all new forms of broadcasting in the Information Society.

In line with the above, the scope of the supposed convergence will need to be made clear since according to the audiovisual media services Directive proposal, whichever broadcasting network is used, it will continue to be subject to the legal rules which have governed television up until now. Consequently, the only convergence which will remain will be that concerning electronic communication networks which has been in force since 1998.

The co-decision process lasted until November 2007⁶¹⁶, when Parliament adopted the Directive after the Council had adopted a Common Position in May 2007. The new Directive⁶¹⁷ came into force on December 19, 2007. In February 2010 the Council adopted a codified version⁶¹⁸. Regarding the name, the Directive finally adopted the "audiovisual media services" denomination.

5.- CONCLUSIONS

In this chapter we have analyzed the process of Review of the 2002 Regulatory Framework for electronic communications, which started in 2005 and ended in early 2010 with the creation of BEREC.

As we advance at the beginning of this chapter, we believe that few substantive changes have been introduced in the Regulatory Framework by this Review. Furthermore, the results of the alleged convergence between the Electronic Communications Policy and Audiovisual Policy have not been relevant.

Indeed, in the review process under study we have identified, on the one hand, issues which have been designed to adjust the institutional architecture of the Regulatory Framework and the procedures for market definition and analysis, taking into account the experience accumulated by the NRAs and the Commission. These issues have not caused a rethinking of the Regulatory Framework, although they have raised some opposition in the European Parliament in relation to the balance of powers between the Commission and Member States. On the other hand, we have identified some political relevant issues, such as radio spectrum management and broadband extension, which have been discussed intensively in the context of the Reviews of the Regulatory Framework and the scope of Universal Service, respectively. We strongly argue that these discussions have not been accidental but purposeful and that they have been addressed so that the Commission could base these two policies—radio spectrum policy and broadband policy—on the Modified Regulatory Framework, as we will discuss in next chapter, once the Regulation has been firmly established over the period 1998-2009.

⁶¹⁶ History: AVMSD Co-Decision process: http://ec.europa.eu/avpolicy/reg/history/codecision/index_en.htm, visited 7/9/2010.

⁶¹⁷ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. OJ L 332 of 18 December 2007. P. 27

⁶¹⁸ OJ L 95 of 15 April 2010, P. 1

CHAPTER 11
NEW ELEMENTS OF THE ELECTRONIC
COMMUNICATIONS POLICY OF 2005



CHAPTER 11

NEW ELEMENTS OF THE ELECTRONIC COMMUNICATIONS POLICY OF 2005

1.- INTRODUCTION

This chapter will address a number of issues that have got left within the Electronic Communications Policy in the second half of the decade of 2000.

We refer mainly to the radio spectrum policy, on the one hand, and broadband policy, on the other.

While it is true that, first, both aspects were present in the Electronic Communications policy of the European Union during 2000-2005 —as we described in Chapter 9, and second, they were addressed during the review of the Regulatory Framework —such as described in Chapter 10, we find it convenient to treat them in a separate chapter.

First, we draw the Reference Framework in which each of these policies fits.

Second, we analyze the detailed evolution of the radio spectrum policy since the adoption of the Radio Spectrum Decision in 2002 until late 2009, while we identify links with the process of the Review of the Regulatory Framework.

Third, we analyze the evolution of broadband policy, in particular, the process of forming a coherent policy from initially dispersed initiatives.

Finally, we assess the evolution of each of these policies in light of the recently adopted Digital Agenda.

2.- FRAMEWORK

2.1.- The radio spectrum policy and broadband policy within the i2010 initiative.

As detailed in the previous chapter, i2010⁶¹⁹ identified as the first of three goals for the period 2005-2010 to create a single European Information space. One such space will:

- Provide "affordable high bandwidth communications [...]"
- Accelerate "the economic pay-off from digital convergence by [...] review[ing] the electronic communications regulatory framework, including defining a efficient spectrum management strategy"

Now, we want to note that the third of these goals referred to the achievement of an information society that is inclusive. The Commission decided to adopt an integrated approach to tackling the

⁶¹⁹ COM(2005) 229. i2010 – A European Information Society for growth and employment. Brussels, 31 May 2005.

challenges posed by digital convergence in relation to inclusion. Within this approach, the Commission undertook to:

- Give "guidance to extend the geographical coverage of broadband in underserved areas and review the scope of the Universal Service Directive in 2005 and the Directive as a whole in 2006."

The analysis to take place in this chapter will confirm what is inferred from the i2010 Communications, following the evidences outlined in the preceding paragraphs. Both the broadband policy and spectrum policy in 2005 were converted into tools for implementing the i2010 strategic objectives. Otherwise, the Commission would not have been entitled to implement during the period analysed in this chapter. This does not preclude a claim that the Commission already had among its priorities to undertake such actions, which is why we are convinced that these policies appeared in the i2010 initiative.

3.- RADIO SPECTRUM POLICY

3.1.- The Radio Spectrum Decision 2002

As explained in Chapter 9, the 2002 Regulatory Framework was able to cover the EU policy on radio spectrum through the adoption of the Radio Spectrum Decision⁶²⁰ (RSD) in March 2002.

The RSD established procedures to:

- facilitate policy making with regard to the strategic planning and harmonisation of the use of radio spectrum in the Community.
- ensure the effective implementation of the radio spectrum policy in the Community.
- ensure the coordinated and timely provision of information on the allocation, availability and use of radio spectrum in the Community, such as their national frequency allocation or the fees and charges for the use of the spectrum.
- ensure effective coordination of Community interests in international negotiations such as those for the World Radiocommunication Conference of ITU.

The RSD was based on the principle that, where the European Parliament and Council had agreed on a Community policy which depends on radio spectrum, committee procedures should be used for the adoption of technical implementing measures (recital 4). And in return, where necessary to adopt harmonisation measures for the implementation of EU policies which went beyond technical implementing measures, the Commission submitted to the European Parliament and to the Council a proposal on the basis of the Treaty (recital 7).

The comitology procedure was implemented through the establishment of the Radio Spectrum Committee (RSC) to assist the Commission.

For its part, the Commission created the Radio Spectrum Policy Group⁶²¹ (RSPG). It was a *sui generis* advisory body responsible for assisting and advising the Commission on issues of broader political impact than the technical measures usually addressed by the RSC Committee.

⁶²⁰ Decision n° 676/2002/CE of the European parliament and of the Council, of 7 March 2002, on a regulatory framework for radio spectrum policy in the European Community. OJ L 108. 24 April 2002. P. 1.

⁶²¹ Commission Decision 2002/622/CE, of 26 July 2002, establishing a Radio Spectrum Policy Group . OJ L 198. 27 July 2002. P. 49.

3.2.- The Review of the Radio Spectrum Policy

The review of Radio Spectrum Policy was carried out according to the provisions made by the RSD in Article 9: that the Commission would report annually on the status of implementation of the policy.

The first annual report was published in a Communication⁶²² in July 2004. In it, the Commission listed the actions associated with each of the elements specified in the RSD since March 2002. The Commission understood that the implementation of the RSD had been satisfactory and timidly raised a number of issues related to spectrum policy that would become, as we shall see, leitmotiv in subsequent years.

The second annual report⁶²³ was published in September 2005. This second annual report took the charge that the Commission forwarded itself by means of the i2010 initiative:

“Review the electronic communications regulatory framework (2006), including defining an efficient spectrum management strategy (2005)”

It then listed the policy objectives of the Commission on the matter, which will be included afterwards in the 2007 Reform Proposals, namely:

- Common policy and regulatory approaches to spectrum access, in order to achieve a genuine EU single market for radio-based equipment and services, without affecting the existing national prerogatives.
- New and more flexible spectrum management, models, which exceeded the traditional model based on detailed ex ante administrative decisions, which have led to a spectrum bottleneck for new radio technologies.

Such policy objectives would be implemented through a series of actions, among which we quote:

- The development of a common set of rules for spectrum management that extended beyond the existing legal basis for radio equipment operation.
- To clarify technology and service neutrality principles as applied to spectrum, i.e. that licenses no restrictions on the technology used or the service they provide.
- To introduce spectrum markets in the EU by 2010. The Commission considered that, based on studies it commissioned, a coordinated EU introduction could generate as much as 9 billion per year net benefits.
- To consider how to extend the licence-exempt approach ("commons") at EU level, so that individual authorisations (i.e. licenses) should be the exception rather than the rule. The Commission questioned whether protection against interference still justified the issuing of licenses.
- The preparation of the Regional (RRC-06) and World (WRC-07) Radio Conferences.

⁶²² COM(2004) 507. First Annual Report on Radio Spectrum Policy in the European Union; State of Implementation and Outlook. Brussels, 20 July 2004.

⁶²³ COM(2005) 411. A forward-looking Radio Spectrum Policy for the European Union: Second Annual Report. Brussels, 6 September 2005.

3.3.- The market-based approach

At the same time that the Commission published the second annual report, it devoted a Communication⁶²⁴ to the market-based approach for the radio spectrum management. In the document, the Commission proposed to implement at the EU level, in the period up to 2010, the right to trade individual rights to use frequencies in a selection of spectrum bands for terrestrial electronic communications services. To this end, frequency bands identified as candidates to incorporate market-based mechanisms were the mobile and fixed wireless communication services, and TV and radio broadcast services, all terrestrial. And it pointed to technological and service neutrality as a principle of allocation of frequencies in these bands.

The proposal of an harmonized introduction of spectrum tradability and flexibility forced the European Parliament and the Council to position themselves with respect to the matter in December 2005:

The European Parliament, through the resolution⁶²⁵ on i2010, "warns against leaving radio spectrum policy solely to the play of market forces."

In the Council Meeting⁶²⁶, "Some delegations supported a more market-based approach while recognising that there were limitations to its application. Other delegations had concerns about spectrum liberalisation"

When the approach became an integral part of the 2007 Reform Proposals, as we saw in Chapter 10, the caution of the European Parliament and the Council would result in one of the main points of contention during the co-decision process which led to the Revised Regulatory Framework.

3.4.- The flexible approach

Within the context of the review of the Regulatory Framework, and medium-term milestone (2010) which introduced the Communication on the market-based approach, the Commission published a Communication⁶²⁷ in February 2007 with the convoluted title of "Rapid access to spectrum for wireless electronic communications services through more flexibility".

As part of the process of the elaboration of this Communication, the Commission asked the RSPG Group in May 2004 to issue an opinion on how to approach a coordinated spectrum policy for radio access platforms used by wireless electronic communications services. This project was named "Wireless Access Platform for Electronic Communications Services" (WAPECS), although the RSPG Group decided to replace the term "Platform" with "Policy." In 2005, the RSPG consulted the Member States and launched a public consultation, to finally give its Final Opinion⁶²⁸ on WAPECS in May 2005.

Under the heading of WAPECS, RSPG Group referred to a framework for the provision of electronic communications in a set of frequency bands to be identified and agreed by the Member States. Under this framework:

1. A range of electronic communications networks and electronic communications services may be offered on a technology and service neutral basis, provided that:

⁶²⁴ COM(2005) 400. A market-based approach to spectrum management in the European Union. Brussels, 14 September 2005.

⁶²⁵ European Parliament resolution on a European information society for growth and employment. 6 March 2006.

⁶²⁶ 2695th Council Meeting, Transport, Telecommunications and Energy. Brussels, 1-5 December 2005.

⁶²⁷ COM(2007) 50. Rapid access to spectrum for wireless electronic communications services through more flexibility. Brussels, 8 February 2007.

⁶²⁸ RSPG05-102final. Radio Spectrum Policy Group opinion on Wireless Access Policy for Electronic Communications Services (WAPECS) (A more flexible spectrum management approach). 23 November 2005.

- a. certain technical requirements to avoid interference and to ensure the effective and efficient use of the spectrum are met
- b. and the authorisation conditions do not distort competition.

In its Final Opinion, the RSPG produced a first survey on which frequency bands fell under the definition of WAPECS in the Member States.

With the support of the RSPG, the Commission proposed that "a flexible, non-restrictive approach to the use of radio resources for electronic communications services, which allows the spectrum user to choose services and technology, should from now on be the rule."

Anticipating coordination problems and comparative grievances, the Commission stated that "facilitating economic efficiency through enhanced flexibility can be reconciled with single market rules, provided that Member States are committed to Community-wide coordination of authorisation schemes⁶ and industry players are committed to cooperating in order to achieve interoperability of services and economies of scale."

The flexible approach that the Commission was proposing by means of WAPECS would run through a series of short-term actions:

- With the assistance of the RSC and the Communications Committee (COCOM), to thoroughly investigate a package of frequency bands currently used by the broadcasting, mobile and IT sectors for an entire or partial implementation of flexibilityBased on the 2002 Regulatory Framework, agreed guidelines for consistently applied authorisation conditions to be established through a Commission Recommendation which should be finalised in 2007.
- To review the validity of the GSM Directive⁶²⁹.
- To mandate ETSI to develop adequate harmonised standards for equipment operating in flexible bands so as to ensure avoidance of interference

Of the above actions, the review of the GSM Directive deserves explicit mention, which took place in the months before final approval of the Modified Regulatory Framework. If you recall, the GSM Directive of 1987 provided the exclusive reserve of the 900 MHz band for operation under the GSM standard. What was then considered a prerequisite for achieving those economies of scale needed by the pan-European mobile system and was later cited as a factor for the success of the GSM system in the world had now become an obstacle. Indeed, this exclusive reservation prevented, for example, that the 900 MHz band was exploited by the more advanced UMTS technology, which had become a demand from the mobile communications sector. To meet this demand and to illustrate the potential that could release the flexible approach proposed by WAPECS, the Commission managed to remove this obstacle in two steps:

- The adoption by Parliament and the Council of a Directive⁶³⁰ in September 2009, which abolished the exclusive reserve of the 900 MHz band for GSM.
- The adoption of a Commission Decision⁶³¹ in October 2009, which adopted the technical measures to enable the coexistence of GSM and other systems in the 900 MHz band.

⁶²⁹ Council Directive 87/372/CEE, of 25 June 1987, on the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community. OJ L 196. 17 July 1987. P. 85.

⁶³⁰ Directive 2009/114/CE of the European Parliament and of the Council, of 16 September 2009, amending Council Directive 87/372/EEC on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community. OJ L 274. 20 October 2009. P. 25.

⁶³¹ Commission Decision 2009/766/CE, of 16 October 2009, on the harmonisation of the 900 MHz and 1 800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications services in the Community. OJ L 274. 20 October 2009. P. 32.

3.5.- The digital dividend

It was, however, the switchover from analogue to digital terrestrial TV the opportunity —and at the same time, the challenge— which allowed the European Commission to implement the principles that the European Parliament and the Council had sanctioned by means of the RSD.

In May 2005, the Commission published a Communication⁶³² on accelerating the transition from analogue to digital broadcasting. The Communication was based on a previous Communication⁶³³ published in 2003, on the review of the switchover plans that Member States had been published as they had committed within the eEurope action plan and on the RPSG opinion which proposed a time limit for the analogue switch-off. In the document, the Commission noted the lack of coordination among switchover plans of Member states and to counteract it, it proposed the following measures:

- On the one hand, to identify a number of factors that contribute to a successful switchover policy, such as broadcaster coordination by the States and the strategy to inform consumers.
- On the other, to propose that a deadline of the beginning of 2012 be set for completing switch-off in all EU Member States, though some countries would have undertaken it by the beginning of 2010.

Within the first point, in addition, the Commission noted the need to raise the possibility that the digital dividend⁶³⁴ be used for other purposes other than broadcasting. And consequently, it proposed to attend the World (WRC-07) and Regional (RRC-06) Radio Conferences with a common position in favour of maintaining flexibility of use for the ex analogue TV bands.

In November 2007, the Commission published a Communication⁶³⁵ on reaping the full benefits of the digital dividend. In the document, the Commission stated clearly and didactically the importance of the digital dividend and proposed coordinated action at EU level to ensure optimal use of the dividend from a combined social and economic perspective. Such measures, as discussed below, were the implementation of the policy approach that the Commission had been preparing since the adoption of the RSD and that it had materialized in the flexible approach WAPECS policy and the 2007 Reform Proposals.

Indeed, the Commission, in the Communication, identified electronic communications services as the most promising category of the possible uses of its part of the spectrum, in particular: wireless broadband communications, additional terrestrial broadcasting services and mobile multimedia services.

To plan a coordinated transition, the Commission proposed a series of measures, among which include:

- The "tidying up" of the digital dividend spectrum, which allowed identification of contiguous spectral bands to create "clusters" of services, through the concerted efforts of all Member States.
- Such clustering would constitute a "top-level" spectrum organisation upon which national plans could be developed. Specifically, the clustering should be based on three sub-bands for the three most common types of networks:

⁶³² COM(2005) 204. Communication on accelerating the transition from analogue to digital broadcasting. Brussels, 24 May 2005.

⁶³³ COM(2003) 541. on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off'). Brussels, 17 September 2003.

⁶³⁴ The Commission had not adopted this term yet and it used to use other such as "ex analogue TV bands".

⁶³⁵ COM(2007) 700. Reaping the full benefits of the digital dividend in Europe: a common approach to the use of the spectrum released by the digital switchover. Brussels, 13 November 2007.

- Sub-band for unidirectional high power networks, which should continue to be used by broadcasting and for which the Commission proposed to maintain national management.
- Sub-band for unidirectional medium to low power networks, which should be used for mobile multimedia services and for which the Commission proposed national management combined with optional EU coordination.
- Sub-band for bi-directional low power networks, which should be used for fixed and mobile wireless broadband access services and for which the Commission proposed a "EU harmonization on flexible basis"

From the responses of the European Parliament and Council, the Commission published in October 2009 a Communication⁶³⁶, which listed a set of measures, classified as either urgent or strategic.

- Urgent measures were contained in the Commission Recommendation⁶³⁷ which was adopted on the same day of publication of the Communication. The Commission understood that such measures already had considerable support and that would achieve immediate political goals. Specifically, the measures were:
 - Confirmation of the target date of January 1, 2012 for analogue switchover.
 - Commitment to open the upper part of the digital dividend (790-862 MHz sub-band). Such opening would be submitted to RSC pursuant to procedures provided in the RSD, so that if a Member State decides to open the sub-bands to new uses, it should adhere to harmonised conditions of use.
- The strategic actions would require to be discussed and agreed with the European Parliament and the Council. The Commission understood that these measures would form part of the next radio spectrum policy program. The measures were:
 - The adoption of a common position for the WRC-12, so as to arrive at more effective cross-border coordination with countries outside the EU.
 - The release of the 790-862 MHz sub-band from high-power broadcasting and opening up to wireless broadband services by 2015 in all Member States.

4.- THE BROADBAND POLICY

As we discussed in Chapter 9, the European Union's concern for the take-up of broadband services goes back to 2002, when the Council issued two separate orders on the Commission and on the Member States:

- on the Commission for the preparation of the eEurope2005 Action Plan in 2002
- on the Member States to prepare their Broadband National Strategies in 2003.

As noted earlier in this chapter, in the period 2005-2010, EU actions on the Broadband issue have increased their policy relevance.

⁶³⁶ COM(2009) 586. Transforming the digital dividend into social benefits and economic growth. Brussels, 28 October 2009.

⁶³⁷ Commission Recommendation 2009/848/CE, of 28 October 2009, facilitating the release of the digital dividend in the European Union. OJ L 308. 24 November 2009. P. 24.

4.1.- Bridging the Geographic Digital Divide

Bridging the geographical digital divide became a priority in the i2010 initiative within the context of eInclusion and the Commission devoted a Communication⁶³⁸ to it in March 2006.

In the Communication, the Commission quantified the broadband gap between urban and rural areas of the EU-15 Member States, both in terms of coverage and connection speed. In the then new Member States no comparable data was available. The Commission listed instruments that the EU and Member States have at their disposal to solve the problem of the geographical digital divide and invited Member States to be more active in their use and to update their Broadband National Strategies. Among the instruments to be used at EU level, it listed the following:

- To fully implement the 2002 Regulatory Framework to enhance open access and facilitate competitive entry in rural areas. In an attempt to establish a link between the digital divide policy and the radio spectrum policy, the Communication stated that "In the area of spectrum, the Commission is working with Member States to harmonise the technical conditions of use in the EU for broadband wireless access applications, with the aim to consolidate the single market and stimulate entry of innovative technologies."
- To promote the development of public intervention in under-served areas. This public intervention would take the form of loans and grants.
- To provide guidelines from the Commission on the rules on state aid applicable to broadband projects. The Commission had already been doing so in previous years and, as we shall see, in 2009 it published a Communication containing the relevant Community guidelines.
- To organize a conference that would bring together the ICT and rural constituencies. Such a conference was held in Brussels in May 2007 under the title "Bridging the Broadband Gap. Benefits of broadband for rural areas and less developed regions"⁶³⁹. The conference was sponsored by the Commissioners for Information Society and Media, for Agriculture and Rural Development, Regional Policy and for Competition and it included, in the traditional Commission style when coping with good practice exchange, the "2007 European Broadband Projects Awards", which despite its name, had no subsequent editions.
- To launch a website aimed to promote the exchange of best practices between local government and suppliers⁶⁴⁰.
- To promote policies that would provide connectivity for public administrations, schools and health centres, which would create a critical mass of users. In particular, the Commission would take into account of this stimulatory effect on the preparation of its Action Plan for eGovernment, which was presented in 2006.

We see from this Communication that broadband still played a minor role in the policy of the European Commission at the beginning of the period 2005-2010, which was the one covered by the i2010 initiative. It was essentially a policy aligned more with the promotion of information society than with electronic communications. This aspect was, as we shall see below, changing as the period elapsed.

⁶³⁸ COM(2006) 129. Bridging the Broadband Gap. Brussels, 20 March 2006.

⁶³⁹ The Conference website barely remains online: http://ec.europa.eu/information_society/events/broadband_gap_2007/index_en.htm, visited 16/6/2010.

⁶⁴⁰ The portal is still live at <http://www.broadband-europe.eu/>, visited 16/6/2010.

4.2.- The European Economic Recovery Plan

The European Economic Recovery Plan⁶⁴¹ was proposed by the Commission in November 2008. The context of President Barroso's proposal was that of the global financial crisis, which by then had caused a squeeze on credit, falls in house prices and tumbling stock markets in the EU. The concern then was the economic forecasts of growth close to zero and the risk of contraction for the EU economy in 2009. The risk identified was that the situation would worsen still further, sparking a vicious cycle of falling demand, downsized business plans, reduced innovation, and job cuts⁶⁴².

The European Recovery Plan had two pillars. The first pillar was a massive injection of purchasing power into the economy to boost demand and stimulate confidence. This budgetary impulse would amount to €200 billion, which was 1.5% of GDP. The second pillar sought to reinforce Europe's competitiveness in the long term through a comprehensive program of "smart" investment, which meant investing in energy efficiency, clean technologies and broadband infrastructure and energy interconnections.

Thus, an important part of the Recovery Plan was the proposal to boost EU spending in strategic sectors, and among them, broadband infrastructure. We strongly believe that at this very moment, broadband policy started to play a key role within the Commission's strategy. To check it, please read carefully the summary of the action "High-speed Internet for all" in the Recovery Plan:

"High-speed Internet connections promote rapid technology diffusion, which in turn creates demand for innovative products and services. Equipping Europe with this modern infrastructure is as important as building the railways in the nineteenth century. To boost Europe's lead in fixed and wireless communications and accelerate the development of high value-added services, the Commission and Member States should work with stakeholders to develop a broadband strategy to accelerate the up-grading and extension of networks. The strategy will be supported by public funds in order to provide broadband access to under-served and high cost areas where the market cannot deliver. The aim should be to reach 100% coverage of high speed internet by 2010. In addition, and also with a view to upgrading the performance of existing networks, Member States should promote competitive investments in fibre networks and endorse the Commission's proposals to free up spectrum for wireless broadband. Using the funding mentioned in action 5 above, the Commission will channel an additional € 1 bn to these network investments in 2009/10. "

Indeed, with the above action the various initiatives that the Commission had been undertaking on broadband came together:

- The initiative for bridging the geographical digital divide in March 2006, which we have described in the preceding sub-section and that we have just seen how it received a further boost with the Recovery Plan.
- The initiative to allocate the digital dividend to the promising electronic communications services, and to generalise this approach through the WAPECS policy in November 2007, which we have described in the previous section.
- The initiative to review the scope of universal service and to discuss the role of the universal service as a means to promote the broadband development in September 2008, which we have described in the previous chapter.
- The initiative to regulate consistently NGAs networks, which is described below.

⁶⁴¹ COM(2008) 800. A European Economic Recovery Plan. Brussels, 26 November 2008.

⁶⁴² In the spring of 2010, when the authors undertook the writing of this chapter, the crisis had spread and had affected the public finances of Member States, forcing them to undertake plans to cut public spending and investment.

Regarding the first initiative, the Commission was very active by publishing a Communication⁶⁴³ in January 2009, which stated that "€1 billion [from the existing rural development instrument] should be fed in rural development spending for the specific purpose of developing broadband infrastructure in rural areas". The Communication was endorsed by the Council in March 2009, which amended⁶⁴⁴ both the Regulation of the European Agricultural Fund for Rural Development (EAFRD) and the Regulation on the financing of the Common Agricultural Policy in May 2009 to allow this action.

4.3.- Regulated Access to Next Generation Access Networks (NGA)

During the Review of the Regulatory Framework, there was an intense debate about the regulated access to Next-Generation Access networks (NGA), conducted by the Commission through two public consultations in 2008 and 2009, each one based on a draft Commission Recommendation. This debate concluded with the approval of the Recommendation in September 2010.

Recall that in Chapter 9 the Recommendation on Markets was described, which contained the list of relevant markets that NRAs should be based on for its market analysis. In Chapter 10, we noted that the 2007 Reform Proposals included the reduction of the number of relevant markets. And so it happened, when the Commission issued the revised Recommendation on Markets⁶⁴⁵. Two markets that remained in the list were the two wholesale broadband markets, namely, the wholesale physical network infrastructure access at a fixed location (known as market 4) and broadband access wholesale (known as market 5).

Basically, when the Commission published in 2008 the first Draft Recommendation, it just sought to foster consistent application over the EU of regulatory remedies on operators with significant market power in the markets 4 and 5 as regards access to NGA. However, when in June 2009, the Commission published the second Draft Recommendation, the above objective had broadened its scope, in parallel with the importance of broadband infrastructure with the adoption of the Recovery Plan. Here, the Commission stated that the Recommendation was part of the European broadband strategy, which we shall discuss in the next section.

Note that the dilemma of how to regulate wholesale markets in the EU—which turned up in relation to broadband Internet access provision in 2000—was again raised as the opportunity to invest in deploying fibre to improve broadband networks showed up. Nevertheless, unlike the dilemma that was presented in 2000, where investment was almost done—if we stick to the incumbent operator copper access network, investment was still to be decided and done in 2008. So the dilemma lay in:

- promoting competition through the imposition of access obligations on operators starting their investments,
- or encouraging investment by those operators willing to do so by means of the partial or total removal of the obligations of access to NGAs.

The context of this dilemma actually exceeded the European framework, as it becomes clear when analyzing how the U.S. had approached it, on the one hand, and Asian countries, on the other⁶⁴⁶. In the U.S., deregulation prevailed, especially after the Brand-X decision in 2005 resulted in the elimination of ex ante obligations for access to ILEC networks (basically, the Baby Bells). One result was the low

⁶⁴³ COM(2009) 36. Investing today for tomorrow's Europe. Brussels, 28 January 2009.

⁶⁴⁴ Council Regulation (EC) No 473/2009 of 25 May 2009 amending Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and Regulation (EC) No 1290/2005 on the financing of the common agricultural policy OJ L 144. 9 June 2009. P. 3

⁶⁴⁵ Commission Recommendation C(2007) 5406, of 17 December 2007 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. OJ L 244. 28 December 2007. P. 65.

⁶⁴⁶ Huigen, J. & Cave, M. (2008), Regulation and the promotion of investment in next generation networks—A European dilemma. Telecommunications Policy, vol. 32, pp. 713-721.

penetration rates were observed in 2007. In contrast, in some Asian countries, like South Korea and Japan, governments have strongly supported investment in fibre optic networks as part of its industrial policy.

The EU has steered a middle course between full deregulation and interventions by government motivated by industrial policy. A non-political point of view was imposed in 90, according to which it was assumed that competition would encourage investment. But the reality seems to belie this assumption when we analyze the scenario of fibre deployment. First, the application of this point of view by the 2002 Regulatory Framework has failed to bring competition between fixed infrastructures in the EU, with the exception of the Netherlands. Secondly, mobile communications have failed in imposing a competitive constraint to induce large-scale investments in fixed access networks. And finally, it was found that the incumbent operators are adopting a defensive strategy, not determined to undertake the huge investments needed.

In conclusion, the Recommendation on regulated access to the NGAs will allow assessing the perception that the Commission has on the success or failure of regulatory principles applied during the decade 2000-2010.

5.- RADIO SPECTRUM AND BROADBAND POLICIES IN THE DIGITAL AGENDA

In this section we examine how the Commission is proposing the continuation of the policies reviewed in this chapter, namely, the Radio Spectrum Policy and the Broadband Policy.

First, the strategic context which has framed the elaboration of this sequel is described. And second, the role that such policies will play as part of the strategy is analysed.

5.1.- The Europe 2020 Strategy and the Digital Agenda

Once the new College of Commissioners took over their portfolios, President Barroso issued a Communication⁶⁴⁷ in March 2010 under the title "Europe 2020. A Strategy for smart, sustainable and inclusive growth." Here, the Commission noted a more concern that it had detected one year and a half before, when former Commission proposed the Recovery Plan. And, while it established to come out successfully from the crisis as the short-term priority, it set five measurable targets for 2020 at the EU level:

- Employment: 75% of the population aged between 20 and 64 should be employed;
- Research and Innovation: 3% of GDP should be invested in R&D
- Climate change and Energy: the "20/20/20" objective⁶⁴⁸ should be achieved;
- Education: the share of early school leavers should be under 10% and at least 40% of the younger generation should have a tertiary degree;
- Fight against poverty: 20 million less people should be at risk of poverty.

Europe 2020 was adopted by the European Council of June 17, 2010.

⁶⁴⁷ COM(2010) 2020. EUROPE 2020 A strategy for smart, sustainable and inclusive growth. Brussels, 3 March 2010.

⁶⁴⁸ Reduce greenhouse gas emissions by at least 20% compared to 1990 levels or by 30%; increase the share of renewable energy sources in our final energy consumption to 20%; and a 20% increase in energy efficiency.

The Commission proposed to catalyze a wide range of actions at national, EU and international level needed to achieve these goals through seven flagship initiatives. One such initiative was called "A digital agenda for Europe", which aimed to "speed up the roll-out of high-speed internet and reap the benefits of a digital single market for households and firms." In this regard, the Commission established the following objectives:

- "Broadband access for all by 2013."
- "access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps."

In the preparation of the Digital Agenda, Commissioner Kroes⁶⁴⁹ sought the support of Member States through the informal meeting of ministers responsible for the Information Society Policy, held in Granada in April 2010 under the Spanish Presidency of the EU. And of the European Parliament, who tried to some extent overshadowed the Commissioner when adopting a Resolution "on a new Digital Agenda for Europe: 2015.eu (*sic*)" in May 2010.

The Digital Agenda was published in May 2010. The Communication⁶⁵⁰ identified eight areas of action, which allowed grouping the key actions which the Commission proposed to itself and to the Member States. Among such areas of activity, the most relevant for electronic communications policy was the "fast and ultra-fast internet access." In this field, the Commission decided to focus on two parallel objectives: first, to ensure universal broadband coverage at increasing speeds, and second, to encourage the deployment of NGAs. Both objectives, as we shall see below, allowed the Commission to relaunch the political momentum of the radio spectrum and broadband policies.

5.2.- The European Strategy for Broadband

The Commission was invited by the Brussels European Council in March 2009 to "develop a European broadband strategy." However, this assignment was not possible until the new Commission took office. The new Commission subordinated any new proposal in Information Society to the preparation of the Digital Agenda, as we saw in the previous section.

Indeed, in the Communication on the Digital Agenda, the Commission committed to launch a European broadband strategy. It started again from the realization that government intervention was, first, essential to achieve optimal deployment of fast broadband networks—which should not be limited to a few areas of high population density—and, second, justifiable by the collateral benefits that these networks would generate for the economy and society. To achieve these objectives, the Commission proposed a "Key Action 8" which included:

- To use national, EU—e.g., ERDF and EAFRD—and European Investment Bank funding instruments to make targeted investments in areas where the business case was weak and which, therefore, only such focused intervention can render investment sustainable. Member States should include these actions in their national broadband plans. This line of action was actually continuing the action specified in the Recovery Plan.
- To adopt a NGA Recommendation in 2010 based on the principles that (i) investment risk should be duly taken into account when establishing cost-oriented access prices, (ii) NRA should be able to impose the most appropriate access remedies taking into account the level of competition in any given area and (iii) co-investments and risk-sharing mechanisms should be promoted. The Commission thus fixed a deadline for the adoption of this Recommendation.
- To develop a European Spectrum Policy Programme in 2010 which would mandate the use of certain digital dividend frequencies for wireless broadband and allow spectrum trading. The

⁶⁴⁹ The new Commissioner responsible for Information Society became Neelie Kroes, in November 2009, which in the previous five years had been responsible for the Competition portfolio. The portfolio was renamed the Digital Agenda.

⁶⁵⁰ COM(2010) 245. A Digital Agenda for Europe. Brussels, 19 May 2010.

Commission insisted, despite the discrepancies already observed during the co-decision procedure which led to the Modified Regulatory Framework, on implementing the market-based and flexible approaches that had proposed during 2005-2009.

The first step of each of the above lines was given when the Commission published in late summer the Communication on "European Broadband"⁶⁵¹, the long-awaited NGA Recommendation⁶⁵² and a Proposal for a Decision on the Radio Spectrum Policy Program⁶⁵³.

Being that the stage laid by the Commission, the following two remarks deserve attention. Firstly, the Commission seems to have opted for an alternative tactic, as far as the radio spectrum policy is concerned. While this policy appeared at the front of the Commission's strategic initiatives during the period 2005-2010, it stands now in a secondary place, within the proposals aimed at realizing the broadband for all vision.

And secondly, the Commission appears to have identified a meeting point on electronic communications with the Council and with European Parliament. Such a meeting point would be to adopt a mixed policy which boosts both the public investments in non-profitable areas, and the competition between operators through the rapid implementation of the Modified Framework.

To corroborate this meeting point, read the following two conclusions, taken from the Ministerial Declaration of Granada:

- *"Provide a strong impulse to the roll out of competitive next generation high speed networks through promotion of competition between broadband providers and by implementing a predictable regulatory regime for the promotion of efficient investment in high speed broadband infrastructure and related services, based on swift implementation of the revised EU e-communication services framework*
- *Boost competition and financing of the networks of the future by encouraging efficient and sustainable private long term investments and providing public support for open networks where needed and appropriate."*

Also, read the following two conclusions, taken from the European Parliament resolution:

- *"Calls upon the Commission and the Member States to promote all available policy instruments to achieve broadband for all European citizens, including the use of the European Structural Funds and of the digital dividend for extending mobile broadband coverage and quality*
- *Urges Member States to transpose the new electronic communications regulatory framework before the established deadline and to fully enforce it and to empower national regulators accordingly; emphasises that the new framework provides for a predictable and consistent regulatory environment which stimulates investment and promotes competitive markets for ICT networks. "*

It remains to be seen if the current inter-institutional consensus is still standing when implementing this mixed policy of public intervention — competition boost. Or if the very implementation of a coherent policy in this mixed framework is possible.

⁶⁵¹ COM(2010)472, European Broadband: investing in digitally driven growth. Brussels, 20 September 2010.

⁶⁵² Commission Recommendation C(2010) 6223 of 20/09/2010 on regulated access to Next Generation Access Networks (NGA).

⁶⁵³ COM(2010)471, Proposal for a Decision of the European Parliament and of the Council establishing the first radio spectrum policy programme. Brussels, 20 September 2010.

6.- CONCLUSIONS

This chapter is based on a hypothesis held by the authors with regards the way that the Commission is addressing the transition between the 2000-2010 period covered by the Lisbon Strategy and the 2010-2020 period covered by the EU2020 Strategy.

We are convinced that the evidence discussed in the last two chapters provides support for our statement that the regulation is no longer an aim of the EU electronic communications Policy and that the EU—and specifically the Commission—is steering its activities towards the promotion of investment in NGAs and the harmonisation of a market-based and flexible approach for the spectrum management. Both objectives have been presented in the form of a European Broadband Strategy.

Only time will allow us to confirm or reject this hypothesis. The reader is called, therefore, for the next edition of the book.

CHAPTER 12

CONCLUSIONS



CHAPTER 12

CONCLUSIONS

This book has endeavoured to analyse how the European Union's Electronic Communications Policy has evolved over more than thirty years, since the first proposals were put forward in 1977 to the present time, when the second review launched in 2005 has been finalised.

During the last three decades, electronic communications have become increasingly more important for the economic and social development of the European Union, which justifies and explains the enthusiasm with which the Community Institutions have set about developing this Policy.

Yet thirty years is very long for almost everything and a lot more for the European Union, which is now more than fifty years old.

Looking for consistency in the actions of an Institution whose top officials change every five years is very difficult, and finding it in the European Union throughout six legislatures is almost impossible.

Hence, the development of a Community policy such as the Electronic Communications Policy can only be seen in the light of the provisions of the Treaties that govern the European Union and that regulate the permanent confrontation between the sovereignty of the Member States and the supranationality of the Union.

And what the Treaties have to say about Electronic communications is that the Community has jurisdiction for guaranteeing that this sector operates in free competition in the framework of the Single Market, but that the Member States still have jurisdiction for specifically supervising its achievement. Once again, this jurisdiction is shared by the Community Institutions and its Member States.

Against this background, it has to be said that there is a European Union Electronic Communications Policy and there are also twenty-seven Electronic Communications Policies, one for each one of the Member States. Remembering this is vitally important for grasping the real scope of the Community actions that have been outlined throughout this book.

In this context, the Electronic Communications Policy of the European Union is heavily Regulatory in nature, as could not be otherwise, and its key results are the legal documents adopted by the Community Institutions in accordance with the provisions of the Treaties.

Nevertheless, the European Union's Electronic Communications Policy European Union also has a markedly strategic nature that is basically to be seen in the documents adopted by the Commission. And that is where things become less clear and sometimes even become rather confusing.

There is no denying that the Commission has played a key role in defining the strategies of the Electronic Communications Policy, due to the legislative initiative it is attributed in the Treaties. Since 1977, the Commission has remained one step ahead of the problems and almost always offered coherent and reasonable solutions for drafting a European Union Electronic Communications Policy. You'll agree with me that defining strategies that then have to be implemented by the Member States is an extremely delicate task that must be handled with tact and prudence.

Yet we must say that, after spending so many years working in this field, and after reading hundreds of documents, we are still unable to digest the sometimes bombastic and pompous style that the Commission tends to use in many of its texts. Calmly and without batting an eyelid, the Commission is capable of putting forward an idea and justifying it by enveloping its proposals in a mishmash in which structure and conjuncture are mixed up on purpose, always against the backdrop of all the most fashionable ideas and proposals of the moment. They are really professionals, oh yes!

Whatever the case, the European Union has an Electronic Communications Policy that is undeniably complex yet solid, coherent and, above all, well designed. That's precisely what this book has tried to spotlight.

Yet as explained in the Introduction, this book, which certainly analyzes the past, endeavours to look towards the future, because in a sector such as this, the future is very promising.

Because a lot still remains to be done in the field of Electronic Communications Policy. And gradually, manufacturers will launch better handsets capable of accessing more and better services.

Yet from the way things are going now, it is obvious that these activities will be controlled by an increasingly smaller number of operators, which of course will be more powerful, and that is where one of the keys to the challenge will lie.

So do not make the mistake of confusing the Electronic Communications Policy with its Regulations. And if the Regulations tend to be simplified for the sake of the market's flexibility, the Electronic Communications Policy will have to continue remaining firm and coherent to the benefit of everyone's interests.

In a sector as important as Electronic Communications, which are regarded as general-interest services, it is essential to clarify the role of economic agents and the role that the Public Sector will have to continue playing as the guarantor of common interests and, of course, as arbitrator in the achievement of the growth, competitiveness and employment objectives that our elders are so fond of reminding us about.

There is a risk that the Electronic Communications Policy will be minimized as its Regulations are minimized, a risk that would lead to these matters being left entirely at the mercy of the interests of the sector's players.

It is to be hoped that, as the European Union relaxes the Regulatory framework, it will consolidate its Electronics Communications Policy to everyone's benefit.

That is the challenge that the Community Institutions face once the second review of the Electronic Communications Policy has been performed. We trust that they will continue doing a good job.

Amen!

APPENDIX I

WORLDWIDE CONTEXT OF THE TELECOMMUNICATIONS POLICY



APPENDIX I

WORLDWIDE CONTEXT OF THE TELECOMMUNICATIONS POLICY

1.- INTRODUCTION

This Appendix analyzes some of the key aspects and features of the world telecommunications framework as an essential ingredient for studying the European Union's Electronic Communications Policy.

This analysis necessarily involves taking into account the principal factors that characterize its world dimension at least in two aspects; the evolution of the Telecommunications Policy in the United States of America due to its bearing on the strategies adopted elsewhere in the world, and the world trade in telecommunications equipment and services, in the framework of the World Trade Organization. Both aspects will be outlined in this appendix, the sole purpose being to afford an overview of the situation so as to remind readers of the lines master keys that have characterized the context within which the European Union's Electronic Communications Policy has been developed.

2.- A SUMMARY OF THE EVOLUTION OF TELECOMMUNICATIONS POLICY IN THE UNITED STATES OF AMERICA

In nearly every country in the world, telecommunications networks and services developed from the outset as monopolies under the direct management of the government; however, in the United States, telecommunications businesses started out as entrepreneurial activities under the supervision of the public sector.

An analysis of the history and experience of telecommunications regulation in the United States is a task that goes well beyond the possibilities of this book; thus, it is not our intention to present an in-depth study of this subject here. Nevertheless, we do feel that this section should include a brief summary of the most significant issues and events, because it may be useful as a frame of reference for the study of the European Union Telecommunications Policy.

The conclusion regarding the need to regulate areas such as licensing mechanisms, the use of terminals, the interconnection of networks, the setting of tariffs and the decision about which services should be regulated and which others should be provided on a competitive basis was the result of nearly a century of confrontations between the industry's different players, among which the different levels of government, primarily the federal and to a lesser extent state governments, played a fundamental role.

The telecommunications regulation experience in the United States was undoubtedly unique and the first of its kind in the world, and has had a key impact on the shaping of the mechanisms that would be adopted in many countries as they began to abandon the former monopolies and establish free competition in this industry.

Therefore, it is worth reviewing the evolution of telecommunications policy in that country.

2.1.- First Steps.

The authorship of the invention of the telephone has always been shrouded in controversy, so this has underscored from the very outset the importance of the legal framework governing an economic activity of this type⁶⁵⁴.

It is well known that Alexander Graham Bell worked on the telephone and filed the patent application for it in 1876, but it is equally true that the Italian inventor Antonio Meucci developed a device for electronic voice communications in around 1860 that he named the “teletrophone.” He patented it in 1871, but lost the rights to the patent in 1874. He gave the prototypes of his device to Western Electric, and this company lost them; shortly afterwards, Bell, who worked at the company, patented the telephone. If Meucci had been able to afford the 10 dollars that it cost to renew his patent, Alexander Graham Bell would not have been able to patent the telephone.

This is not just our speculation; in June 2002, the United States Congress passed a Resolution officially recognizing that Antonio Meucci is to be credited as the inventor of the telephone⁶⁵⁵, and this is something that can be verified⁶⁵⁶. That's life!

The fact is that the Bell Telephone Company began its commercial activities in 1876 and was responsible for the first municipal telephone networks.

It must be pointed out that long distance networks did not come into being until transmission cables were developed that were more suitable than the ones used on the old telegraph lines. An especially important advance took place around 1900, when the scientist and professor of electrical engineering at Columbia University, Mihajlo Pupin⁶⁵⁷, a Serbian emigrant to the United States, invented a system that made it possible to significantly reduce the attenuation of the electrical signal through telephone lines: his famous coils. Thus, the range of telephone communications was extended.

However, the true development of long-distance communications would not take place until 1906, when Lee De Forest⁶⁵⁸, working in the Bell Telephone Company research laboratories, discovered the triode, the first vacuum tube that made it possible to manufacture amplifiers for electrical signals. This was the start of a new era of telecommunications.

The company created by Bell⁶⁵⁹ held the exclusive rights to the patent for the telephone for fifteen years. In 1882, it acquired Western Electric from Western Union to manufacture its equipment. In 1885, it created the company known as AT&T to operate long-distance communication services. It also purchased Pupin's patent and financed De Forest's research. When the patent for the telephone entered the public domain in 1891, the AT&T group already controlled 80% of all telephone communications in the United States⁶⁶⁰.

AT&T's domination of the long-distance communications market enabled it to gradually take over competing telephone companies. The legal argument it used was that it had no obligation to allow the interconnection of these independent companies, most of which were municipal, to the long-distance networks that it had developed.

⁶⁵⁴ History of Telecommunications website <http://www.webbconsult.com/history.html>, visited 10/9/2010.

⁶⁵⁵ Antonio Meucci. http://en.wikipedia.org/wiki/Antonio_Meucci, visited 10/9/2010..

⁶⁵⁶ House of Representatives of the USA. 107 Congress 1st Session. Resolution No. 269. June 11, 2002 <http://hnn.us/articles/802.html>, visited 10/9/2010.

⁶⁵⁷ Mihajlo Pupin http://www.acmi.net.au/AIC/PUPIN_BIO.html, visited 10/9/2010

⁶⁵⁸ Lee de Forest <http://www.leedeforest.org/>, visited 10/9/2010

⁶⁵⁹ Bell System Memorial website : <http://www.porticus.org/bell/bell.htm>, visited 10/9/2010.

⁶⁶⁰ Noam E. et al. Telecommunications in the Pacific Basin. Chapter 24. The United States. Oxford University Press. New York 1994.

In 1890, the United States Congress approved an act to prevent the abuse of a dominant position—the Sherman Antitrust Act⁶⁶¹—and accordingly, in 1913, an action was initiated that forced the AT&T group to halt its acquisition of competing municipal telephone companies. The need to regulate the interconnection of telecommunications networks had arisen.

2.2.- 1934 Communications Act

The World War I, the economic crisis of 1929, the election of President Roosevelt in 1932 and his new policy of State intervention in the economy had a strong bearing on the definition of the Federal Government's role in telecommunications. Within the context of the “New Deal” policy, in 1934 Congress passed the first Telecommunications Act⁶⁶² of the United States, and possibly of the world, which established the industry's rules of the game and regulated intervention by the public administrations in this industry.

Local communications came under the jurisdiction of each State through their respective Utilities Commissions⁶⁶³, which had the power to approve monopolistic operation in each area or zone established and to intervene in the setting of tariffs for services. On the other hand, radio communications, long-distance communications, international communications and the protection of competition in the industry became the responsibility of the Federal Communications Commission – FCC⁶⁶⁴.

The investigations that the FCC initiated of the AT&T Group in 1939 in order to analyse its possibly excessive vertical integration were interrupted during World War II, and culminated in a civil suit filed against this group in 1949 by the US government. This action was settled by a Consent Decree signed in 1956. Under this judgment, the AT&T Group was allowed to maintain its vertical structure in telecommunications, but was prevented from engaging in any other business, in particular activities relating to computer technologies.

Meanwhile, the invention of the transistor at Bell Labs in 1947, as well as advances in electronic and radio technology developed through military research, began to have an impact on the industry. As a result, new companies with an interest in getting into the business of supplying telecommunications equipment began to spring up.

As far as value-added services are concerned, it must be pointed out that these have always been open to competition. The conclusions of Computer Inquiry I in 1971, and in particular, those of Computer Inquiry II in 1980, led to the FCC's decision not to regulate either computer terminal markets or those relating to packet-switched data networks connected to public telecommunications networks, which from that moment were considered to be separate businesses from voice communications.

This was one of the reasons why X-25 data networks met with such little success in the United States, which caused a large number of data communications networks developed by computer equipment companies to come into being, ultimately one of the reasons why internet protocols were developed.

⁶⁶¹ Sherman Antitrust Act Act http://en.wikipedia.org/wiki/Sherman_Antitrust_Act, visited 10/9/2010

⁶⁶² 1934 Communications Act. <http://www.criminalgovernment.com/docs/61StatL101/ComAct34.html>, visited 10/9/2010.

⁶⁶³ NARUC. National Association of Regulatory Utility Commissioners <http://www.naruc.org/>, visited 10/9/2010

⁶⁶⁴ FCC. Federal Communication Commission. <http://www.fcc.gov/>, visited 10/9/2010 .

2.3.- The appearance of the Internet

In a brief history of the Internet, Vinton Cerf refers to the birth of the Internet as follows⁶⁶⁵:

In 1973, the U.S. Defense Advanced Research Projects Agency (DARPA) initiated a research program to investigate techniques and technologies for interlinking packet networks of various kinds. The objective was to develop communication protocols which would allow networked computers to communicate transparently across multiple, linked packet networks. This was called the Internetting project and the system of networks which emerged from the research was known as the "Internet." The system of protocols which was developed over the course of this research effort became known as the TCP/IP Protocol Suite, after the two initial protocols developed: Transmission Control Protocol (TCP) and Internet Protocol (IP).

It is interesting to learn about the importance of the United States Department of Defense's participation, but just as interesting to see what one of the main reasons that led it to participate was.

From the advent of information technologies in the mid-1950s, and especially from the time when teleprocessing systems began to appear in the 1960s, with terminals and computers connected to telephone networks, the federal authorities in the United States, and particularly the Federal Communications Commission, had to decide whether these new services should be regulated in accordance with telecommunications legislation because of their connection to the network, or whether, on the contrary, they should be completely unregulated as computer systems. After conducting the Computer Inquiry I from 1966 to 1971, the FCC went for the second option.

Years later, with the advent of packet switching networks, which were also connected to telephone networks, the same question arose and after the Computer Inquiry II, which was conducted from 1976 to 1980, the FCC took the same decision, i.e., that packet switching networks were computer systems and therefore fully subject to the rules of free competition.

This decision had two main consequences: the first was that the FCC never had to liberalize packet switching services and networks, because they had never been regulated and much less monopolized, and the second was that, as multiple types of packet switching networks began emerging, the Federal Government, in this case the Department of Defence, had to find a solution to allow its computers, which were connected to different types of packet networks that used different types of protocols, to interwork. This is precisely where one can find the origin of the virtual "Internetwork Protocol," i.e., the IP protocol.

2.4.- The breakup of AT&T

With the Telecommunications Act of 1934, the FCC took on the task of promoting competition in the industry and defending the interests of new actors against the dominant companies. After countless lawsuits and FCC proceedings during the 1970s, the terminal market was opened up to competition and the rights to interconnect telecommunications networks were regulated.

Alarmed by the course of events, the US Government filed an anti-trust lawsuit against AT&T in 1974. This would culminate in a new consent decree in 1982 which would give rise to another judgment modifying the one laid down in 1956, a Modified Final Judgment requiring the divestiture of this telecommunications group.

⁶⁶⁵ Cerf, V. A Brief History of the Internet and Related Networks
<http://www.isoc.org/internet/history/cerf.shtml>, visited 10/9/2010.

As a result of the breakup of AT&T, its local telephone businesses were divided among seven independent companies called Regional Bell Operating Companies – RBOCs⁶⁶⁶, while AT&T was allowed to continue in the long-distance and equipment manufacturing businesses. This divestiture became effective in 1984⁶⁶⁷.

Now is the time to mention the fact that the great reform of the structure of the telecommunications business in the United States would have a key impact worldwide.

Apparently⁶⁶⁸, one of the conditions included in the agreement with AT&T was the federal government's commitment to support the company in entering international markets, as compensation for the loss of its local market. As we shall see in the next section, all of this took place on the eve of the start of the new round of GATT negotiations, the Uruguay Round.

In any case, after 1984, the structural changes in the industry, the evolution of technology and above all the appearance of promising business areas such as the new cable television services, satellite communications and mobile telephony left a mark on the industry that would force it to undergo profound changes. However, the final push would come from political change.

When President Clinton and Vice President Gore were elected in 1992, telecommunications-related activities began to be regarded as the new driving force of the American economy, and their flagship was the great national project for the development of a National Information Infrastructure⁶⁶⁹ (NII). This initiative would indeed propel the dynamism of the American economy. It is well known that the European Union proposal for the development of the Information Society, made in 1993, was a straight response to the strategy posed by the Clinton-Gore Administration.

From that moment onwards, two powerful mechanisms aimed at revitalising the industry were launched: the public funding of projects to develop telematic applications, and the creation of a new Telecommunications Act⁶⁷⁰.

2.5.- The Telecommunications Act 1996

In 1996 a new Telecommunications Act was passed⁶⁷¹, modifying the 1934 Communication Act⁶⁷². Among other things, it opened local and long-distance telecommunications and television distribution businesses, which until then had been completely compartmentalised, up to competition.

Much less known are the compensatory mechanisms for free competition provided for in the Act, in particular those relating to universal service. In addition to guaranteeing citizens access to telephone communications at an affordable price, the Act also stipulated that carriers must give discounts to schools, libraries and other organisations of interest, ranging between 20% and 80% of their total telecommunications invoice. In mid 1997, agreements were reached that made the creation of this special fund possible, which was made up of contributions from the telecommunications operators themselves and administered by an independent, not-for-profit company created for that purpose⁶⁷³.

⁶⁶⁶ RBOCs <http://www.porticus.org/bell/bellopercomp.html>, visited 10/9/2010.

⁶⁶⁷ Temin P. *The Fall of the Bell System*. Ed. Cambridge University Press. Cambridge 1987

⁶⁶⁸ Richonier M. *Les Métamorphoses de l'Europe de 1769 a 2001*. Ed. Flammarion. Paris 1985

⁶⁶⁹ The National Information Infrastructures. Agenda for action. NTIA. Commerce Department. US Government. September 1993. <http://www.ibiblio.org/nii/NII-Table-of-Contents.html>, visited 10/9/2010.

⁶⁷⁰ Kellog, M. et al. *Federal Telecommunications Law*. Ed. Little, Brown and Co. Boston 1992

⁶⁷¹ Telecommunications Act 1996. <http://www.fcc.gov/Reports/tcom1996.pdf>, visited 10/9/2010.

⁶⁷² Communications Act 1934 as amended by the Telecommunication Act 1996. <http://www.fcc.gov/Reports/1934new.pdf>, visited 10/9/2010.

⁶⁷³ Universal Service Administrative Company – USAC. <http://www.universalservice.org>, visited 10/9/2010.

The publication of the Telecommunications Act of 1996 put an end to the industry being divided into independent lines of business (local telephony and long-distance services) that had resulted from the 1982 judgment through which AT&T was broken up, as well as the cable TV business, from which they had been banned. Since then, market decisions have been responsible for shaping the current situation of telecommunications companies in the United States.

The implementation of the Act of 1996 was greatly influenced by the Supreme Court decision on the *Brand X*⁶⁷⁴ case in 2005, which effectively ended the “open access” debate. The Court affirmed the FCC’s determination that cable modem service should be classified as an “information service”, and not as a “telecommunication service”. The Court thereby undermined any argument that law requires a cable company to give unaffiliated ISPs common-carriage-type access to its cable modem platform. From that decision, the FCC has been releasing major “legacy” obligations that the telephone companies, but not their cable rivals, had faced in the broadband market, based on the conclusion that DSL Internet access is also an “information service” without a “telecommunication service” component.

When President Bush came into power, the NII project was no longer mentioned, and new and ambitious projects were launched in its place, including the Broadband Initiative and the one for radio spectrum management⁶⁷⁵, which also had counterparts in the European Union. Both initiatives have been rebooted as President Obama took over.

3.- TELECOMMUNICATIONS AND WORLD TRADE

When telecommunications were run as a monopoly, the conditions that governed international telecommunications services were established by the different States and by any bilateral agreements entered into by the latter within the framework of the International Telecommunications Union (ITU) and the European Conference of Postal and Telecommunications Administrations (ECPT).

Over time, the turnover volume for international telecommunications services increased, and became comparable to a true trading operation.

The different tariffs for international calls in effect in each State gave rise (and continue to do so) to substantial differences in the cost of a call between the same two points, depending on where the call originates. Added to this was the difference in the tariffs that each State applied to incoming calls from another country. This latter circumstance, together with the high volume of calls between countries, brought about a true international economic exchange as a result of these telecommunications services.

With regard to the balance of trade for telecommunications services between the United States and Europe, it must be pointed out that in the 1980s, the United States already had a large trade deficit, which gave rise to systematic complaints by that country's authorities.

The argument used by American telecommunications operators was that one of the reasons for this deficit was the fact that the tariffs applied by European administrations to incoming calls were too high because of the lack of competition in this type of service.

The proposals that the operators made to reduce or compensate for this trade deficit, with the support of the United States government, primarily consisted of demanding that the European Union apply free competition for the operation of this type of services, and of demanding the opportunity to participate in their operation.

⁶⁷⁴ National Cable & Telecomm. Ass’n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005), <http://www.law.cornell.edu/supct/pdf/04-277P.ZO>, visited 15/9/2010.

⁶⁷⁵ Spectrum policy initiative. . <http://www.ntia.doc.gov/osmhome/spectrumreform/>, visited 10/9/2010.

3.1.- World Trade in Telecommunications Services

When the Uruguay Round to renew the General Agreement on Tariffs and Trade (GATT), began in 1986, the possibility of establishing an agreement of a similar type that would make it possible to regulate the international trade in services, in particular telecommunications services, began to come under consideration.

It must be recalled that at that time, the breakup of AT&T and the commitment of the United States government to undertake the entry of American carriers in international markets were very recent.

The GATT 1994 negotiations ended in Geneva in December 1993, and the agreement was signed by 117 countries in Marrakech in April 1994. This Agreement, which was signed by 117 countries, envisaged, inter alia, the creation of the World Trade Organization (WTO⁶⁷⁶) as a common institutional framework for the development of international trade ties.

With regard to the content of this document, we can highlight the fact that Annex 1A includes the Agreements on Trade in Goods, and Annex 1B contains the text of the General Agreement on Trade in Services, better known as GATS⁶⁷⁷.

The text of the GATS recognizes:

“the growing importance of trade in services for the growth and development of the world economy”

and manifests the desire to:

“establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization”.

Likewise, this Agreement stipulates that talks should be initiated in order to establish agreements specific to trade in each of the Services.

The fundamental basis of the GATS is the application of the principle of most-favoured-nation treatment to the trade in services. Article II of the Agreement states:

“1.- With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

However, the same article envisages the possibility of exceptions:

“2.- A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions”.

The Agreement has two Annexes which refer to telecommunications services. The first one, entitled “Annex on Telecommunications”, notes the specific characteristics of the industry and establishes some supplementary provisions to the Agreement. According to the content of the Agreement and this Annex, the most-favoured-nation treatment would, in principle, be applicable to all telecommunications services.

⁶⁷⁶ World Trade Organization. <http://www.wto.org/index.htm>, visited 10/9/2010.

⁶⁷⁷ GATS. General Agreement on Trade in Services http://www.wto.org/english/tratop_e/serv_e/serv_e.htm, visited 10/9/2010.

However, a second annex entitled “Annex on negotiations on basic telecommunications” establishes the criteria for the application of the exceptions provided for in article II of the GATS, mentioned above. According to this second Annex, these exceptions would only be applicable to what it called “basic telecommunications”. Therefore, after the GATS was signed, it was necessary to come to an agreement on the content of the list of exceptions provided for in article II.

In May 1994, immediately after the signing of the GATT treaty, a Negotiating Group on Basic Telecommunications, whose aim was to arrive at an agreement on this list of exceptions, was formed within the WTO. Initially, 44 countries participated (this figure would later reach 69), whose telecommunications activities account for over 90% of all revenues in this industry worldwide.

The Group set 30th April 1996 as the deadline for the completion of the negotiations, and 1st January 1998 as the date when the agreement would enter into force. Difficulties inherent to the negotiation gave rise to a delay in the Agreement on Telecommunications Services, which would be finalized on 15th February 1997⁶⁷⁸.

The result of the negotiations is included in a document entitled “Fourth Protocol to GATS,” which contains, inter alia, the list of exceptions provided for in article II. Every signatory country had the opportunity to determine which telecommunications services it did not want to be liberalised during an initial stage. According to the agreement that was reached, these restrictions on full international competition would be in effect for five years, renewable for a single additional five-year period, and would thus be completely eliminated in 2008.

The WTO documents contain the definition of what were considered Basic Telecommunications⁶⁷⁹ and Value-Added Services, in the form of a list of the services included in each of these categories. Both Basic Telecommunications and Value-Added Services were subject to free competition as of 1998.

Furthermore, the Agreement clearly established the obligation of all States to ensure that all service providers are granted access to public telecommunications networks and services under fair and non-discriminatory conditions, in order to use them to supply any service.

As previously mentioned, 1st January 1998 was set as the date when this agreement would enter into force, to coincide with the date chosen by the European Union for the establishment of full competition in the telecommunications industry.

The General Agreement on Trade in Services provides that a new round of negotiations must begin no later than five years after the entry into force of the agreement, and accordingly, GATS-2000 was launched. Its aim was to make continued progress in eliminating obstacles to free trade in services.

This new round of negotiations in 2000 gave rise to the Doha Ministerial Declaration⁶⁸⁰ of November 2001, which was followed by the Hong Kong Declaration⁶⁸¹, adopted in December 2005.

In closing, we must add that one of the subjects included in these negotiations is the international trade in audiovisual services, although it looks like this issue will be under discussion for quite a while⁶⁸².

⁶⁷⁸ Information about these negotiations may be found at the WTO's Information Centre: <http://www.wto.org>

⁶⁷⁹ Coverage of Basic Telecommunications and Value-Added Services.
http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_coverage_e.htm, visited 10/9/2010.

⁶⁸⁰ WTO. Ministerial Declaration of Doha, 14 November 2001.
http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#services, visited 10/9/2010.

⁶⁸¹ WTO. Ministerial Declaration of Hong Kong, 18 December 2005.
http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm#services, visited 10/9/2010.

⁶⁸² Geradin D. (ed.). *The WTO and Global Convergence in Telecommunications and Audio-Visual Services*. Cambridge University Press, 2004

3.2.- World Trade in Equipment

Trade in equipment must also be mentioned as part of this analysis of international trade in telecommunications, particularly those aspects relating to standardisation and certification.

The framework for the negotiations to open up world trade in Information Technology products was established in the Singapore Ministerial Declaration⁶⁸³ of December 1996. Based on this commitment, negotiations aimed at eliminating customs duties from the trade in these products as of the year 2000 began at the WTO in March 1997.

With the incorporation of new member countries into the WTO, in particular China, the efforts to expand the agreements on trade in Information Technology products continue to be a matter open to negotiation⁶⁸⁴.

With regard to the use of technical telecommunications standards, the GATS recognize the authority of the ITU and agree to promote the use of its recommendations. It should be added that, within the framework of GATT, there is a long tradition of using technical standards both to favour trade and to try to prevent their use from hindering it.

Worth mentioning in this respect is the fact that the Agreement on Technical Barriers to Trade⁶⁸⁵ that featured in the 1979 GATT document served as the basis for the standardisation policy that the European Community was to adopt in 1983, as will be seen later on. The 1994 GATT document also included a new text of the aforementioned agreement regarding the use of the technical standards and the application of conformity certification procedures.

As far as conformity certification procedures are concerned, the 1994 Agreement on Technical Barriers to Trade establishes that, in cases where these procedures are required, they may not favour domestic products nor represent any type of barrier to international trade. A new element in this document is that member states are encouraged to enter into agreements for the mutual recognition of results from their respective conformity assessment procedures.

The discussions on eliminating technical barriers that affect world trade are still a very topical issue.

4.- CONCLUSIONS

In this Appendix, we have tried to present an overview of the main telecommunications-related events that have taken place in the United States since the invention of the telephone, as well as those that have come about under the auspices of the World Trade Organization.

This will enable readers to get a clearer view of the international framework in which the European Union's Electronic Communications Policy was formulated and implemented.

⁶⁸³ WTO. Singapore Declaration. 13 December 1996. http://www.wto.org/english/thewto_e/minist_e/min96_e/16.pdf, visited 28/10/2010.

⁶⁸⁴ WTO. Information technology agreements. http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm, visited 28/10/2010.

⁶⁸⁵ WTO. Technical Barriers to Trade http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm, visited 10/9/2010.



UNIVERSITAT
POLITÀCNICA
DE VALÈNCIA

EDITORIAL