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The Regulation of Electronic Communications in the European Union: Lessons Learned and Remaining Challenges

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Abstract

Over the past two decades the regulation of electronic communications in the European Union has undergone significant development. These changes have been motivated by a combination of technological innovations and the adoption of new regulatory strategies consistent with a liberalisation of the sector and the aim of creating an integrated and vigorous market for electronic communications across EU member countries. This paper explains and analyses the main changes in the regulatory framework that the EU institutions have created. Several challenges were overcome in the process of developing a harmonised regulatory framework and effective intra-European competition, but other challenges remain. The paper discusses the lessons learned, and identifies a number of future regulatory issues that may need to be resolved.

1. Introduction

The law regulating electronic communication markets has economic, social and cultural importance. In particular, the principal means of communications – especially telecommunications, television and the internet – are characterised by a continual process of technological innovation and the constant provision of new and improved services and capabilities.

The relentless and rapid change in electronic communications markets influences both public and private life. Technological changes have clearly enabled new and innovative forms of communication and social interaction and have brought many economic benefits. However, these changes – and, indeed, the pace of change – have also brought with them many regulatory challenges. Further, these technological changes have occurred in the context of wider trends in regulatory practice and theory which have seen traditional forms of state regulation replaced with regulatory approaches that rely on the promotion of competition amongst private providers of important services, a service formerly provided by national governments directly to their citizens.

In this paper, my aim is to provide a brief overview of the regulatory approach taken in the European Union (EU) to the challenges posed by the electronic communications market. I will

argue that the European experience can best be understood by reference to three distinct phases of regulation. The most important phase involved the recognition that convergence in the provision and use of communications services requires an integrated regulatory approach, which covers all of means of communication in modern society – telecommunications, television, radio, and, importantly, the internet. What I will refer to as 'technological and regulatory convergence' marks an important moment in the creation of the information society.

As I have mentioned, European regulation of electronic communications can be usefully divided into three phases. The first phase was planned in the 1980s[1] and was implemented in the 1990s. Phase two started in 2002, and created a common regulatory framework for electronic communications networks and services. We are now in a third phase with electronic communications which developed from directives that came into effect in 2009.

Although each phase has been characterised by a number of complex features and legal changes, phase 1 focused on moving away from State-controlled monopolies with an aim to liberalise the market; phase two involved technological and regulatory convergence and a reliance on concepts drawn from competition law; and phase three has involved an exercise in fine-tuning to harmonise regulatory approaches within member states and the development of a new European institution to promote this aim.

2. Phase 1 (the 1990s): Liberalisation of the Market

During the 1990s, the European Community was mostly concerned with the liberalisation of the telecommunications sector in its strictest sense: fixed line telephone and mobile phone services. Television and radio were not included in the focus of regulatory change at this time. And, of course, the internet was only just emerging.[2]

In the 1990s, fixed line telephone was the focus of very strong regulation which aimed to open markets to competition and to develop harmonized conditions for economic activities in Europe: the liberalisation of terminals (*e.g.* fax, telephone) and the liberalisation of services, such as voice telephony.[3] Finally, there was a liberalisation of network infrastructure.[4]

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1. Green paper on the development of the common market for telecommunications services and equipment: Towards a dynamic European economy. COM(87)290 final of 30 November 1987; Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992, *Official Journal of the European Union* C 257, 04.10.1988, 1-3; Communication from the Commission: 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 discussion and proposals by the Commission. COM(88)48 final of 29 February 1988.
2. Bassan, F., 'L'azione comunitaria nelle telecomunicazioni', in Bassan, F. (ed.) *Concorrenza e regolazione nel diritto comunitario delle comunicazioni elettroniche*, Torino, 2002, 1 ff.
3. European Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (legal base article 90 EECT, now article 106 TFEU); Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications; Commission Directive 88/301/EEC of 16 May 1988 on competition the markets in telecommunications terminal equipment*;* Commission Directive 96/19/EC of 13 March 1996 amending

In the emerging mobile telephone sector, regulation was less strong due to the fact that from the beginning the market was more dynamic; there were multiple operators and there was therefore more competition. As regards the television sector, the European Community was principally concerned with regulation of the content of services rather than enabling more competition through requiring greater access to infrastructure.

To summarise, the European Community split the regulation of telecommunications and the regulation of television and radio.[5] In the case of the former, the focus was on liberalisation of infrastructure;[6] in the case of the latter, the focus was content-based regulation.[7]

The regulation of telecommunications in these years was part of a wider EU strategy to establish free trade and effective competition within the EU and to harmonise regulatory approaches in member states.[8] It was thought necessary, for these purposes, to abolish

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Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets; 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; Guidelines on the application of EEC competition rules in the telecommunications sector (91/C 233/02).

4. 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 Open Network Provision – hereafter Directive ONP – (legal base article 100EECT, now article 114 TFEU); Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines; 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; 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; 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; 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.
   The ONP directive, contains the general principles for the harmonisation of conditions for open and efficient access to and use of public telecommunications networks and public telecommunications services; it means that incumbents have the obligation of letting access to telecommunications infrastructure to any undertaking that wants to supply telecommunications services. For this purpose this directive set out the principles of transparency, equality and non discriminatory access.
   On the ONP directive, see Hatzopulos, V., 'L'Open Network Provision (ONP) moyen de dérégulation', *Revue trimesterielle de droit. Europeen*, 1994, 30(1) 67-90; Venturini, G., *Servizi di telecomunicazione e concorrenza*, Torino, 1996, 97 ff; Wheeler, J., 'Key issues in Europe's Open Network Provision: The case of German VANS providers', *Telecommunications Policy*, 1992, 16(1) 80-96.
5. Recital 1 and article of 1 Directive 90/388/EEC; article 1, paragraph 2, of Directive 97/13/EC.
6. See footnote 4.
7. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities; 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.
8. Bassan, F., 'L'azione comunitaria nelle telecomunicazioni', in Bassan, F. (ed.) *Concorrenza e regolazione nel diritto comunitario delle comunicazioni elettroniche*, 2002, Torino, 1 ff; Cambini, C., Ravazzi, P., Valletti, T., *Il mercato delle telecomunicazioni: dal monopolio alla liberalizzazione negli Stati Uniti e nella UE*, Bologna, 2003; Cassese, S., 'La liberalizzazione delle telecomunicazioni', in Bonelli, F., Cassese, S. (eds.), *La disciplina giuridica delle telecomunicazioni*, 1999, Milano, 53 ff; D'Alberti, M., *Poteri pubblici, mercati e globalizzazione*, Bologna, 2008, 56 ff; Radicati di Brozolo, L.G., *Il diritto comunitario delle telecomunicazioni: Un modello di liberalizzazione di un servizio pubblico*, Torino, 1999, 1 ff.; Radicati di Brozolo, L.G., 'L'azione comunitaria in materia di telecomunicazioni', *Diritto dell'UE*, 1996, 1(4) 1093-1118;

monopolies and to impose regulatory obligations on strong undertakings and to give rights to new entrants to correct asymmetric market conditions.[9]

Therefore the regulation was called 'asymmetrical regulation' and was based on an 'automatic and approximate criterion'. The method of this regulation did not take into consideration the specific circumstances of each individual case and did not consider whether or not there was actually pressing need for such regulation. Rather, regulators in member states applied a general rule that prevented *any* undertaking with 25 per cent of market share from abusing its dominant position in the market. The application of this rule was often contested by undertakings subject to it, on the basis that a 25 per cent market share did not necessarily mean that they could or would abuse their market position.[10]

So, in this phase national regulatory authorities (NRAs) in EU member countries had a pre-eminent role and intervened in the market to re-establish a level playing field, to encourage competition in the telecommunications sector. However, for present purposes, the important point to note is that by the end of the 1990s this regulatory approach had been the subject of a number of negative evaluations, most significantly, a report of the 1999 Commission Communications Review.[11] The main criticisms were that (1) there had been too much

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Radicati di Brozolo, L.G., 'Un primo confronto tra la liberalizzazione delle telecomunicazioni nel sistema del WTO e della Comunità europea', in SIDI, *Diritto e organizzazione del commercio internazionale dopo la creazione dell'Organizzazione Mondiale del Commercio*, Napoli, 1998, 231 ff; Rangone, N., 'Comunicazioni elettroniche', in Cassese, S. (ed.), *Dizionario di diritto pubblico*, Milano, 2006, 1101; Rangone, N., 'Le telecomunicazioni', in Cassese S. (ed.), *Trattato di diritto amministrativo: Diritto amministrativo speciale*, III, 2 ed., Milano, 2003, 2391 ff; Tizzano, A., 'L'azione comunitaria nelle telecomunicazioni: interventi recenti e prospettive future', *Diritto dell'informazione e dell'informatica*, 1998, 14(6) 917-932; Tosato, G.L., 'La liberalizzazione delle telecomunicazioni', in SIDI, *Diritto e organizzazione del commercio internazionale dopo la creazione dell'Organizzazione Mondiale del Commercio*, Napoli, 1998, 211 ff.

9. See Cassese, S., *La nuova costituzione economica*, Roma-Bari, 2004, 90; Cassese, S., 'Regolazione e concorrenza', in Tesauro, G., D'Alberti, M. (eds.), *Regolazione e concorrenza*, Bologna, 2000, 11 ff; Radicati Di Brozolo, L.G., 'Simmetria e asimmetria nel diritto comunitario delle telecomunicazioni', *Diritto dell'informazione e dell'informatica*, 1997, 13(3), 493 ff; Radicati di Brozolo, L.G., 'Il nuovo quadro delle comunicazioni elettroniche: Convergenza, concorrenza, regolazione asimmentrica', *Mercato, Concorrenza e Regole*, 2002, 4(3) 561 ff.
10. Bassan, F., *Concorrenza e regolazione nel diritto comunitario delle comunicazioni elettroniche*, Torino, 2002, 117 ff; Bonelli, F., Cassese, S. (eds.), *La disciplina giuridica delle telecomunicazioni*, Milano, 1999, 1 ff; Delli Priscoli, L., 'Asimmetrie e funzione delle Authorities nel processo di liberalizzazione delle Telecomunicazioni', in *Diritto dell'informazione e dell'informatica.*, 1998, 14(2), 493-503; Gambino, A., 'Dal monopolio alla liberalizzazione: regolazione normativa delle asimmetrie nel mercato delle telecomunicazioni', in *Scritti in onore di G. Minervini*, vol. II, Bari, 1996, 195 ff; Genovese, A., Fonderico, G., 'Concorrenza e regolazione asimmetrica nelle telecomunicazioni', in *Europa e diritto privato*, 1999, 45-136; Lupis Crisafi, E., 'La regolamentazione asimmetrica nel settore delle telecomunicazioni', *Rivista giuridica quadrimestrale dei pubblici servizi*, 2002, 33 ff; Noam, E., Pogorel, G. (eds.), *Asymmetric regulation: the dynamics of telecommunications policy in Europe and United States*, New York, 1994; Perrucci, A., Cimatoribus, M., 'Competition convergence and asymmetry in telecommunications regulation', *Telecommunications Policy*, 1997, 21(6) 493-512; Radicati Di Brozolo, L.G., 'Simmetria e asimmetria nel diritto comunitario delle telecomunicazioni', *Diritto dell'informazione e dell'informatica*, 1997, 13(3) 501-524; Sidak, G., Spulber, D.F., 'Deregulation and managed competition in network industries', *Yale Journal of Regulation*, 1998, 15(1) 117 ff.
11. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Towards a new framework for Electronic Communications infrastructure and associated services – hereafter 'The 1999 Communications Review' –, COM(1999)539 of 10.11.1999; Communication from the Commission to the Council, the European Parliament, the Economic and

regulation by NRAs and (2) that regulation was not homogenous across Europe. Ironically, the effect of the regulation was to discourage the development of competition.[12]

In response to these issues and also the emerging trends involving technological development of the various means of electronic communication, the EU set new objectives.[13] The desired focus of *economic* regulation was to, *inter alia*, promote technological and regulatory convergence, and regulatory harmonisation through a reliance on principles to be drawn from competition law.[14]

3. Phase 2 (2002-2009): Convergence[15] and Competition

Major regulatory reform of electronic communications in Europe occurred in 2002. The European Union adopted a number of important Directives[16] to establish a 'common European

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Social Committee and the Committee of Regions - Seventh Report on the Implementation of the Telecommunications Regulatory Package, COM(2001)706 final of 26.11.2001; OECD, 'The role of competition agencies in regulatory reform', in *Report on Regulatory Reform*, II, Thematic studies, 14 Paris, 1997; Commission Communication on the application of competition rules to agreements in the telecommunications sector — Framework, relevant markets and principles (98/C 265/02); Council Resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures, in *Official Journal of the European Union* C 379, of 31 December 1994, p. 4-5; 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, in *Official Journal of the European Union* C 213, of 6 August 1993 p. 1-3; Communication to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector, COM(1993)159 final of 28 April 1993; Review of the situation in the telecommunication services sector, SEC(1992)1048 final of 21.10.1992.

12. Monti, M., 'Concorrenza e regolazione nell'Unione Europea', in Tesauro, G., D'Alberti, M. (eds.), *Regolazione e concorrenza*, Bologna, 2000, 75-86; Radicati Di Brozolo, L.G., 'Simmetria e asimmetria nel diritto comunitario delle telecomunicazioni', *Diritto dell'informazione e dell'informatica*, (1997) 13(3) 493 ff.
13. Radicati di Brozolo, L.G., 'Il nuovo quadro delle comunicazioni elettroniche. Convergenza, concorrenza, regolazione asimmentrica', *Mercato, Concorrenza e Regole*, (2002) 4(3) 561 ff.
14. See the 1999 Communications Review; Green paper on the Convergence of Telecommunications, Media and the Information Technology Sectors, and the Implications for Regulation, COM (97) 623, 3 December 1997; Results of the Public Consultation on the Green Paper on Convergence of the Telecommunications, Media and Information Technology Sectors, IP / 99 / 164, Brussels, 10.3.1999; Presidency Conclusions, Lisbon European Council of 23 and 24 March 2000.
15. For a definition of the convergence of the electronic communications, see: *The Jones Telecommunications and Multimedia Encyclopedia*; *European Commission, Green Paper on the Convergence of Telecommunications. Media and Information Technology Sectors*, and Implications for Regulation, COM (97) 623, 3 December 1997; Pontarollo, E., 'L'Industria degli apparati e dei sistemi per le telecomunicazioni in Italia, Sviluppo del mercato tra presente e futuro' *Il Sole 24 Ore*, Milano, October 1998. For the convergence between fixed line and mobile phone, see Valli, A., 'Verso la convergenza tra telefonia fissa e telefonia mobile', paper presented at the conference *'Come cambia il mercato della telefonia mobile: tra opportunità di business, nuovi operatori, tecnologie'*, Roma, 12-13 November 1997.
16. The Regulatory Framework consists of: Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive); Directive

framework' for regulation based on competition law criteria. It also issued 'soft law', Guidelines and Recommendations which were connected to this legal reform.[17] One of the most important aims of this new framework was to verify the effectiveness of competition in electronic communications markets. The assumption was that in markets where there was insufficient competition, NRAs should impose measures – relating to matters such as transparency, non-discrimination, access and price controls – in order to promote increased competition.[18]

There were three main aspects of the reform, but the focus of the analysis will be on the last one. The first innovation was the clear recognition that the 'convergence of the Telecommunications, Media and Information Technology sectors' means that all transmission networks and services should be covered by a single regulatory framework.[19] Innovation that allows different services and technologies to be combined made this possible. In particular, digital technology led to the unification of different means of electronic communications and has allowed markets, which in the past were separated, to be governed by the same regulation.[20]

The second innovation is the 'clear separation, between the regulation of transmission[21] and the regulation of content'.[22] This framework does not therefore cover the content of services

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2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). The first Directive is referred to as 'the Framework Directive', the other ones to as 'the Specific Directives'.

17. Commission Recommendation n 311 of 11 February 2003 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 (hereafter the 'Commission Recommendation of 11 February 2003'). This recommendation has been replaced by the Commission Recommendation n 879 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 (hereafter the 'Commission Recommendation of 17 December 2007'); Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (hereafter the 'Commission guidelines of 11 July 2002').
18. Recital 27, Directive 2002/21/EC.
19. Recital 5, Directive 2002/21/EC.
20. Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for Regulation – Towards an information society approach - COM (97) 623, 3 December 1997.
    See Bassan, F., *Concorrenza e regolazione nel diritto comunitario delle comunicazioni elettroniche*, 2002, Torino, 117 ff; Cassese, S., 'Il concerto regolamentare europeo delle telecomunicazioni',*Giornale di diritto amministrativo*, 2002, 6, 689-691; D'Alberti, M., 'Comunicazioni elettroniche e concorrenza', in R. Perez (ed), *Il nuovo ordinamento delle comunicazioni elettroniche*, Milano, 2004, 39 ff; D'Alberti, M., 'Riforma della regolazione e sviluppo dei mercati in Italia', in D'Alberti, M., Tesauro, G. (eds.) *Regolazione e concorrenza*, Bologna, 2000, 171; Della Cananea, G., 'I problemi istituzionali nel nuovo ordinamento delle comunicazioni elettroniche', in Della Cananea, G. et al. (ed.) *Il nuovo governo delle comunicazioni elettroniche*, Torino, 2005, 13; Hocepied, C., 'The New EU Regulatory Framework for Electronic Communications: From Sector Specific Regulation to Competition Law', paper presented at *IBA/ABA Communications and Competition: Developments at the Crossroad*, Washington, DC, 20-21 May 2002; KPMG, *Public Policy Issues Arising From Telecommunications and Audiovisual Convergence*, Study for the European Commission, 1 September 1996, p 3; Lupis Crisafi, E., 'La regolamentazione asimmetrica nel settore delle telecomunicazioni', *Rivista giuridica quadrimestrale dei pubblici servizi*., 2002, 33 ff; Perez, R. (ed.), *Il nuovo ordinamento delle comunicazioni elettroniche*, 2004, Milano, 1 ff.
21. Article 2 of Directive 2002/21/EC, Definitions:

delivered over electronic communications networks which are subject to other rules at EU level.[23]

In the regulation of 2002, however, the most important, third, change was the 'convergence between regulation and competition law'.[24] Underlying this aspect of the reform is a fundamental change in the focus of regulatory technique. Under the new approach, regulatory authorities intervene only when a problem of market dominance or other forms of market failure have been identified.[25]

However, the new methodology for the imposition of obligations under the 2002 regulation is not simple and the procedure encompasses a number of legal phases involving national authorities and European institutions that engage with stakeholders.[26]

First, it is necessary for the European Commission to identify and define relevant markets within the electronic communications sector.[27] Second, relevant markets appropriate to national

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a) 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

c) 'electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but 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.

22. Council Directive 89/552/EEC of 3 October 1989.
23. Recital 5 of Directive 2002/21/EC.
    See Ulbrich, M., Verrue, R., 'Il nuovo quadro normativo', *L'industria*, no. 3/2001, 279.
24. Recitals 25-28 of Directive 2002/21/EC; recitals 3 and 24-32, of Commission guidelines of 11 July 2002;
    see Libertini, M., 'Regolazione e concorrenza nel settore delle comunicazioni elettroniche', *Giornale di diritto amministrativo*, 2005, 195 ff; Libertini, M., 'Una disciplina antitrust speciale per le comunicazioni elettroniche', *Contratto e impresa/Europa*, no. 2, 2002, 910 ff; Tesauro, G., D'Alberti, M., *Regolazione e concorrenza*, Bologna, II, 2000, 1ff.
25. Paragraphs 5 and 24 of Commission guidelines of 11 July 2002; recital 27 of Directive 2002/21/EC;
    see Radicati di Brozolo, L.G., 'Il nuovo quadro delle comunicazioni elettroniche', *Mercato, concorrenza e regole*, 2002, 4(3) 561 ff; Perez, R. (ed), *Il nuovo ordinamento delle comunicazioni elettroniche*, Milano, 2004.
26. Articles 15 and 16 of Framework Directive; paragraph 34 of Commission guidelines of 11 July 2002.
27. Commission Recommendation n 311 of 11 February 2003 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; Commission Recommendation n 879 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.
    See Areeda, P., Turner, D., *Antitrust Law*, 1978; Pitofsky, R., 'New definition of relevant market and the assault on antitrust', *Columbia Law Review*, 1990, 1805 ff; Bassan, F., *Concorrenza e regolazione nel diritto comunitario delle comunicazioni elettroniche*, Torino, 2002; Briones, J., 'Market Definition in Community's Merger Control Policy', *European Competition Law Review*, 1994, 195; Landes-Posner, 'Market power in antitrust cases', *Harvard Law Review*, 1981, 937 ff; Siragusa, M., D'Ostuni. Marini Balestra, F., 'I mercati rilevanti dei prodotti e servizi e la regolazione ex ante', in Bassan, F. (ed.), *Diritto delle comunicazioni elettroniche -Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, 2010, Milano, 2010,

circumstances must be defined by NRAs. In particular, relevant geographical markets within a national territory must be identified.[28] Finally, NRAs must carry out an analysis of relevant product and service markets to evaluate whether there is effective competition to decide if it is really necessary to impose obligations on undertakings.[29]

Each part of the methodology is undertaken on the basis of principles drawn from European competition law. It is also important to note that the method of the 2002 framework is specific because it is based on *technical* elements. First, the procedure for the identification and definition of markets, which is based on three criteria:[30]

- The first criterion is the presence of high and non-transitory barriers to entry. These may be of a structural[31], legal or regulatory nature[32].
- The second criterion is an evaluation of the ability of the market itself to eliminate entry barriers. In other words, the European Union will only consider intervening in those markets whose structure does not allow the development of effective competition within the relevant time period. Technological innovation is very important here.[33]
- The third criterion is to consider the efficiency and adequacy of competition law to correct market failures. In other words the decision that market conditions justify *ex ante* regulation should also depend on an assessment of how effective competition law has been in reducing or removing barriers or in restoring effective competition.[34]

The second technical element associated with the 2002 Regulation is included within the analysis of whether it is necessary to impose specific regulatory obligations on undertakings. The fundamental condition for imposing regulatory obligations is the absence of effective competition.[35] This question is assessed through an analysis of: (a) whether there are one or more undertakings in a market that have what is referred to as 'significant market power' (SMP); (b)

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169 ff; Werden, T., 'The history of antitrust market delineation', *US Department of Justice, Economic analysis Discussion Paper*, 1992, p. 92. Korah,, V., *Competition Law of European Community*, New York, 2000; Id., *An introductory guide to EC Competition Law and practice*, 2004, 95; Van Bael & Bellis, *Competition Law of the European Community*, Brussels, 2010, 117 ff; Whish, R., *Competition Law*, Oxford, 2005, 23.

28. See the paragraph 3, Article 15 of Directive 2002/21/CE.
29. See the Article 16, Commission guidelines of 11 July 2002; for this purpose Commission guidelines of 11 July 2002 intend to ensure that the NRAs follow a consistent approach in applying the regulatory framework, and especially when designating undertakings with SMP. In particular, their objective is to explain how NRAs should undertake the assessment of SMP.
30. Paragraphs 5-14, 17 and 18 of Commission Recommendation of 17 December 2007; Paragraphs 9-16, of Commission Recommendation of 11 February 2003.
31. *E.g.* when the provision of service requires a network component that cannot be technically duplicated or could be only at a cost that makes it uneconomic for competitors, especially for new comers.
32. These are from legislative or administrative or other state measures.
see D'Alberti, M., *Poteri pubblici, mercati e globalizzazione*, Bologna, 2008, 59 ff.
33. Paragraphs 11-12 of Commission Recommendation of 17 December 2007.
34. Paragraph 13 of Commission Recommendation of 17 December 2007.
35. As underlined in the recital no. 27 of the Framework Directive and Commission guidelines of 11 July 2002, the regulatory obligations should only be imposed on those electronic communications markets whose characteristics may be such as to justify sector-specific regulation. In particular, on those markets in which there are one or more undertakings having SMP. Finally *ex ante* regulatory obligations should only be imposed where there is not effective competition; paragraph 18 of Commission Recommendation of 17 December 2007; paragraphs 16 and 17 of Commission guidelines of 11 July 2002.

whether national and Community competition law remedies are not sufficient to address the problem.

It is now necessary to briefly consider the idea of SMP as it is a fundamental concept in the justification of the imposition of specific regulatory obligations. The concept of SMP is important for understanding the different approaches taken by competition law and regulation.[36]

The concept of significant market power is set out in great detail in the regulatory framework of 2002. It is introduced and described briefly in Article 14, paragraph 2 of the Framework Directive and elaborated in more detail in Section 3 Commission guidelines of 11 July 2002: 'an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors customers and ultimately consumers'. As is apparent, the Commission in effect equates the concept of SMP with that of dominance. This definition is equivalent to the concept of dominant position in competition law; a concept that is defined in the law case jurisprudence of the Court of Justice and the Court of First Instance (since 2009 known as the General Court) of the European Community.[37]

The result is that, in applying the definition of SMP, NRAs must ensure that their decisions are in accordance with the Commission's practice and the relevant competition law jurisprudence of the Court of Justice and the General Court on dominance.[38] Under the

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36. Paragraphs 24 ff of Commission guidelines of 11 July 2002.
37. See case C-333/94 P, Judgment of the Court (Fifth Chamber) of 14 November 1996, - *Tetra Pak International SA v Commission of the European Communities,* - Appeal - *Competition - Dominant position - Definition of the product markets - Application of Article 86 of the Treaty to practices carried out by a dominant undertaking on a market distinct from the dominated market*, in *European Court reports* 1996, p.I-05951; case T-83/91, Judgment of the Court of First Instance (Second Chamber) of 6 October 1994. - *Tetra Pak International SA v Commission of the European Communities. - Competition - Dominant position - Definition of the product markets - Geographical market - Application of Article 86 to practices carried out by a dominant undertaking on a market which is distinct from the dominated market – Abuse*., in *European Court reports* 1994, p.II-00755; case 27/76, Judgment of the Court of 14 February 1978 - *United Brands Company and United Brands Continentaal BV v Commission of the European Communities - Chiquita Bananas,* in *European Court reports* 1978, p. 00207; case C 85/76, Judgment of the Court of 13 February 1979. - *Hoffmann-La Roche & Co. AG v Commission of the European Communities. - Dominant position*, in *European Court reports* 1979, p.00461; case 6-72, Judgment of the Court of 21 February 1973. - *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, in *European Court reports* 1973, p. 00215 (para 32); case 62/86, Judgment of the Court (Fifth Chamber) of 3 July 1991. - *AKZO Chemie BV v Commission of the European Communities. - Article 86 - Eliminatory practices of a dominant undertaking* – in *European Court reports* 1991, p. I-03359; case 322/81, Judgment of the Court of 9 November 1983 - *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities. - Abuse of a dominant position - Discounts on tyre purchases*, in *European Court reports* 1983, p. 03461.
38. Article 14, paragraph 2, and recitals 25-28 of the framework Directive; paragraphs 24, 70-106 of Commission guidelines of 11 July 2002.
    See: 94/119/EC: Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the port of Rødby (Denmark), in *Official Journal of the European Union* L 055 of 26 February 1994, 52-57; 94/19/EC: Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - Sea Containers v. Stena Sealink - Interim measures) in *Official Journal of the European Union* L 015 of 18 January 1994 p. 0008 – 0019; Commission Decision of 21

regulatory framework, SMP will be assessed using the same methodologies as under competition law. But the application of SMP on the basis of a forward looking – that is, an *ex ante* – approach, requires certain methodological adjustments to be made regarding the way market power is assessed. In other words, when examining the question of market dominance, NRAs rely on assumptions and expectations other than those relied upon by competition authorities (Article 82 EC Treaty).[39]

Regulators do not examine dominance in the context of an alleged committed abuse, but undertake a forward-looking (*ex ante*) analysis to decide whether an undertaking exercises SMP. In contrast, analyses of markets according to competition law principles (Articles 81 and 82 EC Treaty) proceed on an *ex post* basis. An important focus of competition law is the control of anticompetitive practices associated with monopolies and cartels. In such cases, the analysis will consider events that have already taken place in the market.[40]

On the other hand, relevant markets defined for the purposes of sector-specific regulation will always be assessed on a forward-looking basis, as the NRAs will include in its analysis an assessment of the future development of the market. The starting point for carrying out a market analysis for the purpose of the framework (Article 15 of the Framework Directive) is not the existence of a type of anticompetitive conduct within the scope of the competition law provisions

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December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851 - Magill TV Guide/ITP, BBC and RTE**),** in *Official Journal of the European Union* L 78 of 21 March 1989, 43-51.

39. Paragraphs 24-32 and 70 ff of Commission guidelines of 11 July 2002.
See Bassan, F., *Concorrenza e regolazione nel diritto comunitario delle comunicazioni elettroniche*, Torino, 2002, 42 ff; D'Alberti, M., *Poteri pubblici, mercati e globalizzazione*, Bologna, 2008, 59 ff; Rizza, C., 'La posizione dominante collettiva nella giurisprudenza comunitaria', *Concorrenza e mercato*, 2000, 508-563; Tesauro, C., 'Crisi dell'impresa e posizione dominante collettiva nella disciplina delle concentrazioni', *Foro italiano*, 1999, sezione IV, c., 184 ff.; Korah, V., 'Gencor v Commission: collective dominance', *European Competition Law Review*, 1999, 337 ff.; Arnuli, A., 'Collective dominance: trump card or joker?', *European Law Review*, 1998, 199-200; Gugler, P., 'Principaux indicateurs de dominance collective dans le cadre du controle préventif des concentrations', *Revue de droit des affaires internationales*, 1998, 919 ff; Noel, P., 'La théorie de l'entreprise en difficulté et la notion de position dominante collective en matière de controle communautaire des concentrations', *Revue de droit des affaires internationales*., 1998, 893 ff; Venit, J., 'Two steps forward and no step back: economic analysis and oligopolistic dominance after Kali & Salz', *Common Market Law Review*, 1998, 1101-1134; Ysewyn, J., Cafarra, C., 'Two's companies, three's a crowd: the future of collective dominance after the Kali & Salz judgement', *European Competition Law Review*, 1998, p. 468 ff; Briones, J., 'Oligopolistic dominance: is there a common approach in different jurisdictions? A review of decisions adopted by the Commission under the merger regulation', *European Competition Law Review*, 1995, 334 ff; Soames, T., 'An analysis of the principles of concerted practice and collective dominance: a distinction without a difference?', *European Competition Law Review*, 1996, 24 ff; Rodger, B., 'Oligopolistic market failure: collective dominance versus complex monopoly', *European Competition Law Review* 1995, 21 ff; Winckler, A., Hansen, M., 'Collective dominance under the EC merger control regulation', *European Competition Law Review*, 1993, 787 ff.

40 Briones, J., 'Market definition in Community's merger control policy', *European Competition Law Review*, 1994, 195; Cassese, S., 'Regolazione e concorrenza', in G. Tesauro and M. D'Alberti (eds.), *Regolazione e Concorrenza*, Bologna, 2000, 11 ff; D'Alberti, M., 'La «rete europea della concorrenza» e la costruzione del diritto antitrust', in E.A. Raffaelli (ed.), *VI Convegno «Antitrust fra diritto nazionale e comunitario»*, Bruxelles-Milano, 2005, 35; D'Alberti, M., 'Comunicazioni elettroniche e concorrenza', in R. Perez (ed), *Il nuovo ordinamento delle comunicazioni elettroniche*, Milano, 2004, 39 ff; D'Alberti, M., 'Intervento introduttivo: Parsimonia regolatoria e potenziamento della concorrenza', *Industria*, 2001, 2 ff.

of EC Treaty, but is based on an overall forward-looking assessment of the structure and the functioning of the market under examination.[41]

As a result, *ex ante* obligations imposed by NRAs on undertakings with SMP aim to fulfil the specific objectives set out in the relevant directives,[42] whereas competition law remedies aim to sanction agreements or abusive behaviour which restrict or distort competition in the relevant market.

It is now possible to describe the change in regulatory technique post-2002 more clearly. Although NRAs are always engaged in the imposition of *ex ante* regulatory obligations, prior to 2002 this was justified by reference to approximate, automatic and general rules; under the 1998 regulatory Directives market areas were not defined in accordance with the principles of competition law. NRAs had the power to designate undertakings as having SMP when they possessed 25 per cent market share without any further analysis being required.[43] In contrast, after 2002 competition law principles have been used to undertake a detailed analysis of the need for specific regulatory obligations. Although this analysis has a different temporal orientation, there has been a substantive convergence in the principles applied by regulators and the principles that underpin competition law.[44]

Phase two of the story of European regulation of electronic communications is an example, then, of how the EU has taken a partial step back from strong, onerous and automatic

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41. Paragraph 35 Commission guidelines of 11 July 2002.
42. - Access and interconnection measures, Directive 2002/19/EC (Access Directive): article 9 as amended by Directive 2009/140/EC (*Obligation of transparency*); article 10 (*Obligation of non-discrimination*); article 11 Directive 2002/19/EC. (*Obligation of accounting separation*); article 12 as amended by Directive 2009/140/EC (*Obligations of access to, and use of, specific network facilities*); article13 as amended by Directive 2009/140/EC (*Functional separation*);
    see Caiazzo, R., 'L'accesso alle reti. Profili giuridici', in Bassan, F. (ed.), *Diritto delle comunicazioni elettroniche -Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 143 ff; Siragusa, M., D'Ostuni, M., Marini Balestra, F., 'I mercati dei prodotti e dei servizi rilevanti e la regolazione ex ante', in F. Bassan (ed.), *Diritto delle comunicazioni elettroniche - Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 175-176;
    - Universal service obligations: 15 Directive 2002/22/EC (*Universal service obligations including social obligations*).
    See Amendola, G., 'La determinazione delle obbligazioni sostanziali per gli operatori rilevanti', in R. Perez (ed), *Il nuovo ordinamento delle comunicazioni elettroniche*, Milano, 2004, 73 ff; Donati, F., *L'ordinamento amministrativo delle comunicazioni*, Torino; 2007, 164 ff; Lattanzi, F., Cantella, F., 'Il servizio universale', in Bassan, F. (ed.), *Diritto delle comunicazioni elettroniche -Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 109 ff; Caggiano, G., *La disciplina dei servizi di interesse economico generale. Contributo allo studio del modello sociale europeo*, Torino, 2008; Radicati di Brozolo, L., *Servizi essenziali e diritto comunitario*, Torino, 1999; Lattanzi. F., Cantella, F., 'Il servizio universale', in Bassan, F. (ed.), *Diritto delle comunicazioni elettroniche -Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 109 ff.
43. Paragraph 3 of Commission guidelines of 11 July 2002.
44. Case C-62/86, AKZO v Commission, Judgment of the Court (Fifth Chamber) of 3 July 1991. - *AKZO Chemie BV v Commission of the European Communities. - article 86 - Eliminatory practices of a dominant undertaking*, in *European Court reports* 1991, p. I-*03359*, paragraph 60; case T-228/97**,** Judgment of the Court of First Instance (Third Chamber) of 7 October 1999. - *Irish Sugar plc v Commission of the European Communities. - Article 86 of the EC Treaty (now Article 82 EC) - Dominant position and joint dominant position – Abuse*. *Fines.*, in *European Court reports* 1999, p. II-02969 (paragraph 70); case *Hoffmann-La Roche v Commission*, paragraph 41.

regulation, and has preferred regulatory solutions which are more consistent with a liberalised economy. Clearly the underlying policy is to eventually replace market specific regulation with competition law.[45] The challenge, however, remains to ensure coherent and proportionate regulation, given the complexities of the methodology for determining just when *ex ante* regulation is appropriate. Further, the need to ensure consistency in the approach of national regulators across Europe remains a concern.

4. Phase 3 (2009 and beyond): Fine-tuning and Harmonisation

From 2002 to 2009 the regulation of electronic communications developed in a non-uniform manner across the Member States. The main obstacles to uniform development were (1) persistent regulatory fragmentation, (2) the lack of unitary definitions in applying the rules, and (3) the different approaches to implementation taken by the NRAs. Furthermore, the implementation of the EU regulatory framework was insufficient in the Member States in large part because national authorities lacked effective powers in the event of non-compliance with regulatory obligations.[46] This produced uncertainty, had negative effects on the evolution of the internal-single market and jeopardised the competitiveness of the sector.[47] These problems were highlighted by the European Commission in its *Communication* of 29 June 2006.[48]

It became increasingly clear that the reliance on competition law principles had not been sufficient to achieve the main objective of European policy – namely, a higher level of regulatory harmonisation.[49] Consequently, the European Parliament and the Council introduced amendments to the EU Regulatory Framework of 2002. These are contained in the 2009 Reform of the Electronic Communications Framework, the 'Third package of reform'. This package

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45. Cambini, P., Valletti, T., 'Concorrenza senza regolazione? Non ancora, grazie', *Mercato Concorrenza e regole*, 2003, 385 ff; Radicati di Brozolo, L.G., 'Il nuovo quadro delle comunicazioni elettroniche. Convergenza, concorrenza, regolazione asimmentrica', *Mercato, Concorrenza e Regole*, 2002, 4(3), 561 ff.
46. Therefore the third reform has introduced significant changes for an effective and adequate penalties system. In particular, the conferment of the enforcement powers to the national authorities: article 21*bis* Directive 2002/21/EC; article 10 Directives 2002/20/EC as amended by Directive 2009/140/EC.
See Bassan, F., 'Dalle telecomunicazioni alle comunicazioni elettroniche: motivi e percorsi di una riforma permanente', in Bassan, F. (ed.), *Diritto delle comunicazioni elettroniche - Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 20-22.
47. Bassan, F., 'Dalle telecomunicazioni alle comunicazioni elettroniche: motivi e percorsi di una riforma permanente', in Bassan, F. (ed.), *Diritto delle comunicazioni elettroniche - Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 11 ff.
48. Communication from the Commission of 29 June 2006 on the Review of the EU Regulatory framework for electronic communications networks and services- COM(2006)334 final; see recital 2 Directive 2009/140/EC.
See De Minico, G., 'The 2002 EC Directives on Telecommunications: Regime up to the 2008 ongoing revision – Have the goals been reached?', *European Business Law Review*, 2008, 657 ff.
49. Recital no. 2 Directive 2009/140/EC; De Minico, G., 'The 2002 EC Directives on Telecommunications: Regime up to the 2008 ongoing revision: Have the goals been reached?', *European Business Law Review*, 2008, 657 ff.

consists of a regulation to establish a new European body,[50] two directives to amend the current directives,[51] and a recommendation to regulate the access to the next generation network (NGN).[52]

In substance, the reform adopts existing regulatory objectives of the 2002 framework.[53] There is the same logic: the aim is to progressively reduce *ex ante* sector-specific rules as competition develops and, ultimately, for electronic communications to be governed by competition law only. Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that *ex ante* regulatory obligations only be imposed where there is no effective and sustainable competition or where there are clearly defined public policy objectives.[54] In this sense, the reforms can be thought of as an effort to fine-tune the system. For example, technical adjustments to simplify the procedure for the identification and definition of markets have been made;[55] the penalty system has been modified in a way that should ensure the timely implementation of the regulatory framework;[56] and new challenges such as the NGN and the improvement of the current system of spectrum management for electronic communication need to be addressed.[57] It is also notable that the reforms have refocused attention on social obligations, which involves an implicit

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50. 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; Commission Decision of 21 May 2010 repealing Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services.
    See Bassan, F., 'L'evoluzione della struttura istituzionale nelle comunicazioni elettroniche: una rete non ha bisogno di un centro', in Bassan, F. (ed.), *Diritto delle comunicazioni elettroniche - Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 42.
51. 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; 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.
52. Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA).
53. Recital 25, Directive 2002/21/EC; article 8 and recitals 4, 5, 26, 40 of Directive 2002/22/EC.
54. Recitals 5 Directive 2009/140/EC.
    Recital 1 Commission Recommendation n 879 of 17 December 2007; recital 13 Directive 2002/19/EC; recitals 25-27 Directive 2002/21/EC; recitals 51 and 72 of Directive 2009/140/CE.
55. Articles 14, 15 and 16 of Directive 2002/21/EC as amended by Directive 2009/140/EC.
56. Article 21*bis* of Directive 2002/21/EC, article 10, paragraphs 2 and 3 of Directive 2002/20/EC, article 9 of Directive 2002/19/EC.
    See Bassan, F., 'Dalle telecomunicazioni alle comunicazioni elettroniche: motivi e percorsi di una riforma permanente', in Bassan, F. (ed.), *Diritto delle comunicazioni elettroniche -Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 20-22.
57. Recitals 3, 24-40, 67-71 of Directive 2009/140/EC; articles 8*bis*, 9, 9b*is* and 9*ter* of Directive 2002/21/EC.
    See Caggiano, G., 'La riforma del regime delle radiofrequenze nel quadro delle comunicazioni elettroniche', in Bassan F. (ed.) *Diritto delle comunicazioni elettroniche -Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 202 ff; Zeno-Zencovich, V., 'Le frequenze elettromagnetiche fra diritto ed economia', *Diritto dell'Informazione e dell'Informatica*, 2002, 713 ff.

acknowledgment that the complete replacement of *ex ante* regulation with competition law is an unlikely development.[58]

However, the Reform does involve one change of potential general significance: the establishment by the European Parliament and the Council of the Body of European Regulators for Electronic Communications (BEREC).[59] Originally, the European legislator proposed establishing the European Electronic Communications Market(s) Authority as a consultative body for the European Commission, with legal personality and binding regulatory powers. But this idea has not been approved by the Member States. The main reason it was rejected is a fear of conferring determinative power on fundamental matters to a supranational institution. Nevertheless, despite BEREC lacking determinative powers, the compromise solution may play an important role in harmonising the activities of the NRAs by aiming to ensure a consistent application of the EU regulatory framework. Furthermore, BEREC was set up to provide a suitable mechanism for encouraging cooperation and coordination between NRAs, and between NRAs and the Commission.[60] It remains to be seen just how effective BEREC is in promoting harmonisation of regulation in Europe. How this objective can be balanced against different national priorities will continue to be a problem, particularly given the BEREC's lack of determinative power.

4. Concluding Reflections

The European Commission stated in 2006: 'Creating a single European information space with an open and competitive internal market is one of the key challenges for Europe within the broader strategy for growth and jobs. Electronic communications underpin the whole of the economy, and at EU level is supported by a regulatory framework that entered into force in 2002. The aims of the framework are to promote competition, consolidate the internal market for electronic communications and benefit consumers and users'.[61]

Although I have focused on the 'economic' regulation in this paper, the framework seeks to protect the consumer by laying down legal obligations in the areas of privacy and data protection, universal service and user rights. As I have explained, however, the focus of the regulatory framework introduced in 2002 was to reduce the role of regulators in imposing

58. Directive 2002/22/EC, Directive 2002/58/EC as amended by Directive 2009/136/EC.
59. Bassan, F., 'L'evoluzione della struttura istituzionale nelle comunicazioni elettrniche: una rete non ha bisogno di un centro', in Bassan, F. (ed.), *Diritto delle comunicazioni elettroniche - Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 42.
60. Article 1, no. 3 and no. 4, Regulation (EC) no. 1211/2009.
For an historical analysis see Bassan, F., 'L'evoluzione della struttura istituzionale nelle comunicazioni elettroniche: una rete non ha bisogno di un centro', in Bassan F. (ed), *Diritto delle comunicazioni elettroniche - Telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, 2010, 42-49.
61. Communication from the Commission of 29 June 2006 on the Review of the EU Regulatory framework for electronic communications networks and services COM(2006) 334 final; see recital 2, Directive 2009/140/EC.

specific rules and obligations by increasing the role of competition law principles as the market developed. However, markets have not become perfectly competitive and the recent round of reforms in 2009 has demonstrated that national regulators will continue to play an important role. Regulation of electronic communications markets and competition law are likely to continue to exist side by side. This is especially so given the renewed focus of regulation in dealing with the provision of social services.

Another lesson, in my view, of the European experience is that effective regulation needs to respond to technological innovation. An integrated regulatory approach has developed in Europe in response to technological convergence and this element of the recent experience can be judged to be a qualified success. The law continues to struggle with the problem of harmonisation. The application of competition law principles has not by itself been an adequate response; and it remains to be seen how successful BEREC will be and whether a body with stronger powers may need to be created.

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