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Book Review: Telecommunication Laws in Europe

Sophie Stalla-Bourdillon

University of Southampton Law School
S.Stalla-Bourdillon@soton.ac.uk

While Neelie Kroes, Vice-President of the European Commission responsible for the Digital Agenda, has recently promised “to spend the next 12 months building a bridge with [the European Parliament] to our citizens”¹ in order to deliver the new Telecom Package around Easter 2014, Joachim Scherer et al have just published a timely update of their previous edition Telecommunication laws in Europe. Given the speed at which the digital economy evolves and the necessity for law-makers to keep pace with this evolution (the 2009 Telecom Package was meant to be transposed at domestic level by the end of May 2011), it is crucial to draw as quickly as possible the lessons from both the successes and failures of the adoption and implementation of previous regulatory strategies.

The objective of this book, as described by the editor, is to “provide an overview of both the emerging pan-European legislative framework for electronic communications and its application at national level in the 27 EU Member States and seven non-EU Member States, including one acceding and several candidate countries”². It is thus divided into four parts: the first part is dedicated to telecommunication law and policy in the European Union; the second part looks at the international regulatory framework and examines the laws of the International Telecommunication Union and the World Trade Organisation including a chapter on compliance and risk management covering anti-bribery and corruption rules; the third part, the most extensive, contains 27 chapters, one per Member States; and the fourth part covers telecommunication laws in 7 non-EU Member States (Croatia³, Macedonia, Norway, Russia, Switzerland, Turkey and Ukraine).

All in all, the objective has been met. The first part of the book describes in a comprehensive manner the EU “patchy”⁴ regulatory framework comprising the Framework Directive⁵, the Authorisation Directive⁶, the Access Directive⁷ and the Universal Service Directive⁸ as amended by the Better

¹ Neelie Kroes, The politics of the completing the telecoms single market, 30 May 2013., at http://europa.eu/rapid/press-release_SPEECH-13-484_en.htm, accessed 09.07.2013.

² Joachim Scherer, Preface to Telecommunication Laws in Europe, ed. by Joachim Scherer, Bloomsbury Professional, West Sussex, 2013, p. vii.

³ Which is now the 28th Member State since Monday 1 July 2013.

⁴ Term used by Neelie Kroes in her foreward to Telecommunication Laws in Europe, ed. by Joachim Scherer, Bloomsbury Professional, West Sussex, 2013, p. vi.

⁵ 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 [2002] OJ L108/33.

⁶ 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 [2002] OJ L108/21.

Regulation Directive⁹ and the Citizens' Rights Directive¹⁰. Soft laws are obviously also mentioned, complementing in a number of different ways hard laws with a view of responding more appropriately and more quickly to new emerging regulatory needs. The EU regulatory framework is, in a second part, placed within a broader picture, making necessary the analysis of the laws of the International Telecommunication Union and the World Trade Organisation (essentially the GATS), in particular if one wants to fully grasp the regulatory challenges posed by the governance of the Internet and the significance of the World Conference on International Telecommunications of 2012. Who between the WTO and the ITU "has the ultimate economic governance of international telecommunications"¹¹ is still discussed.

Although the content is thus principally descriptive, the various authors manage to highlight the interpretative challenges that are on-going (e.g. the exact remit of electronic communications which strictly speaking are only one dimension of the information society) and on occasion assess in hindsight the effectiveness of the regulatory strategies adopted in 2009 (in particular the implications of the move from an *ex ante* regulatory strategy to an *ex post* regulatory strategy relying mainly on competition law simultaneously to a progressive departure from a "state-centric" approach as regards remedies to be enforced by national regulatory agencies). While improvements are noticeable in comparison with the 2002 Package, e.g. the welcome alignment with competition law concepts¹² in order to facilitate the substitution of sector-specific legislation with competition law¹³, the appraisal of the EU regulatory framework remains critical. In the words of Joachim Scherer:

*"The 2009 Regulatory Package has still not fully achieved the objective of simplifying and consolidating the European regulatory framework: the Framework Directive and the specific Directives continue to be characterised by a multitude of cross-references and contain numerous provisions allowing for the adoption of guidelines, Recommendations and Decisions, which have developed into a 'regulatory jungle' comparable to the previous regulatory framework"*¹⁴.

The same author also insists upon the fact that divergences do persist between and among Member states at the stage of implementation¹⁵.

⁷ 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 [2002] OJ L108/7.

⁸ 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 [2002] OJ L108/51.

⁹ 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 [2009] OJ L337/37.

¹⁰ 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 [2009] OJ L337/11.

¹¹ Luff, 'Telecommunications and Audio-visual Services: Consideration for a Convergence Policy at the World Trade Organisation' (2004) 38(6) Journal of World Trade 1059-1086, at 1063, cited in Joachim Scherer and Serge Pannatier, *The Law of the ITU and WTO in Telecommunication Laws in Europe*, ed. by Joachim Scherer, Bloomsbury Professional, West Sussex, 2013, p. 183.

¹² See in particular the new definition "significant market power", which is more flexible. Article 14(2) of the Framework Directive.

¹³ Keith Jones nevertheless shows that some tensions remain between the regulatory framework and traditional competition law in particular as regards the definition of relevant market. The inclusion of a list of "recommended markets" may have the effect of undermining the flexibility of the standard to be found in competition law. Keith Jones, *EU Competition Law in the Telecommunications Sector*, in *Telecommunication Laws in Europe*, ed. by Joachim Scherer, Bloomsbury Professional, West Sussex, 2013, p. 116.

¹⁴ Joachim Scherer, *Electronic Communication Law and Policy of the European Union*, in *Telecommunication Laws in Europe*, ed. by Joachim Scherer, Bloomsbury Professional, West Sussex, 2013, p. 19.

¹⁵ *Ibid*, p. 19.

Some important suggestions that should be heard by policy makers are put forward throughout the whole book, such as for example the necessity to tackle in a consistent manner complex services that combine elements of electronic communications and content services¹⁶.

With this said, but this could certainly be explained by the precise objective of the book which is above all descriptive, the authors being careful not to express their views tend to take a back seat on hotly debated issues. It is therefore sometimes challenging for the reader to fully gauge the quality of the legal framework under examination. Yet, telecommunication law is full of hotly debated issues such as the implications of the amendment to Article 8(1) of the Framework Directive (the Internet Freedom Provision)¹⁷, the appropriateness of the framework for securing net neutrality¹⁸, the importance of obligations to notify data breaches¹⁹ of which the generalisation lies at the core of the proposed General Data Protection Regulation²⁰ and more generally the legality of the Data retention Directive²¹. And these are only a few of them.

In the end, the real added-value of the book lies in the comparative analysis that follows the description of the EU and International regulatory frameworks in as much as it allows the reader to rapidly confront domestic laws between themselves in the light of the benchmark set at the EU level and eventually at the international level. Each chapter dealing with national law is organised in the same way and thereby uses identical headings. First the legal structure is described. Then comes an analysis of substantive law beginning with the regulatory principles derived from the Framework Directive, the regulation of market entry derived from the Authorisation Directive, the regulation of network access and interconnection derived from the Access Directive, the regulation of Universal Services and Users' Rights derived from the Universal Service Directive, and finally data protection law mainly derived from the e-privacy Directive. Each time, the reader is thus presented with all the pieces of the national regulatory jigsaw, which are subsequently commented upon in a linear manner.

Although it is regrettable that not all regulatory sub-fields are covered with the same amount of details (the part dedicated to data protection law is very often the "slimmest"), the authors endeavour to show when and where the domestic rules go beyond or set back from the yardstick set at the European level. This is how the reader learns for example that the French legislator has several times been reluctant to adopt the exact wording of the EU legislator, (e.g. as regards the definition of "electronic communications network" and "electronic communications services"²² but also and maybe more problematically as regards the definition of "traffic data"²³). By comparison the UK legislator has generally speaking tried to stick as much as possible to the exact wording of the directives to make sure only what was strictly required by the EU legislator was to be transposed²⁴. Nevertheless, it is interesting to note that the UK definition of an electronic communications network does include private networks²⁵, which would mean that the scope of the UK regulatory framework (*rationae personae*) would ultimately be wider than that of the EU regulatory framework.

Not all authors are always optimistic with regard to the role of national regulatory agencies and their enforcement power. In this line it is worth mentioning that although from 2011 the UK national regulatory agency (Ofcom) "has the power to impose a General Condition imposing certain minimum requirements regarding the quality of public electronic communications networks to 'prevent the

¹⁶ Ibid, p. 26

¹⁷ Ibid, p. 28

¹⁸ Ibid, p. 94 and ff.

¹⁹ Holger Lutz and Caroline Heinickel, Data Protection and Privacy, in *Telecommunication Laws in Europe*, ed. by Joachim Scherer, Bloomsbury Professional, West Sussex, 2013, pp. 127-128.

²⁰ Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM(2012) 11 final.

²¹ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54. See Holger Lutz and Caroline Heinickel, Data Protection and Privacy, in *Telecommunication Laws in Europe*, ed. by Joachim Scherer, Bloomsbury Professional, West Sussex, 2013, pp. 137-138.

²² Christian Blomet & Magalie Dansac, The French Market for Electronic Communications in *Telecommunication Laws in Europe*, ed. by Joachim Scherer, Bloomsbury Professional, West Sussex, 2013, p. 427.

²³ Ibid, p. 465.

²⁴ Peter Strivens et al, The UK Market for Electronic Communications, *Telecommunication Laws in Europe*, ed. by Joachim Scherer, Bloomsbury Professional, West Sussex, 2013, p. 947.

²⁵ Ibid, p. 947.

degradation of service and the hindering or slowing down of traffic over networks”²⁶, the authors of the UK chapter opine that “it appears unlikely that Ofcom will introduce such a General condition in the near future”²⁷. In contrast, the authors of the French chapter seem to be more hopeful given that the French regulatory agency (ARCEP) has decided to actively monitor the quality of Internet access services²⁸.

To conclude, even if the authors of this voluminous book cannot always deal with all the particulars of the issues at stake and further research is necessary to fully grasp the ambiguities of the rules to be applied in context, it is certainly an important contribution for a better understanding of the challenges related to both liberalisation of markets for electronic communications and harmonisation, if not uniformisation, of regulatory practices in the field.

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²⁶ Ibid, p. 977.

²⁷ Ibid, p. 977.

²⁸ Christian Blomet & Magalie Dansac, p. 463.