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EC Competition and Telecommunications Law

Second Edition

Edited by
Christian Koenig
Andreas Bartosch
Jens-Daniel Braun
Marion Romes



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Law & Business

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Abbreviations

2G	Second Generation
3G	Third Generation
ADSL	Asymmetric Digital Subscriber Line
AGCOM	Italian national regulatory authority
AJIL	American Journal of International Law
APEK	Post and Electronic Communications Agency of the Republic of Slovenia
API	Application Programming Interfaces
ARCEP	French national regulatory authority
ARPM	Average Revenue per Minute
ARPU	Average Revenue per User
BATS	Basic Agreement on Telecommunications Services
BGBI	<i>Bundesgesetzblatt</i> (Federal Law Gazette)
BGH	<i>Bundesgerichtshof</i>
BLC	Broad Loop Carrier
BNetzA	German national regulatory authority
BSS	Business Support Systems
BULRIC	Bottom-Up Forward Looking Long Run Incremental Costs
BWA	Broadband Wireless Access
CAT	UK Competition Appeal Tribunal
CC	Country Code
CDE	<i>Cahier de Droit Européen</i>
CDMA	Code Division Multiple Access
CEPT	European Conference of Postal and Telecommunications Administrations
CFI	European Court of First Instance

CFI	Canal France International
CMLRev.	Common Market Law Review
CMT	Spanish national regulatory authority
ComReg	Irish national regulatory authority
CNS	Core Network Systems
CPC	Commission for the Protection of Competition
CR	<i>Computer und Recht</i>
CRI	Computer Law Review International
CTLR	Computer & Technology Law Review
DANA	<i>Datenschutz-Nachrichten</i>
DECT	Digital European Cordless Telecommunications
DHCP	Dynamic Host Confirmation Protocol
DRAM	Dynamic Random Access Memory
DSI	Detailed Spectrum Investigation
DSL	Digital Subscriber Line
DSLAM	Digital Subscriber Line Access Multiplexer
DSLAM	DSL modems and aggregation components
DSU	Understanding on Rules and Procedures Governing the Settlement of Dispute
DTH	Direct-To-Home
DTT	Digital Terrestrial Television
DuD	<i>Datenschutz und Datensicherheit</i>
DVR	<i>Datenverarbeitung im Recht</i>
EBLRev.	European Business Law Review
EBOR	European Business Organization Law Review
EC	European Community
ECA	European Common Allocation Table
ECC	Electronic Communications Committee
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECMR	EC Merger Regulation
ECR	European Court Reports
ECTRA	European Committee for Telecommunications Regulatory Affairs
EC Treaty	European Community Treaty
ECAP	Electronic Communication Appeal Panel
EEC	European Economic Community
EECMA	European Electronic Communications Market Authority
EFIS	European Frequency Information System
EJIL	European Journal of International Law
ELRev	European Law Review
EPGs	Electronic Programme Guides
ERC	European Radiocommunications Committee

ERG	European Regulators Group
ERO	European Radiocommunications Office
ERT	Elliniki Radiophonia Tiléorassi
ETSI	European Telecommunications Standards Institute
EU	European Union
EuGH	European Court of Justice
EuR	<i>Europarecht</i>
EuZW	<i>Europäische Zeitschrift für Wirtschaftsrecht</i>
EWS	<i>Europäisches Wirtschafts- Und Steuerrecht</i>
FCC	Federal Communications Commission
FCLJ	Federal Communications Law Journal
FICORA	Finish national regulatory authority
FRA	Sweden's National Defence Radio Establishment
FRAND	Commitment to license such patents on fair, reasonable and non-discriminatory terms
FT	France Télécom
FTTH	Fibre to the Home
FTTx	Next Generation Access of Networks
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPRS	General Packet Radio Service
GSM	Global System for Mobile Communications
GYI	German Yearbook of International Law
HHI	Herfindahl-Hirschman Index
Hz	Hertz
IC	Identification Code
ICANN	Internet Corporation for Assigned Names and Numbers
ICCPR	International Covenant on Civil and Political Rights
ICLQ	International and Comparative Law Quarterly
IETF	Internet Engineering Task Force
IFPI	International Federation of the Phonographic Industry
IJCLP	International Journal of Communications Law and Policy
ILM	International Legal Materials
Int. LAWYER	International Lawyer
IOTs	Inter-operator-tariffs
IP	Internet Protocol
IPS	<i>Industrie des poudres sphérique</i>
ISDN	Integrated Digital Services Network
ISP	Internet Service Provider
ITO	International Trade Organization
ITR	International Telecommunications Regulations
ITS	Intelligent Transport Systems
ITU	International Telecommunications Union

- D	Telecommunication Development Sector
- R	Radiocommunications Sector
- T	Telecommunication Standardization Sector
JA	<i>Juristische Ausbildung</i>
JIEL	Journal of International Economic Law
JuS	<i>Juristische Schulung</i>
JWT	Journal of World Trade
JZ	<i>Juristenzeitung</i>
KJ	<i>Kritische Justiz</i>
K&R	<i>Kommunikation und Recht</i>
LAN	Local Area Network
LDC	Low Duty Cycle
LLU	Local Loop Unbundling
LRAIC	Long-Run Average Incremental Costs
LRIC	Long-Run Incremental Costs
MANs	Metropolitan Area Networks
MCA	Maltese national regulatory authority
MCA	Services Mobile Communication Services on Aircraft
MDF	Main Distribution Frame
MEIP	Market Economy Investor Principle
MEP	Member of the European Parliament
MFN	Most-Favoured Nation
MMR	<i>Multimedia und Recht</i>
MMS	Mobile Satellites Services
MoU	Memorandum of Understanding
MRC	Milestone Review Committee
MSS	Mobile Satellites Services
NCA	National Competition Authority
NG DLC	Next-Generation Digital Loop Carrier
NGN	Next Generation Networks
NJW	<i>Neue Juristische Woche</i>
N&R	<i>Netzwirtschaften und Recht</i>
NRA	National Regulatory Authority
NVwZ	<i>Neue Zeitschrift für Verwaltungsrecht</i>
OCECPR	Cypriate national regulatory authority
OECD	Organization for Economic Cooperation and Development
OFCOM	UK Office for Communications
OJ	Official Journal of the European Communities
ONP	Open Network Provision
OPTA	Dutch national regulatory authority
OSS	One-Stop-Shopping
OSS	Operation Support Systems

PAMR	Public Access Mobile Radio
PMR	Professional Mobile Radio
PMR	Private Mobile Radio
PON	Passive Optical Networks
PSTN	Public Switched Telephony Network
QoS	Quality of Service
RabelsZ	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i>
RAN	Radio Access Network
RFID	Radio Frequency Identification Devices
RIW	<i>Recht der internationalen Wirtschaft</i>
RLANs	Radio Local Area Networks
RPA	Rolling Policy Agenda
RRC	Regional Radiocommunications Conferences
Rs.	<i>Rechtssache</i>
RSPG	Radio Spectrum Policy Group
RTKom	<i>Zeitschrift für das gesamte Recht der Telekommunikation</i>
SAAP	State Aid Action Plan
SGEI	Service of a General Economic Interest
SIM	Subscriber Identity Module
SMP	Significant Market Power
SMS	Short Message Service
SO	Statement of Objections
S-PCS	Satellite-Based Personal Communication Services
SRD	Short-Range Devices
SSNIP	Small But Significant Non-Transitory-Increase In Price
STIRA	Standard International Roaming Agreement
TDM	Time-division Multiplexing
TDMA	Time Division Multiplex Access
TKG	German Telecommunications Act
TKK	Austrian national regulatory authority
TO	Telecommunications Organization
UDHR	Universal Declaration of Human Rights
UHF	Ultra High Frequency
UKE	Polish national regulatory authority
ULF	Ultra Low Frequency
UMTS	Universal Mobile Telecommunications System
UN	United Nations
UWB	Ultra-wideband
VDSL	Very High Speed Digital Subscriber Line
VoIP	Voice Over Internet Protocol
VRS	Voluntary Retirement Scheme

WAP	Wireless Application Protocol
WAPECS	Wireless Access Policy for Electronic Communications Services
WAS	Wireless Access Systems
WCIT	World Conferences on International Telecommunications
WiMAX	Wireless Access Networks
WLAN	Wireless Local Area Network
WLL	Wireless Local Loop
WRC	World Radio Communication Conference
WTO	World Trade Organization
WTPF	World Telecommunication Policy Forum
WuW	<i>Wirtschaft und Wettbewerb</i>
Y.B.I.L.C.	Yearbook of the International Law Commission
YEL	Yearbook of European Law
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>
ZEuS	<i>Zeitschrift für europarechtliche Studien</i>
ZHR	<i>Zeitschrift für das gesamte Handels- und Wirtschaftsrecht</i>
ZIP	<i>Zeitschrift für Wirtschaftsrecht</i>
ZWeR	<i>Zeitschrift für Wettbewerbsrecht</i>

Foreword

EC competition and telecommunications law is a constantly changing and dynamic area. The telecommunications legislative environment has significantly changed since the first edition of this book was published in 2002. Therefore, the second edition represents more than a mere update of the previous one. Indeed, in the first edition we provided an analysis of both the old and the new framework of 2002. Implementation and enforcement by the Member States, the Commission and the Courts remained to be seen. Since then, the 2002 regulatory framework has entered into force and has been transposed into national law.

The regulatory framework set up in 2002 involved a major overhaul in the regulatory approach, linking sector-specific regulation and competition law in a novel way. The previous, more mechanistic approach to regulation was replaced by an economic approach under which regulation is based on competition law principles. It requires national regulators to conduct ‘market reviews’ in order to determine whether a particular market should be regulated. The market review process is subject to scrutiny by the Commission under the Community consultation mechanism established under Article 7 of Framework Directive. This process of cooperation between national authorities and the Commission shaped up to the ‘heart’ of the market review process and at the same time to the most important control mechanism used by the Commission.

Meanwhile, the Commission decided again to revise the current rules of the 2002 regulatory framework. The results of that review were released on 13 November 2007. The 2007 review proposals respond to various challenges that developed since the 2002 regulatory framework was agreed.

In principle, the Commission has acknowledged that good progress is being made in creating a Single Market for electronic communications. Notwithstanding this, the Commission has indicated within the framework of the current review that it has detected a number of weak points in this essentially positive development.

The Commission has identified two major problem areas in current EC communications legislation in the relevant area of market regulation in the Single Market.¹ From the Commission's perspective, the present decentralized regulatory system has two major flaws, which are being attributed to the fact that EC rules are being applied by 27 different national regulatory systems. First, there is a segmentation of the Single Market into individual, national markets. Second, there is a general lack of consistency in the application of the regulatory framework.²

These undesirable developments which the Commission deems to have observed in the Single Market are to be countered by making amendments in the area of the market regulation process and to the institutional organization of regulation at Community level.

As part of the current review of the regulatory framework for the telecommunications sector under Community law, the institutional aspects of regulation have become the focus of discussions at the Commission. In its amendment proposals on the regulatory framework³ the Commission suggested that an EC regulatory agency (European Electronic Communications Market Authority, EECMA) be set up for telecommunications markets. According to the Commission's proposals, EECMA will be involved in a number of different areas of the revised market regulation process, acting in a consultative capacity.⁴ EECMA would be a body with a legal personality of its own. The proposal of EECMA relies on a centralized system of regulating markets and follows the concept of already established European Agencies.

1. Cf. the Commission's reasoning in Document COM (2007) 699 final, 5.

2. Cf. the Commission's reasoning on amendment proposals, COM (2007) 696 final, 9.

3. Cf. proposal for a Directive of the European Parliament and of the Council to amend Directive 2002/21/EC on a common regulatory framework for electronic communications networks and service; Directive 2002/19/EC on access to, and interconnection of, electronic communications and associated facilities and Directive 2002/20/EC on the authorization of electronic communications networks and services, COM (2007) 697 final; proposal for a Directive of the European Parliament and of the Council to amend 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; Regulation (EC) No. 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, COM (2007) 698 final and the proposal for a Regulation of the European Parliament and of the Council on the establishment of the European Authority for Rates establishing the European Electronic Communications Market Authority, COM (2007) 699 final.

4. Prof. Dr Christian Koenig, editor of this book, and Sascha Loetz, lawyer, presented an alternative proposal on the implementation of cooperation of national regulatory authorities in the telecommunications sector commissioned by the Federal Network Agency, which is now being reviewed by the European Parliament. The proposal relies on a decentralized system and wants to establish a 'Joint Body of national regulatory authorities' which would be set up as an association of national regulatory authorities that would not be part of the direct or indirect Community administration. Cf. Koenig, Loetz & Fechtner, 'Do We Really Need a European Agency for Market Regulation?', [2008] *Intereconomics* 4/43, 226-235.

Furthermore, the Commission proposes that amendments be made to the five core Directives of the regulatory framework. The amendments relate mainly to the process of market regulation as defined in Articles 15 and 16 of the Framework Directive and to the consultation and consolidation process outlined in Article 7 of the Framework Directive.

By amending Article 15(1) of the Framework Directive, the Commission is to be given the right to define the Markets Recommendation unrestricted from the constraints of specifications imposed by the legislator.⁵ With regard to transnational markets, the Commission would be fully responsible for the market definition and market analysis process and for the imposition of *ex ante* obligations.⁶ The right to conduct market analysis and to impose *ex ante* obligations in the markets referred to in the Markets Recommendation would also be granted to the Commission if the national regulatory authorities are unable to do so within a certain timeframe.⁷

Furthermore, the Commission intends to expand the veto procedure outlined in Article 7(4) of the Framework Directive to include the imposition of *ex ante* obligations under the existing intervention prerequisites, which would enable the Commission to prevent national regulatory authorities from drawing up proposals for measures at all three levels of market regulation. In addition, the Commission is also to be granted the right to take a decision, requiring the national regulatory authority to impose a specific obligation under Articles 9 to 13a of the Access Directive and Article 17 of the Universal Service Directive within a given time-limit.⁸

By doing so, the Commission is breaking new ground in this sector of the Single Market, as up to now, the so-called dual regulatory approach in these industries has provided for harmonization by aligning national legal bases and liberalizing the markets. These harmonization measures are being supported in the current legislation at the administrative level only.

In a departure from this current regulatory approach, the Commission has now proposed not only the establishment of a European regulatory agency, but also essential extensions of her competences to intervene in national market review procedures. Especially, expanding the Commission's veto power to *ex ante* obligations and the Commission new power to impose *ex ante* obligation is viewed in an extremely critical light, when considering aspects of proportionality and necessity.⁹ In accordance with the Framework Directive, it is for the national regulatory

5. The current version of Art. 15 para. 1 of the Framework Directive at least makes provision for the market definition to be based on the list in the Annex to the Framework Directive, cf. Art. 15 para. 1 sentence 2 of the Framework Directive.

6. Cf. Art. 15 para. 4 in conjunction with Art. 16 para. 5 of the new version of the Framework Directive.

7. Cf. Art. 16 para. 7 of the new version of the Framework Directive.

8. Cf. Art. 7 para. 8 of the new version of the Framework Directive.

9. Cf. the study by Hogan & Hartson and Analyses 'Preparing the next steps in regulation of electronic communications', Jul. 2006, 156 ff. which was commissioned by the European Commission via <http://ec.europa.eu/information_society/policy/ecommm/doc/info_centre/studies_ext_consult/next_steps/regul_of_ecomm_july2006_final.pdf>.

authorities to analyze relevant markets and impose proportionate obligations. It is thus assumed that market conditions in the Member States are not sufficiently homogenous to allow a community-wide definition, analysis and choice of obligations. Within this context, this edition intends to provide an in-depth analysis of the 2002 regulatory framework as applied and enforced to date, as well as a first analysis of the review proposals and of the differences that remain despite the EC's ongoing harmonization efforts. We have revised all chapters completely and exchanged some of them to set priority on the content of the new regulatory framework for electronic communications.

Until this book was first published, there was no work that attempted to analyze EC competition and telecommunications¹⁰ law across all the major areas of general competition law comprising general antitrust, merger control and state aid as well as the specific harmonization rules pertaining to these markets. At the time of writing of the first edition, our ambition has been to fill this gap. For this purpose, we have covered again both institutional and substantive law on the international and EC levels. In a number of cases we have also included the relevant EC media and EC communications law, although we continue to believe that even where the regulatory frameworks of those two fields coincide with that of EC telecommunications law, differences among them remain too steep to allow for a profound joint coverage.

Prof. Dr Christian Koenig, LL.M.
Director of the Center for European Integration Studies

10. At the European level the word 'telecommunications' has been broadly replaced by 'communications', as a legal and regulatory term designating all forms of services, infrastructure and equipment used for sending, transmitting and receiving information via broadcasting or telephony. However, this term has not yet been adopted by the industry sector or by the general public, and is therefore not interchangeable with 'telecommunications' within the meaning of this book. Cf. I. Walden & J. Angel (eds), 'Telecommunications Law and Regulation' [2005], Oxford, UK, 3 et seq.

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The law is at 30 July 2008, save as otherwise stated.

We depend on our readers to direct comments and suggestions for the improvement of subsequent editions directly to us at the following address:

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