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SOCIAL CONCERNS AND CONSISTENCY IN EUROPEAN TELECOMMUNICATIONS POLICY

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Twenty years ago, a survey of European telecommunications offered a simple, albeit dismal, picture. The industry was characterized by cosy - and lucrative - collaboration between State authorities, equipment suppliers and network operators which in turn led to paralyzing mutual dependance and bloated labour forces. The overall environment produced near absolute unaccountability and lackluster customer service (surly business attitudes, stodgy performance records...). Generally speaking, little concern was granted to affordability, or efficiency in the installation of a simple phone line, let alone advanced call features. Vast sections of the population had no access to the telephone network despite a *credo* in public service.

At the time, the role of the European Union in addressing these shortcomings verged on the non-existent. Regulation of telecommunications was to European integration what fast-food is to gastronomy : *le degré zéro* (but we shall come back to fast-food later...)[1]. The first significant European foray into the regulation of the sector came in 1983 when the Council of Ministers set up its Senior Official Group on Telecommunications and invited telecommunications administrations to consult each other with a view to harmonizing *telematic* services[2]. Thereafter, the Commission spread its wings over the industry, re-discovering Article 86 EC (ex-Article 90), whilst the Court of Justice adjudicated its first telecoms dispute in 1985[3].

The drive of European integration, and in particular the aim to complete the Single Market in the mid-1980s, accelerated the Union's involvement in telecommunications. The achievement of this special purpose induced several well-known phenomena. Most notably, it led to the tearing down of the

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1 On this topic, see R. BARTHES, « Lecture de Brillat-Savarin », *Le bruissement de la langue (Essais critiques IV)*, Paris, Éditions du Seuil, 1984, pp. 285-306.

2 See Council Recommendation of 12 November 1984 concerning the implementation of harmonization in the field of telecommunications, *O.J.*, No. L. 298 of 16.11.84.

3 Case 41/83, *Italy v. Commission*, 20 March 1985, ECR, 1985-I, pp. 873-892 (commonly known as the *British Telecoms* case).

barriers that shielded telecoms operators for close to a century and the breaking up of the cosy collaboration mentioned above. One-by-one, equipment, data communications, mobile telephony, and fixed-line voice business were pried open. On 1 January 1998, Europe woke up to competition in all areas of telecoms business. Global alliances were formed (Atlas, Global One, Concert...), whilst prices tumbled dramatically (notably for long distance and international rates). Changes were spectacular for State, industry, labour and users alike. Taken together, they eschew thorough analysis within the space of a few pages.

The purpose of this paper is to devote particular attention to two outstanding priorities in Europe's current telecommunications environment. The first concerns the requisite level of *social protection* in a sector which has seen full liberalisation over a short period of time. The second concerns the requisite degree of *consistency* in an environment which has spawned a wealth — if not overkill — of detailed regulations at the European and national levels of government.

I. REQUISITE SOCIAL DIMENSION IN TELECOMMUNICATIONS POLICY

Over the past decade, the awareness of a requisite social dimension within Europe's telecommunications sector largely focussed on the introduction and development of *universal service*, a concept that has been used as a shorthand for a variety of social obligations. Whilst this concept initially gave cause for concern, if not outright hostility in certain Member States, it has progressively given way to pragmatic acceptance (1). Flexibility in the defining of the concept largely explains this smooth evolution although it harbours certain dangers (2).

1. Only a short while ago, the European Union's foray into public utility reform was seen as a free market onslaught directed at entrenched national values and traditional forms of business organisation. The introduction of universal service, and its seemingly pale comparison with the French concept of *service public*, drew particular criticism[4].

4 See, for example, in France, the reaction of M. CLAUDE et A. PAILLIER : « Il ne s'agit plus du service public pour les usagers, mais d'un service universel pour les indigents à qui on fait la charité ! », in « Les services publics et l'Europe : une vraie menace », *Le Monde*, 21 June 1995; see, in Belgium, the appeal of the *Centrale Générale des Services Publics* (C.G.S.P.), « Pas d'Europe sans services publics », Brussels, 6 June 1996. For transnational studies on this evolution, see *Vers un Service Public*

Within two years, resistance to reform had sunk as quickly as it had flared. In particular, the concept of *service public* no longer bore the signs of torment of 1996-1997. A considerable degree of serenity and pragmatism had meanwhile emerged throughout the Union.

Doubtless, an explanation for the lessened tension between traditional values and universal service provision lay in the fact that the notions were no longer viewed as self-exclusive. The French legislator aptly reconciled *service public* and *service universel* in the Law of 26 July 1996[5]. Experience further showed that the notions could coexist harmoniously in a competitive environment. Without sacrificing *le service public*, customer service improved in France while long distance and international rates fell sharply despite (or because of) the opening to competition of French telecommunications markets on 1 January 1998 (and the issuance of more than 60 licences to France Télécom's rivals). Meanwhile, the revenue of the dominant operator rose and the French universal service charge was cut by half[6].

The measure of the evolution is noteworthy inasmuch as, until very recently, the coexistence of the notions seemed unlikely, as partaking in different ideological sources. They were seen as antithetical, including in the United States where the notion of universal service originated. By way of reminder, when the American Department of Justice filed its third antitrust lawsuit against AT&T in 1974, the company forcefully sustained that its « traditional corporate goals — universal service and network optimization — could not be pursued in a fragmented, competitive market. The Bell System's role as a universal public utility would be precluded if the Department of Justice's prevailed »[7]. In the opposite direction, partisans of free prices and free competition contended that universal service need not be taken into consideration by policy-makers at all. Utmost and exclusive reliance was to be

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Européen (edited by L. GRARD, J. VANDAMME, and Fr. R. van der MENSBRUGGHE), Paris, ASPEurope Editions (collection TEPSA), 1996.

5 See Law No. 96-659 of 26 July 1996, *J.O.R.F.*, 27 July 1996, p. 11384, reproduced in the *Recueil Dalloz Sirey*, 1996, pp. 355-367. The Belgian legislator followed suit in December 1997 : see Law of 19 December 1997, *Moniteur belge*, 30 December 1997, p. 34986 (see in particular Article 24 which replaces Article 82 of the Law of 21 March 1991, relating to the reform of certain economic enterprises).

6 The *Autorité de régulation des télécommunications* (hereafter, ART) first estimated that the universal service charge, i.e., the charge levied on the country's private sector operators to compensate France Télécom for its obligation to provide a universal service, would amount to FF. 4.8 Billion (740 Million Euros) in 1999 (see *J.O.R.F.*, 5 January 1999). Several weeks later, further to tariff rebalancing by the incumbent operator, the telecommunications regulator cut the universal charge by half, in effect amounting to FF. 2.7 Billion. See D. BX. « Le montant du service universel divisé par deux en 1999 », *Les Echos*, 11 February 1999.

7 P. TEMIN and L. GALAMBOS, *The Fall of the Bell System, A Study in Prices and Politics*, Cambridge, Cambridge University Press, 1987, p. 166.

placed on the antitrust responsibilities of the Federal Trade Commission and the Department of Justice. Even today, prominent American authors favour unleashed competition. Thus Peter Huber for whom « [e]xperience teaches that the most universal hamburger — the Big Mac — was supplied by the market. The best and most universal meat in Moscow today is served under golden arches, not the red flag »[8]. Notwithstanding, the American legislator soon came to consider that telecommunications services could not be regarded as ordinary commodities (or hamburgers...) to which competition rules alone should apply. Market failure and the impossibility of the market to self-correct itself led to the consideration — and legislative consecration — of requisite social obligations.

These two self-exclusive positions — faith in the virtues of a natural monopoly to preserve social concerns, or outright competition — permeated European debate in the 1980s-1990s. There also existed the entrenched belief in the virtues of cross-subsidies as a constituent element in the furtherance of network diffusion. Conversely, staunch competitive rhetoric also occupied certain — mainly British -—spirits. It soon became apparent, however, that markets should be opened and that special attention should be afforded to consumers, small producers, and potential new entrants in order to protect them from welfare losses and mandate equality. A report delivered by the British Department of Trade and Industry in 1998 illustrates this realism : « [c]ompetition is a key means of ensuring value and choice for all consumers. But we must make sure that, for these essential services, the benefits of competition do not go disproportionately to the better off, and that poorer consumers are protected »[9]. In characteristic fashion, pragmatism came before theory. Telecommunications policy implied a requisite social dimension in the U.K. and beyond.

Community institutions themselves never embraced the idea of immediate and ruthless imposition of liberalisation policies upon the telecommunications industry. From the start of Europe’s interest in utility services, preference was given to a gradual and consensual approach with marked social concerns. The social dimension that underlies these services, and the gradual approach towards liberalisation, was acknowledged at a very early stage by the European Parliament. As early as 1984, it recognized the « vital public service obligations of telecommunications administrations, and

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8 P. HUBER, *Law and Disorder in Cyberspace. Abolish the FCC and Let Common Law Rule the Telecosm*, Oxford-New York, Oxford University Press, 1997, pp. 140-141.

9 *A Fair Deal for Consumers : Modernising the Framework for Utility Regulation*, March 1998, available at : <http://www.dti.gov.uk/urt/fairdeal/part1.htm>, point 1.15. See also T. PROSSER, « Theorising Utility Regulation », 62 Modern Law Review 196 (1999).

[further stated that it did] not believe that deregulation on the American model could be applied within the Community »[10]. The European Commission also underscored the social dimension of telecommunications in its Green Paper of 1987 on the Development of the Common Market for Telecommunications Sevices and Equipment[11].

Meanwhile, cross subsidies were tested under EC competition rules, and in particular the doctrine concerning predation (i.e. the doctrine according to which a dominant undertaking in one market is prevented from using its market power to offer predatory prices in another market). Predatory practices were viewed as either violating Article 82 (ex-Article 86)[12] or Article 87 (ex-Article 92) EC. At the same time, the access/interconnection issue, along with the concept of essential facilities, were seen as preferred alternatives and promoted to further network diffusion[13].

Various rulings delivered by the European Court of Justice nevertheless endorsed a gradual and pragmatic approach to these issues. Cross-subsidization was accepted inasmuch as there were convincing economic and financial arguments to justify the exclusion of competition. The Article 86(2) exemption (ex-Article 90(2)) could apply if cross-subsidies were the only means of ensuring the necessary economic conditions for a firm entrusted with public service obligations[14].

Whilst this approach was being taken, Community institutions improved their communication, reiterating their neutral attitude towards privatization (referring to Article 295 EC, ex-Article 222), and recalling the Commission's sparse usage of Article 86(3) EC (ex-Article 90(3)) : since 1958, only eight directives plus amendments and seven decisions have been based on this Article, and most received the unanimous support of the Member States within the Council. The Maastricht Treaty itself took care to avoid misunderstandings in the context of this evolution, providing in Article 16 EC (ex-Article 7d)

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10 European Parliament, Resolution of 3rd March 1984 [Report of the European Parliament on telecommunications in the Community, Doc. 1-477/3].

11 European Commission, *Towards a Dynamic European Economy, Green Paper on the Development of the Common Market for Telecommunications Sevices and Equipment*, Brussels, 30 June 1987, COM(87) 290 final. See in particular pp. 66-67.

12 See Case T-83/91, *Tetra Pak II*, [1996] ECR II-826, paras. 147-151; Case C-333/94 P, *Tetra Pak II*, [1996] ECR I-6007, paras. 39-44.

13 An increasing body of literature exists on the concept of essential facilities. In Belgian law (with a detailed overview of European law), see E. VEGIS, « La théorie des 'essential facilities' : genèse d'un fondement autonome visant des interdictions d'atteinte à la concurrence ? », *Revue de droit commercial belge*, 1999, pp. 3-21.

14 See the well-known cases : Case C-320/91, *Corbeau*, [1993] ECR I-2533; Case C-393/92, *Almelo*, [1994] ECR I-1477; Cases C-157/94, *Commission v. Netherlands*, C-158/94, *Commission v. Italy*, C-159/94, Commission v. France, and C-160/94, *Commssion v. Spain*, [1997] ECR I-5815.

that : « [...] given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions ».

The Commission's Communication of September 1996, *Services of General Interest in Europe*, further lifted confusion and softened resistance to change[15]. Adopted in the context of the Intergovernmental Conference of 1996, the document's principal aim was to dissipate the perceived tension between public service goals and the pursuit of liberalisation in utility services. Specifically, the Communication sought to allay concerns over employment and economic and social cohesion, asserting in its opening paragraph that « [s]olidarity and equal treatment within an open and dynamic market economy are fundamental European objectives ». The Commission offered definitions of four key concepts (services of general interest, services of general economic interest, public service, and universal service) and addressed five sectors, i.e. telecommunications, postal services, transport, electricity and broadcasting. The mixing of conceptual reflexion and concrete applications quickly dashed the lobbying efforts of the European Parliament and special interest groups to amend the EC Treaty on these issues[16]. Generally speaking, it constituted a welcome effort at clarifying the Union's commitment to a balanced combination of competitiveness and social concerns.

2. Unarguably, flexibility in the defining of universal service was instrumental in allaying worries with respect to national values and traditional forms of business organisation. Notwithstanding, flexibility in this domain constitutes both an asset and a danger for Europe.

In its Communication on *Services of General Interest in Europe*, the Commission provided for periodic reviews of the set of services to be funded in the context of universal service in line with « technological change, new general interest requirements and users' needs »[17]. The Voice Telephony II Directive specified this need in its Article 31[18].

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15 European Commission, *Services of General Interest in Europe*, COM(96) 443 final of 11.09.1996.

16 Concerning the European Parliament's lobbying efforts in this direction, see Resolution of 17 May 1995, adopting the Bourlanges/Martin Report, A4-0102/95/Part I.A. See in particular §10(xi).

17 European Commission, *Services of General Interest in Europe*, *op. cit.* (note 15), point 29.

18 Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision and on universal service for telecommunications in a competitive environment, *O.J.*, No. L 101 of 1.4.98.

Transposing these provisions, German legislation provides an interesting example of such review in §17(2) of the Telecommunications Act (TKG) :

> « (2) The federal government shall be empowered to designate as a universal service, [...] telecommunications services in accordance with §17(1) sentences 2 and 3 herein. Such designation shall be *adapted to technical and social developments in line with demand*. [...] »[19] (emphasis added).

Like provisions exist in Belgium[20] and in France[21].

Various remarks may be advanced with respect to these provisions. On the one hand, flexibility offers potential increased participation, hence democratization, in the defining of public services and European social values. On the other, it opens avenues of change that might capture the benefits of a future Information Society. Finally, it offers a periodic assessment of norms that is novel in Europe. In large part, it is reminiscent of American *sunset* legislation, i.e. the legislative technique that consists in enacting a norm for a specified period of time, after which reenactment of the norm past the expiry date is subordinate to an assessment of its usefulness and overall desirability. Hence, adaptation of the norm is embedded in its very production. The norm has become quasi-experimental. We are far from the French revolutionary ideal whereby « L'idée d'un changement possible de législation était écartée comme un scandale et l'abrogation d'une loi [était] regardée comme une mesure tout à fait exceptionnelle »[22]. The evolution is striking. It arguably reveals the transition from one type of society to another where legal dogmatism is past and where norms are produced in an ongoing process of collective negotiation[23].

Flexibility in the European approach to these matters was further apparent in the Commission's assertion that that there « [was] nothing to

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19 *Telekommunikationsgesetz* (TKG) of 25 July 1996, *BGBl* I, pp. 1120 *et seq*., reproduced in *Telekommunikationsrecht : Zweisprachige Ausgabe (dt./engl.) mit Einführung* (edited by H. SCHÄFER), Köln, RWS Verlag Kommunikationsforum GmbH, 1998, pp. 17-138, p. 42.

20 See Article 26 of the Law of 19 December 1997 (which replaces Article 84 of the Law of 21 March 1991), *Moniteur belge*, 30 December 1997, *op. cit.* (note 5).

21 See Article L. 35-7 of the the Law No. 96-659 of 26 July 1996, *op. cit*. (note 5).

22 G. BURDEAU, « Essai sur l'évolution de la notion de loi en droit français », *Archives de philosophie du droit*, Tome 9, Paris, Sirey, 1939, pp. 7-55, p. 16. According to Jacqueline de ROMILLY, referring to the Locrians : « Quiconque propose une loi nouvelle le fait la corde autour du cou. La proposition paraît-elle louable et utile, l'auteur se retire, la vie sauve. Sinon, on serre la corde, et c'est la mort », in *La loi dans la pensée grecque*, Paris, éd. Les Belles Lettres, 1971, p. 204.

23 For extended discussion on this topic, see J. CHEVALLIER, « Vers un droit post-moderne ? Les transformations de la régulation juridique », *Revue du droit public*, No. 3-1998, pp. 659-690.

prevent the Member States from defining additional general interest duties over and above universal service obligations, provided that the means used comply with Community law »[24].

What exactly is the role of subsidiarity in this picture[25] ? Traditionally, the avenue of approach of European Community institutions in these matters is narrow : we are not here in an area of exclusive Community competence. Accordingly, consistency in these matters depends on the goodwill of Member States. The success of Community rules depends almost entirely on the Member States which transpose, implement, and enforce these rules. The record is far from brilliant. According to a recent European Commission report on Economic and Structural Reform in the EU (Cardiff II), telecommunications and transport currently stand out as two of the worst areas for non-transposition of directives (the others include public procurement and intellectual and industrial property)[26].

Generally speaking, subsidiarity may constitute a grave danger to the telecommunications sector inasmuch as it leads to the emergence of different industry structures throughout Europe with different competitive models[27]. The funding of universal service is a case in point. Member States may levy supplementary charges on regular interconnection charges or they may finance universal service obligations through a universal service fund. They may also do nothing at all. The growing divergence of universal service obligations may lead to non-transparency which itself « will act to some extent as entry barriers for cross-border operators and will increase market fragmentation »[28].

Under the circumstances, it is imperative to rein in the subsidiarity principle to meet the Single Market criterion and other Treaty obligations, for example the need to ensure a « high level of consumer protection » (dealt with in Title XIV EC (ex-Title XI)).

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24 European Commission, *Services of General Interest in Europe*, *op. cit.* (note 15), point 30.

25 Article 5 EC (ex-Article 3b). For extended developments, see T. SCHILLING, « Subsidiarity as a Rule and as a Principle, or : Taking Subsidiarity Seriously », *Harvard Law School*, 1995, <http://www.law.harvard.edu/groups/jmpapers/schill/index.html>. See also L. IDOT, « L'application du principe de subsidiarité en droit de la concurrence », *Recueil Dalloz Sirey*, 1994, pp. 37-44.

26 European Commission, *Economic and Structural Reform in the EU* (Cardiff II), Brussels, 17.02.99, COM(1999) 61 final, p. 10.

27 See J.B.K. RICKFORD, « Change, politics and determinist economics in Europe », *Telecommunications Policy*, Vol. 22, No. 6, pp. 471-482, p. 481 (1998). See also the opinion of J.-M. CHEFFERT, E. COUNE, and L. LECOCQ in « Principes régissant la politique de service universel : une relecture des solutions belge et européenne », *Cahiers du CRID*, No. 15, Brussels, Story-Scientia, 1999, pp. 51-85 : « Paradoxalement, nous avons montré que la liberté d'action des États souffre d'une place trop grande faite à ce principe [de subsidiarité]... » (p. 84).

28 T. KIESSLING and Y. BLONDEEL, « The EU regulatory framework in telecommunications », *Telecommunications Policy*, Vol. 22, No. 7, pp. 571-592, p. 590, 1998.

The need to check subsidiarity in order to ensure both competitiveness and solidarity cannot be neglected in the telecommunications sector. If network industries make up a mere 5% of EU GDP and employment, « their economic importance is [...] greater because the price and quality of their outputs is essential for the growth and competitiveness of European industries, for the operation of the Internal market and for the European consumers' living standards. [...] The regulatory regime of some of these sectors can also affect the functioning of TENs which are vital for the integration of European product markets »[29]. The need to ensure regulatory consistency is also of paramount importance.

II. REQUISITE REGULATORY CONSISTENCY

A wealth of change has taken place over the past twenty years with a spawning of regulations at the national and European levels of government, the setting up of national regulatory authorities, the formation of global alliances, etc. As mentioned above, change has affected everyone. A by-product of this change has been to observe vast extremes - or lack of consistency in Europe's current telecommunications landscape. The issue may be taken under various angles.

A first level of inconsistency may be seen in the powers vested in national regulatory authorities themselves. As such, it is not possible to systematize these powers throughout the European Union. They are specific to each Member State, and vary accordingly. It should suffice to point out that a streak of ambiguity is inherent in them. On occasion, this ambiguity has been deliberate and non-problematic : thus with the U.K. where OFTEL was given a large array of loosely specified powers (eg. setting price caps and performance standards). In other Member States, on the other hand, the ambiguity was unintentional and has already given rise to problems. Thus with France where the Law of 26 July 1996 provides that regulatory authority in the telecommunications sector is shared by the Minister in charge of telecommunications and the national regulatory authority for telecommunications, the ART. Soon after the ART was installed, the obscure wording of this provision led to a dispute which focussed on France's numbering plan and the authority of the ART to attribute telephone prefixes. Challenged in court, the French *Conseil d'État* in this instance upheld the regulatory powers of the regulatory authority. Whilst this particular instance

29 European Commission, *Economic and Structural Reform in the EU* (Cardiff II), *op. cit*. (note 26), p. 12.

may be viewed as a 'victory' for the telecoms regulatory authority, the French government subsequently sought to avoid similar problems when defining the scope of powers to be vested in the *Commission de régulation de l'électricité* (CRE)[30]. A minimum degree of consistency in the powers of European regulatory authorities would overcome these disparities and their wide-ranging effects.

A second level of inconsistency concerns the jurisdictional problems that may result from the coexistence of sector-specific and competition rules. Conflicts in subject-matter jurisdiction are bound to emerge. By way of illustration, Article L. 36-8 of the French Posts and Telecommunications Code provides that the ART has jurisdiction to resolve disputes involving interconnection refusals, or the conclusion or execution of interconnection or telecommunications network access agreements. This being the case, interconnection is by its very nature embedded with considerations in competition law, hence possible conflicts with France's competition watchdog, *le Conseil de la concurrence*.

Another issue of concern has to do with the delicate - and often neglected - problem of conflicts in territorial jurisdiction. Such conflicts would seemingly arise between regulatory authorities alone[31]. The problem will become ever more present in the telecommunications sector. Noteworthy in this respect is the recent filing by the French telecommunications operator of a request for arbitration with the International Court of Arbitration of the International Chamber of Commerce in a dispute with Deutsche Telekom AG[32].

Consistency may be improved in various manners. We have already mentioned the limits to be assigned to subsidiarity. General provisions on transborder disputes in the telecommunications sector would also be welcome. European texts generally offer liitle guidance on transborder disputes. There is

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30 See Article L 32-1° of the French Posts and Telecommunications Code. See C.E. 26 June 1998, *AXS Télécom et Esprit Télécom France*, *AJDA*, 1998.636; see also S. RODRIGUES, *Services publics et services d'intérêt économique général dans la Communauté européenne*, Thesis, Paris, University of Paris I (Panthéon-Sorbonne), 1999, Vol. II, pp. 474-475.

31 Articles 81 (ex-Article 85) and 82 (ex-Article 86) EC judge anticompetitive conduct by the effects produced on intra-EU trade. National law may judge the same anticompetitive conduct as to the effects produced on domestic trade. Concurrent application of national and Community law is nevertheless envisageable. According to the Court of Justice « [...] conflicts between the rules of the Community and national rules in the matter of the law of cartels must be resolved by applying the principle that Community law takes precedence » : see *Walt Wilhelm*, ECJ, Feb. 13, 1969 ECR 1, 14-15; 1969 *CMLR* 100, 119. For extended discussion, see W.D. BRAUN, F. RAWLINSON, and L. RITTER, *EEC Competition Law*, Deventer-Boston, Kluwer Law and Taxation Publishers, 1991, pp. 36 *et seq*.

32 See K.J. DELANEY, « Telecom Spat Shines Light on Arbitrator », *The Wall Street Journal*, 19 May 1999.

of course the conciliation procedure of Article 26 of the Voice Telephony II Directive (aforementioned) but its competence is limited. Two recent Directives concerning common rules for the internal market in electricity and natural gas are noteworthy in these matters[33]. Article 21(3) of the latter Directive provides that « [i]n the event of cross-border disputes, the dispute settlement authority shall be the dispute settlement authority covering the system of the natural gas undertaking which refuses use of, or access to, the system. Where in cross-border disputes, more than one such authority covers the system concerned, the authorities shall consult with a view to ensuring that the provisions of this Directive are applied consistently ».

Without going so far in the immediate future, a way to overcome inconsistency lies in cross-border coordination among different national regulatory authorities and with the European Commission. Fortunately, such coordination has already begun in Europe. In its *Fourth Report on the Implementation of the Telecommunications Regulatory Package*, the Commission states that regulatory authorities « are exchanging information on a systematic basis with each other and with the Commission »[34]. The ONP Committee constitutes a noteworthy forum where representatives of national regulatory authorities for telecommunications gather regularly, under the chairmanship of the European Commission, to discuss and decide issues which fall under its remit.

Coordination could go further. Examples may be found abroad. Thus in the United States where regulatory authorities gather annually within the organization of the *National Association of Regulatory Utility Commissioners* (NARUC). Founded in 1889, the objectives of this quasi-governmental nonprofit organization consist in « [...] the *promotion of uniformity* of regulation of public utilities and carriers by the several commissions, the *promotion of coordinated action* by the commissions of the several States to protect the common interests of the people with respect to the regulation of public utilities and carriers, and the *promotion of cooperation* of the commissions of the several States with each other and with the Federal commissions represented in the Association » (emphasis added)[35]. Often

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33 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, *O.J.*, No. L 27/20, 30/01/1997 (see in particular Article 20(4)); Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, *O.J.*, No. L 204, 21/07/1998.

34 Commission, Fourth Report on the Implementation of the Telecommunications Regulatory Package, COM(98) 594 of 25 November 1998.

35 NARUC Constitution, Article II, reproduced in P. RODGERS, *The NARUC Was There : A History of the National Association of Regulatory Utility Commissioners*, NARUC, 1979, Washington D.C., Appendix N.

ignored in Europe, the NARUC has played a invaluable educational role, providing State commissions with technical assistance and policy research on regulatory issues. It has also prepared and introduced important pieces of Federal legislation, among which the Federal-State Communications Joint Board Act of 1973[36]. A noteworthy application of this Act may be found in the Federal-State Joint Board on Universal Service which is in charge of recommending the definition of the services that are supported by Federal universal service support mechanisms in telecommunications[37].

Finally, a way to improve consistency would be to require simplification and avoidance of unnecessary regulatory burdens on business, whether at the European or at the national level. This has begun in Europe with the *SLIM* initiative (Simpler Legislation for the Internal Market), currently in its third phase. By virtue of this approach, outlined in the Action Plan for the Single Market and endorsed by the Amsterdam European Council in June 1997, concrete suggestion have appeared in a certain number of fields to simpify Single Market rules (VAT, legislation on fertilisers, combined nomenclature for external trade, construction products, etc.). A suggestion put forward for the banking sector, i.e. an invitation to national and EU authorities imposing reporting requirements to avoid duplication, could be transposable to the telecommunications sector. Similar initiatives exist in various Member States. Further measures could be taken via developments such as those adopted in the United States at the federal level[38] or at the State level[39]. These include laying down a set of substantive principles for all administrative agencies, including a commitment to cost-benefit analysis.

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36 P. RODGERS, *The NARUC Was There..., op. cit.*, p. 37.

37 Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996). The Law amended the Communications Act of 1934, 47 U.S.C., sect. 151 *et seq.* See in particular 47 U.S.C. Sect. 254(a)(1) and Sect. 254(c)(1).

38 President Ronald REAGAN adopted two Executive Orders (maintained by Presidents George BUSH and Bill CLINTON) that profoundly modified the adoption of federal regulations : see Executive Order No. 12291, 3 CFR 128 (1981), reprinted in 5 USC §601 note (1988). See also Executive Order No. 12498, 3 CFR 323 (1985), reprinted in 5 USC §601 note (1988). For extended discussion on recent regulatory reform in the United States, see R.H. PILDES and C.R. SUNSTEIN, « Reinventing the Regulatory State » (1995) 62 *University of Chicago Law Review*, pp. 1-129.

39 See, for instance, Executive Order No. 20 adopted by Governor George E. Pataki of New York on 30 November 1995. The Order established the position of State Director of Regulatory Reform and an office known as the Governor's Office of Regulatory Reform (GORR). Various criteria are laid down in the Order by which the GORR is to judge proposed rules offered by Executive branch administrative agencies. GORR may authorize publication of the rule in the State Register or require specified changes be made before publication, or it may prohibit the publication of the rule entirely. This power to prohibit publication effectively blocks a proposed rule from promulgation. The Order was challenged as unconstitional but was nevertheless upheld by the N.Y. Court of Appeals (New York's highest court) on 6 May 1999 : see *Rudder v. Pataki*, 99 N.Y. Int. 0067, available at : <http://www.law.cornell.edu/ny/ctap/I99_0067.htm>.

FINAL REMARKS

Requisite social concerns and consistency made up the principal threads of this paper. As such, our survey of these issues presented but a partial glimpse of the many threads that have been woven together in Europe's telecommunications industry over the past twenty years. As mentioned above, the state of the market, the position of telephone users, and the level of regulation bears little ressemblance with the picture offered in 1979 : a variety of factors have contributed to *connecting* the sector with efficiency, affordability, and general customer satisfaction.

In this paper, we welcomed the Union's pragmatic and gradual bringing together of social concerns and market opening. Ensuring their continued presence remains vital. Whilst the world has largely become prey to sole economic considerations, Europe's role in these matters has become ever more important. This includes the preservation of its own interests but also of those of developing countries. The Union should play a greater role within the framework of the World Trade Organisation to help define consistent universal service obligations on a worldwide scale whilst maintaining transparent, non-discriminatory and competitively neutral industry structures. Pure sovereign considerations are difficult to maintain in an environment which knows no borders. Interests in this domain are interdependent.

This paper also welcomed various regulatory novelties, notably the periodic reviews of the set of services to be funded in the context of universal service, and the promise of increased participation, hence democratization, in the defining of public services and European social values.

As yet, change should not be precipitated much further in institutional terms. In the first place, current regulatory authorities and regulatory laws in the Member States need to be given a chance before proceeding further. Important areas of change have yet to be fully implemented. Whilst a European regulator is envisaged today, it would be unwise, at the present stage, to advocate the necessity, role, and responsibilities of a strong, centralised regulator at the European level other than to ensure hub-like coordination between national regulators[40]. As mentioned several times in this paper, consistency and coordination should constitute Europe's present-day goals.

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40 See on this subject the *Draft Final Report on the Possible Added Value of a European Regulatory Authority for Telecommunications*, prepared by Eurostrategies and Cullen International, for the European Commission, September 1999. The report was placed on the server of the Information Society Project Office (ISPO), September 8, 1999 : <http://www.ispo.cec.be/news.html>

In addition, change cannot be considered as an end in itself. It is to be welcomed if greater — and better — public participation in the administrative process is truly fostered and the democratic deficit mitigated. Naturally, citizen participation in the decision-making process could be enhanced through traditional means such as representation by Offices of Consumer Advocates. Particular attention should be drawn however to today's opportunities to associate users of public utilities (i.e. all citizens) within the regulatory process. As such, users may be associated in the *rule-making* process itself, via on-line advertising of rule-making, the on-line solicitation of public comments, or on-line availability of public comments. Many such changes have already taken hold in the United States and are beginning to blossom in Europe. They can, and should be, developed further. Were these practices to be generalized, users' rights and their relationship to both regulatory authorities and their public utilities would be improved significantly. We believe these practices would enhance much-needed open debate and public analysis of European utilities.

Change is to be welcomed if good administration and adequate telecommunication services are provided to all. The enhancement of government and industry transparency as well as the furtherance of equality among the citizenry of Europe remain ever more important requisites.