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EU regulations on telecommunications: The role of subsidiarity and mediation

by Panayiota Tsatsou

Abstract

This article provides a critical examination of telecommunications regulation in the EU and argues for the need for change along the lines of subsidiarity and mediation. This discussion is particularly timely, as the European Commission is working on a new telecommunications regulatory framework, with the lessons and failures of the past appearing more critical than ever. In this context, this paper points to the debate between national heterogeneity and shared vision in the European Information Society and proposes a shift of the culture and procedures dominating formal EU regulation. It brings to the fore the potential for tensions between national particularities and EU regulation. These tensions will be resolved by applying subsidiarity along with existing regulatory tools and mediation via the enforcement of mediating networks and the establishment of institutions that increase accountability of EU regulations on telecommunications.

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Introduction

In 2002 the European Commission proposed and implemented a new regulatory package for telecommunications, which has been under reform since the end of 2009. The need for this reform was brought forward in 2007 when the Commission acknowledged that the vision to create a single European telecommunications market still has a long way to go and that a revised regulation should be proposed in order this vision to be realized:

> "... strengthening consumer rights; giving consumers more choice by reinforcing competition between telecoms operators;

> promoting investment into new communication infrastructures, in particular by freeing radio spectrum for wireless broadband services; and making communication networks more reliable and more secure, especially in case of viruses and other cyber–attacks." [1]

At this transitory stage, it is important that the 2002 regulatory framework is approached critically, so that lessons of the recent past can benefit current developments and all actors involved in the regulatory domain. Of course, such a critical view cannot cover all possible areas of discussion. For the purposes of this paper, EU telecoms regulations will be critically examined on the grounds of the long standing issue of national heterogeneity in the EU. This perspective is important in light of the ongoing growth of the EU community (currently, 27 member states) and in consideration of the highly promoted vision of a uniform European information society — and particularly of a single market.

The 2002 telecoms regulatory framework in the EU has been surrounded by debates regarding its timely transposition and effective implementation within the EU member states. It has also brought into question EU administrative policies and shifts in those policies thanks to the rapid evolution of technologies combined with the diverse socio–cultural composition of Europe today. Through subsidiarity and mediation, EU authorities should play a more systematically supervisory, cooperative, and enforcing role so that the long–standing disputes between member states, EU authorities, and the uneven application of EU telecoms regulations can be finally confronted. In turn, the currently problematic issue of national heterogeneity will become a positive parameter for diversity and plurality in Europe. This paper examines the implementation of the 2002 EU telecoms law, suggesting meaningful and extensive application of the principles and rules of subsidiarity and mediation. This paper as well points to challenges that EU authorities might also face in their efforts to ensure the effective implementation of the reform of the 2002 telecoms regulations in the near future, pointing to the potentially beneficial roles of subsidiarity and mediation.

Subsidiarity is a political and legal concept which mainly applies to the effective application of administrative and legal policies. Subsidiarity can be defined simply as "the principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself" [2]. Although a general and, in some respects, vague concept, characterized by internal tensions and paradoxes [3], subsidiarity can operate as a significant structural principle for the successful operation of the EU telecoms laws in the member states. This is justified by the constitutional system of the Union, which notes that subsidiarity can function "as a conceptual and rhetorical mediator between supranational harmonisation and unity, on the one hand, and local pluralism and difference, on the other" [4]. Also, the Commission recently reported positively on subsidiarity (European Commission, 2008) and the necessity of its application in all regulatory domains in the EU. Subsidiarity can arguably lead to the fulfilment of the second central principle and legal tool for the effective application of the EU telecoms law: the principle of mediation. Mediation is also a general political and legal concept that derives from subsidiarity and constitutes, at the same time, the means and mechanisms through subsidiarity can be fulfilled.

In the first section of this paper, a brief history of EU telecoms regulations and the constituent elements of the 2002 telecoms regulatory framework are presented. In the second section, the failure of the European regulatory authorities to ensure the timely, unanimous and effective implementation of this framework in a nationally heterogeneous Europe is discussed; related debates and literature critiques are presented. The third section focuses on the potential of subsidiarity and mediation to facilitate a more successful implementation of future EU laws in light of national heterogeneity, showing how national heterogeneity can assist in a constructive and beneficial European synthesis.

2002 EU telecoms regulation

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EU telecoms regulation: History in brief

The historical course of EU policies and initiatives regarding electronic networks and communication services essentially started in 1987 when the European Commission appeared as an "early mover" for a design of an initial regulatory framework. That framework set in action legislation to open national EU markets for telecommunications equipment and services, resulting in the full liberalisation of the EU telecoms markets by 1998. In 1999 a report entitled *Towards a new framework for electronic communications infrastructure and associated services* (European Commission, 1999) was published, providing an overview of EU regulations in telecommunications as well as proposing a new framework for communications infrastructure and associated services.

The liberalisation in 1998 and the 1999 Communications Review resulted in a 2002 regulatory package. Through this package, the Union attempted to overcome historical national fragmentation and diversity of European telecommunications and information markets, which was seen as a considerable barrier to "Europe" or "Europeanisation". European institutions involved were able to serve as a catalyst for changes and regulatory developments that had proven to be more difficult to achieve at the national level. Thus, the European Parliament and the Council adopted in March 2002 a new package of regulation for electronic communications which came into force in July 2003. Evaluated in retrospect, the outlined objectives of that package were the promotion of a competitive environment, consequent empowerment of a single European market, as well as the protection of consumer interests in the electronic communications sector [5]. In more specific terms, the key principles of that new EU regulatory framework were: "cutting red tape", including a general procedure for operators to enter new markets and entailing faster entrance of enterprises; "technological neutrality", so that the necessary flexibility could be achieved when dealing with emerging technologies and their convergence in media, telecommunications, the Internet and mobile communications; "light regulation" according to the dominant competition principles; and, "consistency across the European market", in order for the establishment of a single and unified market to be achieved [6].

The Commission proposed (European Commission, 2007) in 2007 to reform the 2002 regulatory framework and put reformed regulation in effect from 2010 onwards. This proposal can hardly be seen as an indication of reform of regulatory mindsets, visions and practices which have been prominent in the EU for quite some time now. The essential continuity of regulatory practices at the EU level is clearly shown in the initial suggestions for regulatory reform by the European Regulators Group (ERG) and the Independent Regulators Group (IRG) which emphasized the importance of market competition and the subsequent need for deregulation and smooth implementation of regulation in all member states [7].

The emphasis on market competition and uniform application of the terms and conditions of regulation across the EU borders is also confirmed by recent outcomes of regulatory reform. The European Parliament and Council of Ministers agreed on reform of the 2002 telecoms regulations on 4 November 2009, which consists of two Directives: the "Better Regulation" Directive (Directive 2009/140/EC) and the "Citizens' rights" Directive (Directive 2009/136/EC). The "Better Regulation" Directive 2009/140/EC amends the 2002 Framework Directives 2002/21/EC and the "Citizens' rights" Directive 2009/136/EC amends the Directive 2002/22/EC on universal service, the Directive 2002/58/EC on privacy and the Regulation (EC) No 2006/2004 on cooperation of national authorities on consumer protection laws. These two Directives suggest 12 main points of reform in order to achieve four objectives altogether: more competition, better regulation, strengthening of the internal market and consumer protection [8]. The emphasis on market de–regulation and competition is stressed in the "Better Regulation" Directive 2009/140/EC, which sets the basic principles of the reformed regulation and declares that the reform aims to "complete the internal market for electronic communications" [9] and to push all national regulators towards stronger market competition through lifting regulation in markets where competition operates well [10].

Of interest to this paper is the emphasis of the ongoing reform on full and consistent implementation of telecoms regulations in all EU member states with no divergence or delays allowed. Indicative of this emphasis is the new European advisory, coordination, and knowledge body, the European Body of Telecoms Regulators (BEREC) that the current reform establishes, which is further empowered than and replaces the ERG, aiming to formally

ensure consistent implementation of regulation across the EU borders. This emphasis essentially constitutes a continuity of the spirit and mandates of the 2002 regulatory package, the content and provisions of which are presented in what follows.

The 2002 EU regulatory framework: Content and provisions

The content of the 2002 regulatory framework was mostly driven by a two–fold aim: to boost market competition at the level of networks and platforms; and, to promote consumers' interests through a framework of universal service and privacy rules, including rules against spamming. Indicatively, the 2002/21/EC Framework Directive [11] states:

> The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by *inter alia*: ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality (Article 8, par. 2).

Hence, the 2002 EU telecoms regulatory framework consisted of six directives and one regulation:

1. *The 2002/21/EC Framework Directive of 7 March 2002* (European Commission, 2002a). This outlines the general principles, objectives and procedures applied horizontally to all. It mainly emphasizes the responsibilities, powers, and obligations of the National Regulatory Authorities (NRAs) in the EU member states, thus addressing the issue of timely transposition and full implementation of the regulatory package for all members.

2. *The 2002/20/EC Authorisation Directive of 7 March 2002* (European Commission, 2002b). This replaced individual licences with general authorisations in order to provide communications services. The Authorisation Directive aimed to diminish the regulatory burden on market access, so that more consistent treatment of operators could be achieved.

3. *The 2002/19/EC Access and Interconnection Directive of 7 March 2002* (European Commission, 2002c). This sets out rules for a multi–carrier marketplace, ensuring openness and interoperability. By working for the interests of market–driven forces, it assigns the NRAs to intervene wherever market forces cannot ensure the fulfilment of the objectives set out in the Framework Directive.

4. *The 2002/22/EC Universal Service Directive of 7 March 2002* (European Commission, 2002d). This is a directive that provides consumers with basic rights and minimum levels of availability and affordability of electronic communications services. The main obligations stated are the availability of Universal Service, the provision of equal access to disabled users, the affordability of tariffs, and the quality of the service of designated undertakings.

5. *The 2002/58/EC e–Privacy or Data Protection of 12 July 2002* (European Commission, 2002e). This protects users' privacy and personal data transferred over public networks. Some of the issues it addresses are: traffic data retention (Article 6); location data processing with previous user consent (Article 9); security (Article 4) and confidentiality of communications (Article 5).

6. *The 2002/77/EC Directive on Competition of 16 September 2002* (European Commission, 2002f). Its main goal is the abolition of special and exclusive rights related to electronic communications networks and services, as well as the assurance of objectivity, non–discrimination and transparency in the criteria according to which networks are provided with undertakings by the member states.

7. Finally, the *2887/2000/EC Regulation* on local loop unbundling (European Commission, 2000) requires incumbent operators to provide competitors with full and shared unbundled access to their local loops on fair, reasonable and non–discriminatory terms. This remains, however, one of the least competitive segments of the liberalised telecommunications market, as it takes into account policy, economic, cultural and other aspects and it seeks to balance the various interests of different users within the spectrum

(Røgeberg, 2004).

The 2002 EU regulatory framework: Problematic implementation vs. regulatory integration?

Problematic implementation

The performance of the 2002 EU regulatory framework has been given a generally positive assessment. Nevertheless, challenges stemming from national differences have regularly questioned its efficient implementation and illustrated the ineffective communication between the national and EU authorities in the field.

The IP/03/1121 EC report (European Commission, 2003a) on the transposition and implementation of the regulatory package into the member states announced that only five member states (Finland, Denmark, Sweden, United Kingdom, and Ireland) had taken by the deadline of 24 July 2003 (exception was the Directive 2002/58/EC, which had to be transposed by 31 October 2003) the necessary action to transpose the package into national law. The rest of the members had, according to the same report, lagged behind, as they did not meet the deadline for applying the required national transposition measures from 25 July 2003.

On 19 November 2003, the ninth report on the implementation of the EU electronic communications regulatory package (European Commission, 2003b) highlighted the remarkable divergence between the EU member states in the process of transposing and implementing the regulatory package, as of 1 November 2003 [12]. For the e–Privacy Directive it stated that "five countries had adopted measures to transpose the *Privacy Directive* by the deadline of 31 October. They are: *Denmark, Spain, Italy, Austria and Sweden*." [13]. Likewise, for the Universal Service Directive (2002/22/EC), it identified a range of inconsistencies and national "failures" in terms of timely, full and effective implementation of the Directive: "not all the provisions relating to the rights and facilities to be made available to end–users appear to be consistently transposed in the member states" [14]. Thus, it highlighted the risk for the market forces to "get" out of control and for the citizens to remain not fully served and protected.

Also, the tenth report (European Commission, 2004) argued that, despite the generally positive status of notifications and legal measures adopted by various member states, more than one year after the deadline for full adoption and implementation of the telecoms regulatory framework, five member states — that is Belgium, Czech Republic, Estonia, Greece and Luxemburg — had not transposed the framework. As a result, the Commission had launched, according to the report, infringement proceedings for non–notification, with proceedings before the European Court of Justice against Belgium, Greece and Luxemburg [15]. Also, the report highlights that Spain, France, Cyprus, Latvia, Lithuania, Poland, Slovenia and Slovakia had not at that point adopted secondary legislation in order to give full effect to primary legislation [16].

Finally, the eleventh report in 2006 notes delays, omissions and difficulties with respect to the regulatory "performance" of some member states as well as to the operation and independence of NRAs. For instance, the report informs that:

> Greece adopted primary transposition measures only in January 2006, and the adoption of some secondary legislation is still awaited in a few Member States. A number of Member States have also not yet made a start on the notification of market reviews, which are a key aspect of the framework; there are also concerns relating to the length of time that can elapse in some cases between the start of a market review and its completion [17].

The above official evaluations of the transposition and implementation of the EU telecoms regulation bring to the fore concerns related to regulatory delays and inconsistencies as well as to the degree of divergence of

national regulations. They also indicate the necessity for considerations of the wider power and discretion conferred to NRAs, the assignment and the clear attribution of tasks to those Authorities, the availability to them of a full range of remedies, the timely completion of the market analyses and the scope of Universal Service [18].

The member states failed to transpose the 2002 regulation promptly and to enable its efficient integration into national legislation, as particular national contexts significantly influence the whole transposition and implementation process. Here is where subsidiarity and mediation could be useful, providing more flexible and more highly mediated procedures to be followed by the EU throughout regulatory activity and development. Subsidiarity, for instance, should be considered not in relation to how market competition and deregulation could be encouraged (Haucap, 2009), but with respect to how EU visions and regulatory goals will become compatible with national particularities, priorities and demands. National heterogeneity deals with particular national market structures as well as with national particularities in policy cultures and practices, social mindsets, consumer preferences and pace of technological development.

Hence, this paper does not aim to proceed to normative judgements about transposition and implementation delays in member states or the rightfulness of the 2002 regulatory package *per se*. Instead, its aim is to illustrate that the objective of the Commission to build a single telecoms market and to "protect" consumers through specific regulatory premises cannot be communicated properly to member states unless the processes of EU regulation making, transposition and implementation take more seriously into consideration subsidiarity and mediation. This might have implications for the uniformity of telecoms regulation across the EU borders. The Commission should worry less about uniformity of regulation and more about how its declared regulatory goals are evaluated by the member states and the possible usefulness of the national or local perspective before, during and after the implementation of EU regulations.

EU regulation and critiques: National heterogeneity vs. regulatory integration?

There has been criticism of the character and performance of EU regulatory and policy procedures, posing a number of questions about national heterogeneity and regulatory integration in Europe. Negotiation, meaningful consultation, deliberation and democratic persuasion are more likely to succeed than legal standardisation and penalisation as a means of effective implementation and operation of EU regulations.

For example, Cuilenburg and McQuail (2003) challenge of a new communications policy paradigm in Europe. The European normative policy model of the past (1945–1980/90) and its principles of legitimized government intervention in communication markets for social purposes and public monopoly over radio and broadcasting [19] are being supplanted by an emerging policy paradigm which is "driven by an economic and technological logic, although it retains certain normative elements" [20]. In this emerging communications policy paradigm, normative and public interest parameters appear increasingly weakened in the process of policy formation, whereas market and economic criteria are increasingly empowered as the dominant forces at work: "… the motives have more to do with commerce and control than with 'social equality' as a valued end in itself…" [21].

This new market–oriented policy paradigm calls for uniformity of laws across nations in Europe in order for an internal profitable market to be established, thus creating a "paradox of nationalism" (Hedley, 2003). This paradox means that individual nations can only enforce their laws if they frame them similarly to those of the other nations. This entails an order to which all nations subscribe (Hughes, 2003). This order applies particularly within the EU borders, where the goal of uniformity and compliance is commonly accepted and the weakening of national laws is an unavoidable consequence. Such a homogenizing regulatory order poses, however, questions of national identity in societal, economic, political and technological terms, as well as questions regarding the feasibility of a uniform EU telecoms order where different and divergent national identities coexist.

Hence EU initiatives and regulations envisage the creation of a European information society for all. Scholars such as Mansell and Steinmueller (2000) predict that this vision will result in negative effects that would be overcome only through social regulation. Instead of the somehow

deterministic vision of a uniform European information society, the national and local distinctiveness of the EU member states arises as an intervening factor that paints a diverse and differentiating picture of the information society across the EU: “there are many different configurations of the European Information Society. These configurations involve different industrial structures, different roles of users, and different approaches to policy in both the private and public sectors” [22].

National contexts and their political, institutional, economic and socio–cultural traits influence the outcome of policy– and regulation–making (Sancho, 2002) and necessitate the further consideration of “social, technical, cultural and political relations to produce an unavoidably mixed set of outcomes — some good, others bad” [23]. The way in which regulation works depends on the features of each society “and include[s] a nation’s economic development, cultural idiosyncrasies and previous track record on market for products and services” [24]. This largely challenges EU regulations and brings to the fore, from an institutional viewpoint, the idea of path–dependency, which suggests that the world is not controlled and governed by us but by “insignificant accidents of history” [25]. This idea has implications for policy which depends on historical conditions, events, cultures and previous policies, making necessary for policy–makers to give “priority to investments in further information acquisition” rather than to policy–making *per se* [26]. Policy changes can be regarded as local adaptations to supra–national decisions (Pierson, 2000). EU policy–makers and regulators should take “a more flexible approach, giving member states the freedom to deviate from EU mandated policy” and allowing the EU “to explore the advantages and disadvantages of different policy solutions” [27].

National heterogeneity has affected the EU and its regulation of telecoms and the information society with different national governments attempting to interpret EU decisions in different ways, thus pursuing different goals through different means. National variability and divergence became obvious in the 1990s with domestic opposition and resistance to telecommunications liberalisation (Thatcher, 2002). Research identified a “Southern European” interventionist approach to telecommunications regulation correlated with “cultural affinities” of the countries in that region [28]. Simpson [29] raises the matter of multiculturalism and diversity in the EU, indirectly raising the question: who should represent the nations in the Commission’s regulatory mechanisms and what means will be required in order for national diversity to be reflected and balanced in the regulatory practice of decision–making, transposition and implementation in the field?

Hence, arguments concerning the market driven character of the EU telecoms regulation, the complex political and socio–cultural character of the supranational EU context, and the new challenges arising particularly for EU regulators in the telecoms domain suggest that negotiation, meaningful consultation, deliberation and democratic persuasion be considered more seriously and in juxtaposition with legal standardisation and penalisation as a means of implementing effectively the relevant EU regulatory mandates.

Subsidiarity and mediation: The remedy to the EU telecoms regulation?

This paper argues that the failures and shortcomings of the EU for the successful implementation and operation of the 2002 telecoms regulations push the EU to reconsider a more flexible, mediating and socio–culturally oriented regulatory actions.

Whereas the 2002 telecoms regulatory framework recognizes the necessity for flexibility and constant revision, at the same time it has aimed to launch a single European communications market through the timely and simultaneous transposition of the regulatory provisions of all member states [30]. This inconsistency is obvious in mid–term EU reports and evaluation of the implementation of regulations, where delays, partial inconsistencies and divergences are noted, indirectly bringing up the useful role that subsidiarity and mediation can play.

Subsidiarity

In general, the role of subsidiarity in public administration and governance

at the supranational, national, regional and local levels has constituted a major area of discussion in relation to European politics (Gelauff, *et al.*, 2008; Henke, *et al.*, 2006; Kersbergen and Verbeek, 2004; Bruce, 2006). The European Union itself has recognized the importance of subsidiarity for transposing and implementing EU decisions into the member states. The principle of subsidiarity constitutes part of the Treaty on European Union (7 February 1992, O.J. C 191), or the Maastricht Treaty. Article 5 of the Treaty frames the operative definition of the principle of subsidiarity as follows:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The Union recognizes the importance of subsidiarity as the appropriate tool for addressing the persistent opposition between centralised harmonisation and uniformly imposed EU law, on the one hand, and local resistance, control and partial autonomy of the member states on the other. Therefore, in 1996 the EU took a step forward when an intergovernmental conference led to a "Protocol on the Application of the Principles of Subsidiarity and Proportionality", which afterwards was annexed to the EC Treaty of Amsterdam (2 October 1997, O.J. C 340, 1, 105). Also, the Committee of the Regions established in 2007 a Subsidiarity Monitoring Network (http://subsidiarity.cor.europa.eu/) that examines new policy document by the Commission for compliance with the subsidiarity principle. More recently, the Committee of the Regions expressed the view that subsidiarity is key to the smooth operation of a multilevel governance model in the EU, and thus very beneficial for the economic development of the region and its territorial cohesion as well: "subsidiarity should thus be understood as the basis for a greater responsiveness to citizens' needs by all levels of governance and improved efficiency in decision–taking." [31]

However, the ideal balance between integration and diversity has not come through in EU governance as yet. Significantly, EU institutions such as the European Court of Justice have been resistant to subsidiarity because they think it over–emphasizes diversity and lacks legal content, thus being harmful to the vision of European integration (Broughton, 2007; Estella, 2002). EU institutions and many analysts in the field argue that subsidiarity is "a very elastic notion", as well as "diffuse and ambiguous, when not incoherent" [32]. In this sense, EU institutions have been facing a persistent anxiety about the way in which subsidiarity may jeopardize the certainty and consistency of the law applied within EU borders and create a sense of ambivalence and risk.

Fischer and Schley (2000) propose the federal idea based on subsidiarity as a remedy for regulatory inconsistencies and divergences in the EU. They illustrate that the resistance of citizens and member states to the European Union's actions mainly derives from the lack of subsidiarity and federal balance [33]. They consider subsidiarity important not only for the protection of dignity and diversity of social systems throughout the EU, but also for addressing structural problems of unity and difference within the European Union, through its dual nature — it both limits the state and empowers it, it limits intervention, while it also requires it — and its inherent paradoxes [34].

Thus, Fischer and Schley argue in favour of reconstructing the federal system through the far–reaching restructuring of the competency system and the reduction of the European Union's spectrum of tasks, so that the rule of subsidiarity comes to life and the "Protocol on the Application of the Principles of Subsidiarity and Proportionality" is put into action [35]. Specifically, they propose the re–distribution of competencies and execution of responsibilities between EU and member states as a prerequisite for encountering contradictions, arbitrariness and divergences within the EU [36]. The generic and "technically" difficult nature of such a re–distribution of competencies and execution of responsibilities can be overcome, according to other supporters of subsidiarity, through the employment of both horizontal and vertical means of application of subsidiarity: the horizontal model involves actors, institutions and procedures at the European level which are called to operate with accountability and democratic manner in their actions; the vertical model

involves the appropriate allocation of competence and roles between institutions at the European level and those at the national and sub–national levels [37].

Others have rightly emphasized the significance of subsidiarity as a principle and not simply as a rule. According to Schilling, "taking subsidiarity seriously implies basically not to restrict the subsidiarity principle to the role of a rule … but to give it an additional dimension by holding that there exists, alongside this rule, a subsidiarity principle" [38]. Similarly, de Búrca (1999) estimates the significance of subsidiarity as lying more in its rhetorical function to articulate and mediate problems between the EU as a whole and its constituent parts, rather than in its practical operation through institutions, as well as lawmaking and policy–setting forces at work. Carozza remarks in this respect:

> [the] human need for both belonging and differentiation reside in the same soil, and it would truly impoverish our discourse and reduce our capacity for understanding to limit subsidiarity to a technical European rule that does not grow up out of that ground [39].

Subsidiarity can be particularly useful in the domain of telecoms regulation. This is because it recognizes the necessity for proportionality of regulation, the varying national capabilities for the implementation of the EU law, the diverse national legal cultures, the so far centralised approach of the EU directives and decisions, and the simultaneous weakening of decentralised bodies of action. On this basis, subsidiarity offers an alternative to the history of EU communications regulation and proposes a reorientation of the 2002 framework and principles of telecoms law, bringing to the fore a more moderate regulatory approach.

Subsidiarity and the introduction of a more moderate approach to EU telecoms regulations are particularly needed if one considers the nature of telecoms markets and regulation. Telecommunications services are dependent on local and national infrastructures. Thus the regulated telecommunications services are not tradable across national borders; European regulations have to recognize relevant national environments and their particularities. Centralised regulatory mechanisms, practices and values cannot support equally all national telecoms services, leading to some form of "regulatory favoritism" [40]. From an economic and market perspective, if subsidiarity is not employed, market fragmentation occurs, undermining the goal of the EU authorities to construct a single internal telecoms market (Sun and Pelkmans, 1995).

Although the Commission recently reported positively on subsidiarity (European Commission, 2008), the application of subsidiarity is still rather uncertain, unclear and absent in telecoms regulation and among other regulatory domains. EU authorities in the telecoms domain rely heavily on infringements on delayed member states, penal action against them, a practice of sovereignty, and the judicial sphere of action that attributes a negative form of subsidiarity [41]. In this sense, the mere recognition by EU authorities of the usefulness of subsidiarity has not proven sufficient for its meaningful and multi–layered application in telecommunications regulation. Thus, subsidiarity becomes "a critical viewpoint with which to constantly undermine the internal and external foundations of … State Sovereignty" [42]. Subsidiarity should be more essentially applied as a structural guideline or a rhetorical mediator between integration and differentiation, harmonisation and diversity in telecommunications regulation.

In a way, this proposal is a political rather than a legal or "technical" change. It touches upon the deliberative character of policy discourses in the EU and the need to overcome the often–void nature of public consultation and other open coordination practices that take place in the Union today. Even when EU institutions initiate consultations among and between member states, these "open–coordination" practices are top–down and centrally determined and monitored, thus encouraging certain discourses and delivering results which are largely compatible with pre–defined agendas. The principle of subsidiarity into the political culture(s) of the Union would not make national differences the prominent parameter in EU regulation, but would enable the understanding of these differences, leading to compromises between EU and national actors on decisions which reflect many of the interests involved, with no "the winner takes it all" rule in the "game".

However, the application of subsidiarity does not automatically and in all cases ensure smooth and unproblematic co–existence of national– and EU–level regulatory interests and practices. In the case of a deadlock, agents involved could put in effect judicial and penal actions, which are currently omnipresent. The proposal here aims to a political and realistic change towards the idea of complementarity, with subsidiarity preceding penal action and exhausting all possibilities for democratic and open authority at all levels of EU governance. Under the umbrella of complementarity, subsidiarity will be in full effect, with penal actions by EU authorities taken only if and when subsidiarity has exhausted its potential and cases of national divergence are likely to put the EU at risk.

Mediation

The often abstract idea of subsidiarity can assume a more practical orientation through the effective application of mediation.

In order for the autonomy of the member states to be respected and the danger of ineffective implementation of EU law from member states to be avoided, mediation between the EU and member states should be employed. Mediation and its relevant mechanisms and bodies of execution can be regarded as the basis on which the claims of either side about the right to legislate will be dealt with and mediated satisfactorily. This has the potential to mitigate existing and long–standing discrepancies and divergences within the EU (Weidenfeld, 1994), and to give more incentives to NRAs to harmonize their decision–making, since the absence of such incentives to NRAs is considered one of the issues at stake in the implementation of EU regulations [43].

More specifically, what is suggested are mediating mechanisms of the EU to stimulate NRA independence and to monitor decision–making procedures of cooperation between NRAs, member states and the EU [44]. Mediating mechanisms can address the “principal–agent” relation and put “accountability instruments in centre position”, allowing “national regulatory authorities (NRAs) to use their discretion intelligibly and reasonably”. This can facilitate the empowerment of NRAs and their discretion, making at the same time NRAs more accountable [45].

Such mechanisms are considered to be mediating networks and, in particular, the qualitative upgrade and quantitative expansion of European agencies or institutions that increase accountability of policies and regulations:

> These institutions are primarily concerned with gathering information and developing joint methods of analysis for the evaluation of the effectiveness of EU action in the respective policy areas. In isolated cases such agencies can also be given supervisory and executive powers [46].

Mediation between the EU and its constituent parts can take place by establishing better “templates” for the transposition of EU regulations. Such “templates” can ensure a better level of democratic guidance to national authorities, provide further mechanisms for feedback [47], and coordinate various national initiatives through the exchange of information and experiences among NRAs and other competent authorities in charge [48]. Better “templates” of transposition encourage cooperation between interested parts and pluralism throughout the process of transposition and implementation of EU laws, establishing a new and feasible political choice for the EU and national authorities.

Mediating mechanisms should be in place through regulatory activities and after the transposition and implementation of EU regulation in member states. Pre– and post–legislative consultations and complaints mechanisms can be thought of as such mechanisms. Their qualitative and quantitative development can be particularly useful in developing deliberation. In this sense, what is proposed here is not necessarily a replacement of existing institutional and other fora for mediation, but rather a more efficient operation of such fora and, in particular, of consultation and complaint mediating mechanisms. This can be achieved and managed by the relevant EU bodies and authorities and in tight collaboration with the national authorities in the respective domains of activity and governance.

In telecommunications, the question of mediation can be related to the Commission’s decision in late 2009 to establish a new advisory,

coordination, and knowledge diffusion group — the Body of European Regulators for Electronic Communications (BEREC), made up of the heads of 27 national telecoms regulators. Taking into consideration the representativeness of all member states in this body, one could assume that this is an application of the principle of mediation. It is too early to reach any conclusions about the operation of this body. The concentration of European regulatory power in a single body invites further top–down decision–making and centralisation instead of subsidiarity (Haucap, 2009) and mediation, while it runs the risk of causing new power struggles within BEREC, between BEREC and the Commission and between BEREC and policy and regulatory authorities of the member states.

Mediation puts subsidiarity in practice through the active involvement of institutional bodies and stakeholders' organisations in a dialogue between supranational, national and even regional actors in the field. Such a synthesis does not undermine market development or modify telecoms regulations. On the contrary, proposals made in this paper address the way in which EU telecoms regulations can take place in an open, democratic, and accountable way to overcome the relentless contrast between national heterogeneity and a shared European vision.

Conclusion

The European Commission has been working on a reformed, ambitious and economically inspired regulatory framework for telecommunications. The outcomes of this reform have been published but not implemented. At this critical point, this paper argues for the emergence of a shared regulatory vision out of the diverse cultural and institutional landscape in Europe. Taking the example of the 2002 telecoms regulatory framework in the EU, this paper supports the principles of subsidiarity and mediation which can complement and essentially improve current regulatory tools and institutional practices, making national particularities a core consideration of EU regulations of telecommunications.

A fundamentally sociological perspective on EU regulation for telecommunications was adopted in this paper. By mainly discussing the possible role of subsidiarity and mediation, a series of other proposals or remarks for changes in the way that the EU designs its telecoms regulation were not included in the discussion. This work can be taken further. Although there is much criticism about formal decision–making in the EU, there is a need for in–depth, extensive and empirical research on telecoms regulation.

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Notes

1. European Commission, 2007, p. 1.

2. Carozza, 2003, p. 38.

3. Carozza, 2003, p. 39.

4. Carozza, 2003, p. 40.

5. DG Information Society, 2007, p. 1.

6. DG Information Society, 2007, pp. 1–2.

7. European Regulators Group (ERG) and the Independent Regulators Group (IRG), 2006, p. 35.

8. See at http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm .

9. European Commission, 2009, p. 37.

10. European Commission, 2009, p. 38.

11. European Commission, 2002a, p. 42.

12. European Commission, 2003b, pp. 3–4.

13. European Commission, 2003b, p. 4; original emphasis.

14. European Commission, 2003b, p. 35.

15. European Commission, 2004, p. 9.

16. *Ibid.*

17. European Commission, 2006, p. 10.

18. European Commission, 2004, pp. 5–6.

19. Cuilenburg and McQuail, 2003, pp. 191–195.

20. Cuilenburg and McQuail, 2003, p. 198.

21. Cuilenburg and McQuail, 2003, pp. 199–200.

22. Mansell and Steinmueller, 2000, p. 18.

23. Goodwin and Spittle, 2002, p. 235.

24. Jordana, 2002a, p. 5.

25. Liebowitz and Margolis, 1995, p. 33.

26. David, 2000, p. 15.

27. Bauer, 2002, p. 129.

28. Jordana, 2002b, pp. 86–109.

29. Simpson, 2000, p. 447.

30. DG Information Society, 2004, p. 2.

31. Committee of the Regions, 2009, p. 1.

32. Estella, 2002, pp. 82 and 96.

33. Fischer and Schley, 2000, p. 13.

34. Fischer and Schley, 2000, p. 44.

35. European Commission, 2000, pp. 13 and 15.

36. European Commission, 2000, p. 49.

37. Sypris, 2004, p. 325.

38. Schilling, 1994, p. 255.

39. Carozza, 2003, p. 52.

40. Haucap, 2009, p. 470.

41. Carozza, 2003, p. 56.

42. Endo, 2001, p. 36.

43. Sutherland, 2003, p. 6.

44. Geveke, 2003, p. 27.

45. Nicolaides, *et al.*, 2003, p. 2.

46. Fischer and Schley, 2000, p. 51.

47. Law Society, 2003, p. 15.

48. European Commission, 2003c, p. 8.

References

Johannes M. Bauer, 2002. “Normative foundations of electronic communications policy in the European Union,” In: Jacint Jordana (editor). *Governing telecommunications and the new information society in Europe*. Cheltenham, U.K.: Edward Elgar, pp. 110–133.

Linda M. Broughton, 2007. “Subsidiarity and proportionality in European law,” *ExpressO*, at http://works.bepress.com/linda_broughton/1, accessed 25 November 2009.

Raymon Bruce, 2006. “The quest for subsidiarity in Eastern European nation building,” *International Journal of Public Administration*, volume 29, number 13, pp. 1,215–1,227.

Gráinne de Búrca, 1999. “Reappraising subsidiarity’s significance after Amsterdam,” *Jean Monnet Center for International and Regional Economic Law & Justice, New York University Law School, Working Paper*, number 7/99, at http://centers.law.nyu.edu/jeanmonnet/papers/99/990701.html, accessed 14 December 2010.

Paolo G. Carozza, 2003. “Subsidiarity as a Structural Principle of International Human Rights Law,” *American Journal of International Law*, volume 97, number 1, pp. 38–79.http://dx.doi.org/10.2307/3087103

Committee of the Regions, 2009. *Opinion of the Committee of the Regions on Better Lawmaking Package 2007–2008*. 82nd plenary session (3 and 4 December), CONST–IV–023.

Jan van Cuilenburg and Dennis McQuail, 2003. “Media policy paradigm shifts,” *European Journal of Communication*, volume 18, number 2, pp. 181–207.http://dx.doi.org/10.1177/0267323103018002002

Paul David, 2000. “Path dependence, its critics and the quest for ‘historical economics’,” *Stanford University, Department of Economics Working Paper*, number 00011.

DG Information Society, 2007. “Electronic communications: Principles of the new regulatory framework,” at http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=1398, accessed 5 January 2008.

DG Information Society, 2004. “A three–pronged approach to the information society,” at http://akgul.bilkent.edu.tr/eu/002-3pillars-october04.pdf, accessed 19 March 2005.

Ken Endo, 2001. “Subsidiarity & its enemies: To what extent is sovereignty contested in the mixed commonwealth of Europe?” *EUI Working Paper*, number RSC 2001/24, at http://cadmus.eui.eu/handle/1814/1733, accessed 14 December 2010.

Antonio Estella, 2002. *The EU principle of subsidiarity and its critique*. Oxford: Oxford University Press.

European Commission (EC), 2009. *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, L 337/37, 18 December 2009*. Brussels: EC.

European Commission, 2008. *Report from the Commission on Subsidiarity and Proportionality (15th Report on Better Lawmaking, 2007)*, COM(2008) 586 final, 26 September 2008. Brussels: EC, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?

uri=CELEX:52008DC0586:EN:NOT, accessed 14 December 2010.

European Commission, 2007. "Commission proposes a single European telecoms market for 500 million consumers," press release IP/07/1677 (13 November). Brussels: EC, at http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3701, accessed 14 December 2010.

European Commission, 2006. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. European Electronic Communications Regulation and Markets 2005 (11th Report)*. COM (2006) 68 final, 20 February 2006. Brussels: EC.

European Commission, 2004. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. European Electronic Communications Regulation and Markets 2004*. COM (2004) 759 final, 2 December 2004. Brussels: EC.

European Commission, 2003a. "Telecommunications: Five member states have transposed new regulatory package into national law on time — Commission to start proceedings against latecomers," IP/03/1121 (25 July). Brussels: EC, at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1121&format=HTML&aged=1&language=EN&guiLanguage=en, accessed 14 December 2010.

European Commission, 2003b. "Report on the implementation of the EU electronic communications regulatory package," COM (2003. 715 final, 19 November 2003). Brussels: EC, at http://europa.eu/legislation_summaries/information_society/l24217d_en.htm, accessed 14 December 2010.

European Commission, 2003c. "DG Information Society, Paper presented at the EU Workshop on Unsolicited Commercial Communication on Spam" (Brussels, 1 October), at http://ec.europa.eu/information_society/policy/ecomm/doc/todays_framework/priv, accessed 14 December 2010.

European Commission, 2002a. *Framework directive* (2002/21/EC), O.J L 108, 24 April 2002. Brussels: EC.

European Commission, 2002b. *Authorisation directive* (2002/20/EC), OJ L 108, 24 April 2002. Brussels: EC.

European Commission, 2002c. *Access and interconnection directive* (2002/19/EC), OJ L 108, 24 April 2002. Brussels: EC.

European Commission, 2002d. *Universal service directive* (2002/22/EC), OJ L 108, 24 April 2002. Brussels: EC.

European Commission, 2002e. *E–privacy or data protection directive* (2002/58/EC), OJ L201, 31 July 2002. Brussels: EC.

European Commission, 2002f. *Directive on competition* (2002/77/EC), OJ L 249, 17 September 2002. Brussels: EC.

European Commission, 2000. *Regulation on local loop unbundling* (2887/2000/EC), OJ L 336, 30 December 2000. Brussels: EC.

European Commission, 1999. *Towards a new framework for electronic communications infrastructure and associated services*, COM(1999) 539. Brussels: EC, at http://europa.eu/legislation_summaries/internal_market/single_market_services/l2, accessed 14 December 2010.

European Regulators Group and Independent Regulators Group, 2006. *Response to call for input on the forthcoming review of the EU regulatory Framework for electronic communications and services* (23 February). Brussels: I/ERG, at http://www.erg.eu.int/doc/whatsnew/irgerg_call_for_input_final_pdf.pdf, accessed 14 December 2010.

Thomas Fischer and Nicole Schley, 2000. *Organizing a federal structure for Europe: An EU catalogue of competencies*. Gütersloh: Bertelsmann Foundation.

George Gelauff, Isabel Grilo and Arjan Lejour (editors), 2008. *Subsidiarity*

and economic reform in Europe. Berlin: Springer Verlag.

Arjan Geveke, 2003. "Improving implementation by national regulatory authorities," *Eipascope*, volume 2003, number 3, pp. 26–30, and at http://aei.pitt.edu/2592/01/scop_3_3.pdf, accessed 14 December 2010.

Ian Goodwin and Steve Spittle, 2002. "The European Union and the information society: Discourse, power and policy," *New Media & Society*, volume 4, number 2, pp. 225–249.http://dx.doi.org/10.1177/146144480200400206

Justus Haucap, 2009. "The regulatory framework for European telecommunications markets between subsidiarity and centralisation," In: Brigitte Preissl, Justus Haucap and Peter Curwen (editors). *Telecommunication markets: Drivers and impediments*. Heidelberg: Physica–Verlag, pp. 463–480.

Steve Hedley, 2003. "Nations, markets and other imaginary places: Who makes the law in cyberspace?" *Information & Communications Technology Law*, volume 12, number 3, pp. 215–224.http://dx.doi.org/10.1080/1360083032000198736

Klaus–Dirk Henke, Wolf Schäfer, Jacques Pelkmans, and Ian Cooper, 2006. "Subsidiarity in the European Union," *Intereconomics*, volume 41, number 5, pp. 240–257.http://dx.doi.org/10.1007/s10272-006-0194-3

Justin Hughes, 2003. "The Internet and the persistence of law," *Boston College Law Review*, volume 44, pp. 359–396, and at http://lawdigitalcommons.bc.edu/bclr/vol44/iss2/4/, accessed 14 December 2010.

Jacint Jordana, 2002a. "Introduction: Regulating telecommunications and enforcing the information society in Europe," In: Jacint Jordana (editor). *Governing telecommunications and the new information society in Europe*. Cheltenham, U.K.: Edward Elgar, pp. 1–23.

Jacint Jordana, 2002b. "The persistence of telecommunications policies in national states: Portugal and Spain in the European arena," In: Jacint Jordana (editor). *Governing telecommunications and the new information society in Europe*. Cheltenham, U.K.: Edward Elgar, pp. 86–109.

Kees van Kersbergen and Bertjan Verbeek, 2004. "Subsidiarity as a principle of governance in the European Union," *Comparative European Politics*, volume 2, number 2, pp. 142–162.http://dx.doi.org/10.1057/palgrave.cep.6110033

Law Society, 2003. *Law Society comments on the Convention on the Future of Europe* (June).

Stanley Liebowitz and Stephen E. Margolis, 1995. "Policy and path dependence: From QWERTY to Windows 95," *Regulation: Cato Review of Business & Government*, volume 1995, number 3, pp. 33–41.

Robin Mansell and W. Edward Steinmueller, 2000. *Mobilizing the information society: Strategies for growth and opportunity*. Oxford: Oxford University Press.

Phedon Nicolaides, Anne–Mieke den Teuling and Arjan Geveke, 2003. *Improving policy implementation in an enlarged European Union: The case of national regulatory authorities*. Maastricht: European Institute of Public Administration.

Paul Pierson, 2000. "Increasing returns, path dependence, and the study of politics," *American Political Science Review*, volume 94, number 2, pp. 251–267.http://dx.doi.org/10.2307/2586011

Marianne Røgeberg, 2004. "The EU regulations on electronic communications networks and services," paper presented at ITU/ITC Regional Seminar (Moscow, 27–30 April).

David Sancho, 2002. "European national platforms for the development of the information society," Jacint Jordana (editor). *Governing telecommunications and the new information society in Europe*. Cheltenham, U.K.: Edward Elgar, pp. 202–227.

Theodor Schilling, 1994. "A new dimension of subsidiarity: Subsidiarity as a rule and a principle," *Yearbook of European Law*, volume 14, pp. 203–256.http://dx.doi.org/10.1093/yel/14.1.203

Seamus Simpson, 2000. "Intra–institutional rivalry and policy entrepreneurship in the European Union: The politics of information and communications technology convergence," *New Media & Society*, volume 2, number 4, pp. 445–466.http://dx.doi.org/10.1177/14614440022225904

Jeanne–Mey Sun and Jacques Pelkmans, 1995. "Why liberalisation needs centralisation: Subsidiarity and EU telecoms," *The World Economy*, volume 18, number 5, pp. 635–664.http://dx.doi.org/10.1111/j.1467-9701.1995.tb00237.x

Phil Sypris, 2004. "In defence of subsidiarity," *Oxford Journal of Legal Studies*, volume 24, number 2, pp. 323–334.http://dx.doi.org/10.1093/ojls/24.2.323

Ewan Sutherland, 2003. "Evaluating the implementation process," speech made at *WiK The Changing European Regulatory Framework* (Berlin, 28 October), text at http://www.3wan.net/talks/2003/, accessed 14 December 2010.

Werner Weidenfeld (editor), 1994. *Europe '96: Reforming the European Union*. Gütersloh: Bertelsmann Foundation.

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