

## Interactions through Soft Law in the EU Multi-level Space – the Cases of Competition Enforcement and Telecommunications Regulation

### | Section I: Introduction |

The study of the evolution of EU administrative law<sup>1</sup> has brought to scholarly attention a plethora of peculiar governance processes that are taking place in virtually the entire EU policy space, with EU Economic Law<sup>2</sup> – the foundational pillar of EU integration – being a prime example. As Colin Scott puts it, governance refers to ‘the dispersal of capacities and resources relevant to the exercise of power among a wide range of state, non-state and supranational actors.’<sup>3</sup> As such, the phenomenon is in stark contrast with command-and-control methods of regulation that rely on the centralized concentration and exercise of power.

Governance models have thrived through the growth of the administrative state of the past 30 years, characterized by technical complexities that fuel decentralization in the form of delegation to expert enforcers (the so-called ‘agencification’<sup>4</sup> phenomenon). This development invariably leads to layering of national as well as supranational administrations, resulting in the creation of multi-level networks. The use of the multi-level network design is prevalent in EU Economic Law where strong representatives such as the ECN (European Competition Network) for competition policy and the BEREC (Body of European Regulators for Electronic Communications) for telecommunications regulation are at the forefront of enforcement. The legal instruments these networked regulators employ to fulfil their mandates also break away from hierarchy. Increasingly, use is made of non-binding ‘soft law’ guidelines, recommendations and notices that blur the initially vertical relationship between the national and the supranational level in the EU. This blurring happens because soft law, characterized by lack of binding force, skates past the guarantees of democratic rulemaking that binding legislation (hard law) has to meet. In this sense, soft law can be issued by a lot more (national and supranational) actors with indirect democratic legitimation that work together in a ‘networked’ governance setting. Surely, soft law can also evolve into legislation (hard law) provided that it is re-adopted through a Treaty-prescribed (EU) or Constitutionally-prescribed (national) legislative

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<sup>1</sup> See P. Craig, *EU Administrative Law* (OUP, 2018).

<sup>2</sup> The main two pillars of EU economic law are EU Internal Market Law and EU Competition Law, but the field also encompasses the so-called ‘public’ competition law – EU State Aid Law and Public Procurement Law. Additionally, EU Regulatory Law (telecommunications, energy, healthcare) also fall under this umbrella term.

<sup>3</sup> Scott, ‘Regulation in the Age of Governance: the Rise of the Post-regulatory State’ in Faur and Jordana (eds.) *The Politics of Regulation: Institutions and Regulatory Reforms in the Age of Governance* (Edward Elgar, 2004), 1.

<sup>4</sup> Chamon, ‘Transparency and Accountability of EU Decentralised Agencies and Agencification in Light of the Common Approach on EU Decentralised Agencies’ in Garben et al (eds.), *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing, 2019), 245-266

procedure. As will be seen in the paragraph below, it seems that the Commission does lobby Council and Parliament for such conversions and is successful.

By comparatively examining cases of inter-institutional interactions of the key actors in the fields of EU competition law and telecommunications regulation (national regulatory authorities, national and EU courts, and the EU Commission), this paper aims to show how the European Commission is making strategic use of the core of governance outputs - soft law instruments - in order to obtain enforcement outcomes that are consistent with the Commission’s own vision of the ‘correct’ *modus operandi* for EU Economic Regulation. The paper also claims that the success of this approach depends on the institutional design of the policy field, which the Commission wants to dominate. In particular, a field where the Commission has exclusive competence to regulate – such as competition policy – lends itself to a lot easier steering through soft law; by contrast, attempts at power grabbing through soft regulation in domains where the Commission is weaker by design (such as in telecommunications regulation) seem to fail. In the latter case, to still achieve a position of power, the Commission is likely to exert pressure on the Council to adopt hard law at EU level so that the legal framework leans towards regulation through stealth, again aligned with the preferences of the Commission. All in all, it is maintained that the Commission, as the umpire of internal market integration, strategically uses governance processes generally and soft law in particular to secure a position of intellectual dominance in the domain of EU Economic Regulation. When soft instruments turn out not to be fit for purpose (in fields where the Commission wields less power by design), the institution resorts to lobbying the Council to enact hard law as was the case with the enactment of Art. 75 (1) of the Code for European Electronic Communications in 2018 to be discussed in Section III of this contribution. The argument is schematically summarized in the below table.

Assumption: Commission acts to increase its power and influence in EU Economic regulation	Commission operates within institutional design that allots to it exclusive competence and lots of power	Commission expands power ‘in the shadow of hierarchy’, by using more and more governance mechanisms and soft law in particular
	Commission operates within institutional design that allots to it shared competence with Member States and moderate amounts of power	Commission cannot achieve power expansion through soft law ‘in the shadow of hierarchy’ and lobbies Council and Parliament for extending its power through a non-governance mechanism – enacting legislation (hard law)

The picture painted above is surprising in light of theories that stipulate that national resistance to transfer competencies to the EU institutions leads those to resort to alternative decision-making mechanisms such as soft law.<sup>5</sup> Here, we stipulate that the opposite is true in EU Economic Regulation and prove this contention through illustrative examples in Section III.

The examples informing this contribution are derived from the fields of EU Competition Law and Telecommunications Regulation, respectively. As will be explained below, these two domains have been chosen because they exhibit significant similarities – procedurally, they are equipped with two of the strongest network designs according to network studies.<sup>6</sup> Additionally, on the level of substance, the principles of free market competition provide the tools for enforcement by the networked regulators under both domains. Further, although the goals of telecommunications regulation are broader than these of competition law, both fields are currently geared towards the ultimate goal of the achievement of a harmonized internal market through consistent multi-level enforcement of the free market competition principles.<sup>7</sup> As Gamito puts it ‘Telecommunications regulation, together with competition law, is placed at the core of network-based governance’.<sup>8</sup>

Before proceeding to a summary of the outline of this contribution, it is important to observe that the examples this paper is built on are drawn from the original six EU Member States – those that have been subject to both regulatory and competition enforcement from the outset of the two policy domains, respectively. This selection will contribute to a balanced comparison of the identified cases, given that Member States who joined the EU at later stages (especially post-2000) experienced simultaneous introduction of both competition and sector regulation. This fact is likely to have had an impact on their overall level of acceptance of the new regimes that is different from that of the original Member States where competition and regulation were introduced sequentially. Furthermore, it is hereby noted that for its empirical core this paper relies on descriptive accounts of identified core cases (judicial and/or administrative decisions), which are accompanied by quantitative insights where available primary (data) or secondary (legal empirical literature) sources were identified.

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<sup>5</sup> Massaro, ‘Between Integration and Protection of National Sovereignty in the European Union’s Radio Spectrum Policy: Uncovering Potential Research Avenues’ 2019 (9) *Journal of Information Policy*, 158-197.

<sup>6</sup> D. Coen, M. Thatcher, ‘Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies’ (2008) 28 *Journal of Public Policy*, 49.

<sup>7</sup> P. Larouche, ‘A Closer Look at Some Assumptions Underlying the EC Regulation of Electronic Communications’ (2002) 3 *Journal of Network Industries* 32.

<sup>8</sup> Gamito, ‘The Transformation in the Making of Private Law via EU Telecommunications Regulation’ in *The Private Law Dimension of the EU Regulatory Framework for Electronic Communications Evidence of the Self-sufficiency of European Regulatory Private Law* (EUI Department of Law PhD Thesis, 2016), 88.

With this information in mind, the current paper proceeds to briefly introduce the respective institutional designs of competition policy and telecommunications regulation, with a focus on the core similarities and differences between them (Section II). Section III, in turn, presents the examples of competition and telecommunications judgments and administrative decisions that inform the findings of this paper. These are presented in Section IV, which also draws the threads together by reflecting on the implications of the findings for the role of the Commission as a power player in EU Economic Regulation and, and as a corollary, on theories on soft law evolution in EU multi-level governance processes.

## | Section II | The institutional designs of competition policy and telecommunications regulation

As Gamito argues in the context of EU telecommunications regulation, ‘the enforcement architecture (...) significantly impacts the effectiveness of substantive rules’.<sup>9</sup> This paper expands on the above assertion by claiming that enforcement architecture (i.e. institutional design) also conditions the *type of legal instrument* that those substantive rules are going to ultimately be contained in. As a first step on the way to substantiating this claim, a more in-depth look into the institutional designs of the policy fields of competition and telecommunications regulation is in order. Additionally, attention will be paid to the instrumental interests of the actors involved in both competition and telecommunications regulation, in order to examine how they influenced (or are independent from) the institutional design features of the respective fields under examination in this paper.

### | Competition Policy

Competition Policy – the domain that curbs market power when it is exercised to the detriment of competition on the merits – figured prominently in the foundational Treaty of Rome as an exclusive core competence of the (then) EEC and maintains this status to the current day. At the point of adoption of competition policy in the EU in the 1950’s, there was only one Member State with competition law experience – Germany,<sup>10</sup> while the other five original Member States were bandwagoning on the efforts of the US to export its antitrust regime to post-war Europe. This limited experience at the time, the youth of the then European Communities and the instrumental centrality of competition policy to the achievement of the main goal of the Communities at the time – an internal market – would explain why there was no serious resistance to the transfer of significant amounts of decision-making and rulemaking power to the European Commission in the field of competition. As will be explained in the section to follow, the historical and institutional context within which liberalization took place was quite different, which resulted in the field of telecommunication regulation being designed differently.

To complete the picture of the fundamentals, on which EU Competition Policy rests, we should mention that the main legal provisions governing the field are Articles 101 and 102 TFEU and Article

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<sup>9</sup> Gamito, ‘Dispute Resolution in Telecommunications: a Commitment to Out-of-Court’ *European Review of Private Law* 2-2017, 388. The same idea is also expressed by Miranda Cole, ‘Pursuing European Regulatory Cooperation and Consistency’ (GCR Sector Regulation Brief 2010/02), 25.

<sup>10</sup> Gerber, ‘Domestic Experience and Global Competition Law’ in *Global Competition: Law, Markets and Globalization* (OUP, 2010).

2 of the Merger Control Regulation.<sup>11</sup> Besides these core provisions that express main principles, the largest source of EU Competition Law is the huge set of individual decisions, issued by both the Commission and National Competition Authorities (NCA's) when applying EU law and the principles embodied in the abovementioned main provisions. Additionally, the judgments of national courts and the CJEU when dealing with matters of EU competition law also fall under the latter category. The European Commission as the responsible supranational authority has the upper hand in the enforcement of competition law, both in its encounters with EU courts (as its decisions are almost always deferred to when judicially reviewed) and in its daily interactions with national authorities (the Commission can decide to relieve national authorities from jurisdiction to decide a case with an EU dimension if it deems it appropriate). In addition to its powers to set the agenda on substance and to control procedural division of jurisdiction, the Commission also occupies a position of 'first among equals' within the framework of the European Competition Network (ECN) – a governance structure of exchange of information and development of best practices and policies by national authorities and the Commission. In the institutional framework of competition policy, the Commission can employ both hard-and-fast (relief of jurisdiction) and soft mechanisms (communication and work within the ECN) to achieve its policy objectives. For the most part, it makes use of the latter methods as demonstrated by its ever increasing reliance on soft law instruments to set and steer policy developments.

Additionally, one should not lose sight of the fact that compliance with soft methods in competition policy happens at the backdrop of the constant possibility of the Commission reverting to hard-and-fast mechanisms on its own initiative when not pleased with enforcement outcomes – a possibility permitted by the institutional design of EU Competition Policy, but not available under telecommunications regulation. Therefore, soft law in competition enforcement seems to be used 'in the shadow of hierarchy'<sup>12</sup> – wary of its power to employ (costly) command-and-control mechanisms, the Commission uses (low key) soft instruments instead, with the aim to spread its enforcement vision that then gets *de facto* and *de jure*<sup>13</sup> adopted at the national level without much resistance. Soft instruments in this context are an indispensable feature of the Commission's power to dictate the rules in EU Competition Policy and the adoption of hard law instruments as an alternative is unlikely. This point will be illustrated through an example in Section III below.

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<sup>11</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance).

<sup>12</sup> A. Héritier and D. Lehmkuhl, 'The Shadow of Hierarchy and New Modes of Governance', (2008) 28(1) Journal of Public Policy 1-17.

<sup>13</sup> De jure adoption can either happen when courts interpret soft law instruments in their own right, or when soft law instruments of the Commission get verbatim 'transposed' into the national legal system of an EU Member State. In competition law, this happened in the Netherlands with respect to the Article 101(3) guidelines of the Commission.

## | Telecommunications Regulation

The ‘shadow of hierarchy’, within which competition policy instruments seem to exist, does not apply to telecommunications regulation due to its different institutional design. Telecommunications regulation can be defined as the policy domain created when the principles of free market competition were mobilized in order to liberalize the state monopolies prevalent in the telecommunications sector in Europe until the late 1980’s. The application of the principles of competition to this sector, however, is subject to the provision of access for all (universal service)<sup>14</sup> that can lead to different enforcement outcomes than under the application of ‘pure’ competition enforcement; still, in their core both domains apply competition principles when intervening in markets. However, the success of the Commission in enforcing the details of those principles is different as mentioned in Section 1 above and as will be illustrated by examples in Section 3 below.

From the outset of EU-level regulation of telecoms in the 1990’s, it was clear that enforcement would happen through national competent bodies – National Regulatory Authorities (NRA’s) – which would implement EU telecommunications Directives-based legislation at the national level and make decisions on the basis thereof. As Bergqvist testifies, ‘(...) opening for competition in the supply of electricity and telecommunications has required a delicate balancing between what the Commission considered required and what the Member States were willing to accept.’<sup>15</sup> In telecommunications regulation, therefore, the interests of Member States in not having the Commission to excessively meddle in the politically sensitive topic of utilities prevailed. Consequently, the Commission was excluded from the possibility to take regulatory decisions in parallel with NRA’s and could logically not relieve the latter from jurisdiction in cases where it would deem it appropriate. The only way for the Commission to influence the national regulatory setting within the constraints of the selected institutional design was through issuing non-binding instruments – ‘serious objection’ letters, recommendations, etc. – with the aim to coordinate national and supranational preferences on the direction of telecommunications regulation. As will be seen in Section III below, this move did not prove to achieve its objective.

Similarly to competition policy, the Commission tries to increase its influence in telecomm regulation through the creation of a network for telecommunications regulation – the Body of European Regulators for Electronic Communications (BEREC). This structure, however, allocates a much less

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<sup>14</sup> Covelo de Abreu, ‘Digital Single Market as the New World to the European Union: Repercussions in Social and Institutional Regulatory Structure – the Universal Service and the Body of European Regulators for Electronic Communication’s (BEREC) Re-definition’ 4(2) EU Law Journal (2018), 55.

<sup>15</sup> Bergqvist, *Between Regulation and Deregulation* (DJOF Publishing, 2016), Chapter VIII.

central role to the European Commission; efforts of the supranational enforcer to change the power distribution and the status of the BEREC (from an EU body to an EU agency capable of own decision-making) have so far proven to be fruitless. This is also the case because of the strong resistance by the Member States to cede regulatory power in a domain that has until recently been subject to exclusively state-controlled decision-making in most EU jurisdictions. As demonstrated in the section to follow, these tensions came to the fore once again with the newest revision of the Directives-based EU telecommunications framework in 2018. The field of competition is not subject to such issues of institutional design, because – as explained above – the policy domain developed organically at supranational level and was then adopted on a clean-slate basis by jurisdictions joining the EU.



The divergent institutional designs of competition policy and telecoms regulation have attracted criticism from scholars, given that the core objective of both policy domains is the promotion of undistorted competition on the internal market. In this sense, giving the Commission less, rather than more tools to influence telecommunications regulation is seen as a bad idea that could lead to inertia on the side of the Commission and make of it a mere policy setter with no real hands-on experience.<sup>16</sup> This worry, however, is unfounded as will be seen in the examples to be presented in Section III – the latter paint a picture of an expansionist Commission in the sector of telecommunications regulation.

What the above summary of the origins of telecommunication regulation and competition enforcement showed is that the i) interests of the actors involved and ii) the timeframe within which the policies were adopted both had an influence on the ultimate institutional design features of the respective enforcement domains. One could even say that these factors condition institutional design while, in its turn, institutional design conditions the approaches to regulation (soft law-based or legislation-based) that the Commission opts for with the aim to expand its overall influence and power in EU Economic Regulation. The chain of influence described above can be graphically represented as follows.

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<sup>16</sup> Larouche, 'A closer look at some assumptions underlying EC Regulation of electronic communications' (2002) 3 *Journal of Network Industries*, 147.



i) Interests of Member States  ii) Time period of policy adoption  	Institutional design features of competition law and telecommunications regulation, respectively  	Commission acts through soft law (governance-based response) or through hard law (legislative, 'classical' response). Assumption is still that Commission acts to increase power and influence in EU Economic Regulation.
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**| Section III | The Commission’s instrumental usage of soft law – making the most of institutional design**

After having examined in more detail the similar objectives, but different institutional designs of the fields of competition and telecommunications regulation, we proceed to presenting and analyzing specific instances of interactions between the Commission acting as a policy entrepreneur with its soft law instruments, and the relevant actors in one of the original six EU Member States, reacting to them. The main point that transpires is that the Commission is prone to aggressively substitute soft law for command-and-control methods of enforcement under telecommunications regulation, while the case is not the same for competition. The hypothesis explaining this phenomenon is that where the Commission’s enforcement powers are weaker, it is more likely to be reactionary and plead the Council for adoption of hard legal instruments when it meets resistance to its soft law-‘clothed’ policies at the national level. Conversely, when the Commission is ‘in full control’ of an enforcement domain, soft measures suffice to achieve the goal of enforcement consistency, i.e. compliance with what is supranationally postulated by the Commission.

Before proceeding to the examples/cases that speak to the hypothesis expressed above, it needs to be reiterated that where quantitative data was available, it was included in the respective sections on Competition Policy and Telecommunications Regulation below. An important further caveat is that the objective of this study is for it to be expanded with more quantitative and qualitative data that points towards a more nuanced picture regarding the hypotheses expressed above. While it is indeed possible that instrumental usage of soft law is an important driving force behind our observations, we are mindful of other factors that might transpire in the course of further research.

## | Competition Policy

The examples to be given with respect to the strategic usage of competition soft law by the Commission refer to the so-called ‘Guidelines on vertical restraints’,<sup>17</sup> which the Commission issues to clarify when it will act against market distortions caused by the dealings between a supplier and buyer, i.e. enterprises interacting vertically in the supply chain. These guidelines include lots of intricate rules, but one of them – expressed in paragraph 54 thereof – sparked debates and divisions between the courts and competition authorities in France in Germany and made it all the way up to the European Court of Justice.<sup>18</sup> The rule amounted to allowing the supplier in an online selective distribution system to prohibit his authorized distributors from selling his goods on online platforms not explicitly vetted by the supplier. For example, under such a rule, the supplier of a luxury perfume could prohibit all his authorized distributors in the EU from selling on E-bay, provided that E-bay is not on the list of the platforms vetted by the supplier. It is also important to note that lawful selective distribution systems as a rule have the objective of protecting the image of a brand/product and are therefore geared at excluding distributors not authorized by the supplier, both in online and in brick-and-mortar context.

The concerns from a competition perspective picked up by German and French courts and authorities alike were that such a rule could divide (online) markets and customers in the EU, which is a serious infringement of – among others – the main Treaty provision Article 101(1) TFEU. However, the practice could also be seen as a type of a selling arrangement that is innocuous because it excludes from the sales channels parties that could harm the selective distribution agreements’ core – namely, brand image. To make matters worse, there was no previous precedent on this specific issue and the only rule that gave any guidance was a non-binding soft law instrument issued by the Commission. It is not a surprise, therefore, that the two jurisdictions that were examining the issue at the same time came to diverging conclusions. In particular, the Paris Court of Appeal ruled that article 54 constituted an outright infringement under Article 101(1) TFEU, while the German judiciary’s response was more nuanced, reflecting the two contending considerations on the nature of online sales bans described above. Overall, the position of the German judiciary on online platform sales bans seems to depend on whether the court sees these practices as either:

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<sup>17</sup> Vertical Guidelines, [2010] OJ C 130/01, para.52-54, p.14.

<sup>18</sup> Judgment of 21 December 2016, *Concurrence*, C- 618/15, ECLI:EU:C:2016:976 and Judgment of 6 December 2017, *Coty Germany*, C-230/16 ECLI:EU:C:2017:941. For the significance of this latter case, see the blog post of P.I.Colomo, ‘Case C-230/16, Coty: a straightforward issue with major implications’, *Chilling Competition Blog* (2017), <https://chillingcompetition.com/2017/02/16/case-c-23016-coty-a-straightforward-issue-with-major-implications/>.

- (1) restricting market access to a particular customer group, in which case they will be deemed as ‘by object’ restrictions, or
- (2) restricting a particular method of distribution, whereby they are unlikely to be seen as anti-competitive.<sup>19</sup>

In the battle between those approaches and in the aftermath of the subsequent preliminary references to the Court of Justice that crystalized a rule that article 54 of the Vertical Guidelines was not anti-competitive, one would have expected that the Commission would react by solidifying this finding in a hard law instrument (a Commission Regulation, for example) that would – among others – settle the issue once and for all. However, this did not happen. The Commission seems to be satisfied with the current *status quo* and has not taken further steps although almost two years have passed since the last (non-binding on Member States) CJEU answer on a preliminary reference regarding the matter.

Given that the Commission has a mandate for securing consistent competition enforcement across the EU, conducive to the achievement of a healthy internal market one would expect that – if the Commission sees a threat – it should easily take an appropriate action given its toolkit under competition policy’s strong institutional design. The realities are therefore puzzling, but can be explained under the assumption made initially that the Commission in competition law operates and achieves consistency under the ‘shadow of hierarchy’. This assumption is also confirmed by the results of an empirical legal study by this author on national judicial attitudes to competition soft law in four EU jurisdictions, three of which are founding EU Member States.<sup>20</sup> On the whole, the study shows that while not all national courts are equally enthusiastic when faced with a soft law instrument that they need to apply, the overall reaction is positive, in the sense that national courts predominantly follow the rules expressed in soft law; at times, but a lot less often, they also thwart them, especially when it comes to certain contentious soft law instruments (see graph in the Annex to this paper).<sup>21</sup> In this sense, more is needed to achieve more consistent treatment of specific issues under the Vertical Guidelines, but these usually get solved either through informal communication within the ECN or the Association of the Competition Law Judges.<sup>22</sup> This fact points to the conclusion that the Commission makes good use of governance-embedded network-based ‘soft’ enforcement

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<sup>19</sup> Case C-26/76 *Metro v Commission*, EU:C:1977:167.

<sup>20</sup> Georgieva, *Soft Law in EU Competition Law and its Reception in Member States’ Courts* (Tilburg University Prisma Print, 2017) ISBN: 978-94-6167-320-6.

<sup>21</sup> For example, the 102 Guidance Paper is an instrument that seems to contradict established case law in the area of abuse of dominance. This instrument therefore proves to be contentious if it comes to be interpreted in national courts.

<sup>22</sup> For example, several competition authorities and the Commission came up with a common position on the treatment of a controversial topic under the Vertical Guidelines – the so-called MFN clauses in competition law; see here: [https://ec.europa.eu/competition/ecn/hotel\\_monitoring\\_report\\_en.pdf](https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf).

mechanisms in the competition field. On certain occasions, there are escalations of contentious issues contained in soft law instruments that make it to the CJEU,<sup>23</sup> but this never triggered the Commission to start an effort for re-adoption of the Vertical Guidelines or any other soft instrument as a hard legal act. The opposite is true for the field of telecommunications regulation, to which we turn next.

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<sup>23</sup> Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* (ECR-General; ECLI:EU:C:2017:941).

## | Telecommunications Regulation

In December 2018, the legislative framework regulating telecommunications in the EU was significantly changed for the first time since 2009 to better reflect evolving technological realities and in particular the fact that due to the advent of the Internet the phenomenon of convergence of services made it imperative to make laws more flexible and to cover more regulatory ground. As Savin explains, the phenomenon convergence of services is a development whereby ‘conveyance of telephone, video and data is taking place using a single network’, that being the Internet.<sup>24</sup> This development prompted the Commission to include all relevant prior legislation into one consolidated and updated directive, given a rather telling name – European Electronic Communications Code.<sup>25</sup> What is also remarkable about the Directive is that it literally absorbed the abovementioned Recommendation on the regulatory treatment of fixed and mobile termination rates in the EU (the recommendation).<sup>26</sup> In what is now Article 75(1) of the Directive, the Commission was given a mandate to adopt a hard non-legislative act by 31 December 2020 in order to set a fixed methodology for cost termination regulation across the entirety of the EU. This resulted in the adoption of a Delegated Regulation on 18 December 2020.<sup>27</sup> Needless to say, flexibility and deviation under the new instrument will not be possible and – what is more worrisome – we are talking about a delegated act, for which adoption a lot less democratic guarantees apply than for the ‘classical’ legislative acts (directives, regulations and decisions) and other non-legislative acts (implementing acts). Under the procedure for delegated acts, the Commission moves to adopt these instruments alone and is not obliged to consult comitology committees, as is the case for implementing acts.<sup>28</sup> This information, combined with the developments regarding termination rates in several original EU Member States to be described below, could suggest that the newly introduced regulation of termination rates through hard law was a deliberate and well-negotiated act of the Commission, which was losing its grip on national regulators regarding this matter in previous regulatory periods. The story of the recommendation-turned-regulation, it is argued, shows the Commission’s struggle for power assertion in roundabout ways in a policy domain, the institutional design of which does not allow it much room for maneuver. This move must have been seen as imperative by the

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<sup>24</sup> A. Savin, ‘EU Telecommunications Law’ (Edward Elgar, 2018), Chapter 1.

<sup>25</sup> The word ‘code’ is reminiscent of codification as performed in Napoleonic France and is likely deliberately chosen by the EU to signify an evolving telecoms system that is to apply strictly and consistently throughout the EU, no matter the fact that the governing instrument is actually a directive.

<sup>26</sup> Termination rates are the rates that telecom operators charge each other to deliver calls between their respective networks. In Europe, call termination is arranged on the basis of the ‘caller pays’ principle – the network the caller is subscribed to pays to the network of the called party a ‘call termination rate’ for the execution of the said call. Call termination rates (also known as ‘call termination charges’) are usually (but not always) reflected in the customer’s bill.

<sup>27</sup> For the text of the instrument, please consult the website of the European Commission at: <https://digital-strategy.ec.europa.eu/en/news/commission-adopted-delegated-regulation-eu-wide-voice-call-termination-rates>.

<sup>28</sup> See Articles 290 and 291 TFEU and implementing acts in particular (Article 291 TFEU). For more information, consult Z. Xhafferri, ‘Delegated acts, implementing acts, and institutional balance: implications post-Lisbon’ (2013) 20(4) Maastricht Journal of European and Comparative Law.

Commission, given long-lasting resistance from Italy, Germany and the Netherlands to adopt its previous policy line, enunciated in the now former recommendation on call termination rates.

In August 2011, the Dutch Trade and Industry Appeals Tribunal (Cbb) quashed<sup>29</sup> a decision of the OPTA<sup>30</sup> (the former Dutch Telecom Regulator, now ACM) whereby the regulator chose to adopt an approach for setting call termination rates suggested by the European Commission Recommendation on the regulatory treatment of fixed and mobile termination rates in the EU (the recommendation). The Tribunal reasoned that although there was an EU law based<sup>31</sup> obligation of ‘taking utmost account of’ the Commission recommendation, this fact did not prevent the national regulator from opting for a different approach. It added that this conclusion was also confirmed by the recommendation’s non-binding nature. Since the Tribunal is a last appellate instance in the Netherlands, its pronouncement against the OPTA decision was final, and OPTA had no choice but to abide by it through adopting – in January 2012 – a new decision based on the methodology suggested by the Tribunal. The judgment did raise scholarly criticism; in particular, the above ruling was considered to be in stride with the principle of loyal cooperation between Member States and the Union enshrined in Article 4.3 TEU.<sup>32</sup> The European Commission, pursuant to its powers under the Electronic Communications Directive, expressed doubts as to the contents of OPTA’s January 2012 decision and urged the authority to comply with the EU-suggested framework in direct opposition to Cbb’s judgment.<sup>33</sup> OPTA was thus put in an uncomfortable position between a binding national judicial decision and a non-binding but imperatively worded soft law instrument issued by the European Commission. Since OPTA did not respond to the Commission’s doubts within the envisioned deadlines, the issue was silently put to rest.

The story repeated itself in the next regulatory period in mid-2013 when the successor of OPTA – the ACM – had to set the new call termination rates by means of a new administrative decision.<sup>34</sup> Once again, the methodology of setting call termination rates selected by the regulator was compliant with the prescriptions of the European Commission’s soft law – the recommendation. In adopting its 2013

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<sup>29</sup> Cbb 31 augustus 2011, ECLI: NL:CBB:2011:BR6195. See in particular paragraph 4.8.3.6.

<sup>30</sup> Autoriteit Consument en Markt (Dutch Competition Authority), *Marktanalyse Vaste en Mobiele Gespreksafgifte (Besluit Betreffende het Opleggen van Verplichtingen voor Ondernemingen die Beschikken over een Aanmerkelijke Marktmacht als Bedoeld in Hoofdstuk 6A van de Telecommunicatiewet, 2010)*, available for consultation at <[https://www.acm.nl/sites/default/files/old\\_publication/publicaties/10045\\_fta-mta-marktanalysebesluit-2010-07-07.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/10045_fta-mta-marktanalysebesluit-2010-07-07.pdf)>.

<sup>31</sup> Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407.

<sup>32</sup> J.F.A. Doeleman, ‘OPTA: Klem Tussen Cbb en Commissie? Over Regulering, Onmacht en Overmacht’ (2012) 5 *Nederlands Tijdschrift voor Europees Recht* <[http://www.biutijdschriften.nl/tijdschrift/tijdschrift/europeesrecht/2012/5/NtER\\_1382-4120\\_2012\\_018\\_005\\_004/fullscreen](http://www.biutijdschriften.nl/tijdschrift/tijdschrift/europeesrecht/2012/5/NtER_1382-4120_2012_018_005_004/fullscreen)>.

<sup>33</sup> Commission Recommendation of 13 June 2012 in accordance with Article 7a of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“Framework Directive”) in Case NL/2012/1284: call termination on individual public telephone networks provided at a fixed location in the Netherlands and in Case NL/2012/1285: voice call termination on individual mobile networks in the Netherlands [2012] OJ C(2012) 3770.

<sup>34</sup> Autoriteit Consument en Markt (Dutch Competition Authority), *Marktanalyse Vaste en Mobiele Gespreksafgifte (Besluit, 2013)*, available for consultation at <[https://www.acm.nl/sites/default/files/old\\_publication/publicaties/11831\\_13203266-besluit-fta-mta-4.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/11831_13203266-besluit-fta-mta-4.pdf)>.

decision, the ACM added a twist by arguing that the regulatory situation with regard to call terminations had drastically changed from 2012 to 2013, whereby many EU Member States had chosen for a calculation methodology in line with the Commission recommendation. Therefore, according to the ACM, in the current state of affairs, any different approach taken by the Netherlands would constitute a deviation hindering the proper flow of cross-border services in the EU and thus thwarting the internal market objective – a primary concern under the Electronic Communications Directive. It is largely because of this latter argument by the ACM that the subsequent – and expected – appeal to the ACM decision at the CbB made it to the CJEU in the form of a preliminary reference. By means of this reference, the CbB requested clarification on the question on the extent to which the national judge can give a ruling contradicting the Commission recommendation on call termination rates.

In its answer of 15 September 2016,<sup>35</sup> the CJEU held that the space for deviation from the recommendation is quite narrow.<sup>36</sup> In particular, the national court can deviate ‘only where it considers that this is required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State in question.’<sup>37</sup>

This rather stringent requirement, echoing the *Grimaldi* ruling issued in the sphere of social security law,<sup>38</sup> raises questions about the changing nature of the dialogue between the national administrative apparatus and the supranational institutions in the sphere of EU economic law – a sphere where soft law instruments are gaining increasing relevance. This question is not readily answered by the institutional actors involved, as can be seen in the roundabout treatment of the matter in the latest CbB judgment of September 2017.<sup>39</sup> In line with the CJEU preliminary ruling, the CbB confirmed the correctness of the methodology suggested by the Commission recommendation. However, this preliminary ruling reference was certainly a missed chance by the CbB to ask the CJEU to rule on the validity of the recommendation underlying the ACM decision by means of plea of invalidity. When prompted to refer this question to the CJEU, the CbB stated this was not needed, as the ‘contested [administrative] decision was not based on the recommendation but on the own

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<sup>35</sup> Case C-28/15, *Koninklijke KPN NV and Others v Autoriteit Consument en Markt (ACM)* [2016] ECR-General.

<sup>36</sup> For a comment on the judgment (annotatie), see C. van Dam, ‘Het Hof van Justitie Spreekt zich uit over de Bindende Werking van een Aanbeveling van de Europese Commissie’ (2017) 4 NTER, 84. See also Marta Cantero, ‘Testing EU Experimentalist Governance in the Telecoms Sector’ (EU Law Analysis, 30 May 2016) <<http://eulawanalysis.blogspot.com/2016/05/testing-eu-experimentalist-governance.html>>.

<sup>37</sup> Case C-28/15, *Koninklijke KPN NV and Others v Autoriteit Consument en Markt (ACM)* [2016] ECR-General, para. 43.

<sup>38</sup> Case C-322/88, *Salvatore Grimaldi v. Fonds Des Maladies Professionnelles* [1989] ECR I-04407. According to Balestra, the compliance requirement introduced by the KPN case is even stronger than ‘taking utmost account of’ and goes towards ‘comply or explain’. See Balestra, ‘The Role of National Judges and Regulatory Consistency’ 3(2013) Computer and Telecommunications Law Review, 99.

<sup>39</sup> CbB 10 juli 2017, ECLI:NL:CBB:2017:213.

investigation of the national regulatory organ'.<sup>40</sup> This lack of acknowledgment of the source, from which the national regulator drew on to perform its analysis, is remarkable and asks for increased scholarly attention and scrutiny with respect to the underlying causes thereof. As ventured above, this development, taken together with the below-described resistance of the Italian and German authorities to heed the Commission's methodology as proposed in the recommendation, led to the Commission pushing for the adoption of a hard legal instrument in order to achieve full compliance with its policies.

In Germany, the national regulator – the Bundesnetzagentur – has refused to accept the methodology for setting call termination rates that the Commission proposes in its recommendation, with adopting negative decisions in that respect in 2013<sup>41</sup> and in 2018.<sup>42</sup> Currently, non-compliance is no longer the case (or an option) given the recently adopted Delegated Regulation on Call Termination Rates.

In Italy, the story is very similar to that of Germany – in 2013<sup>43</sup> and 2016,<sup>44</sup> the Italian regulator also employed an own methodology, contrary to the one proposed by the Commission in its recommendation. Additionally, before the change in the regulatory framework and the adoption of the delegated directive, the Italian courts have taken an active role in the thwarting of compliance with the recommendation's prescriptions. In particular, as Balestra explains, in 2012 the Italian Council of State, in an appeal to a decision of the national regulator that did follow the Commission's approach, annulled the regulator's decision and itself stepped into the shoes of regulator by 'imposing de facto its regulatory strategy'.<sup>45</sup> The regulatory strategy of the Council of State in no way complied with the one proposed by the Commission.

All in all, from studying the context of these decisions, it transpires that the German and Italian authorities decided to side with the local telecommunication services providers that lobbied for a methodology different from the Commission's, as the latter led to lower profits than any other methodology proposed nationally. The Dutch authority, on the contrary, sided with the Commission's

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<sup>40</sup> CBB 10 juli 2017, ECLI:NL:CBB:2017:213, para. 7.2.2.

<sup>41</sup> For the 2013 termination rates decision, see here:

[https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2013/130719\\_MobileTerminationRates.html](https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2013/130719_MobileTerminationRates.html).

<sup>42</sup> For a Commission press release on the German 2018 termination rates decision, see here:

[https://circabc.europa.eu/webdav/CircaBC/CONNECT/e-cctf/Library/01%20-%20Commission%20Decisions/Commission%20Decisions%202018/DE-2018-2070%20ADOPTED\\_EN.pdf](https://circabc.europa.eu/webdav/CircaBC/CONNECT/e-cctf/Library/01%20-%20Commission%20Decisions/Commission%20Decisions%202018/DE-2018-2070%20ADOPTED_EN.pdf).

<sup>43</sup> For a Commission press release on the 2013 Italian termination rates decision, see here: [https://europa.eu/rapid/press-release\\_IP-13-98\\_en.htm](https://europa.eu/rapid/press-release_IP-13-98_en.htm)

<sup>44</sup> For a Commission press release on the 2013 Italian termination rates decision, see here: <https://ec.europa.eu/digital-single-market/en/news/commission-halts-italian-proposal-set-asymmetrical-termination-rates-postmobiles-dispute>

<sup>45</sup> Balestra, 'The Role of National Judges and Regulatory Consistency' 3(2013) Computer and Telecommunications Law Review, 100.

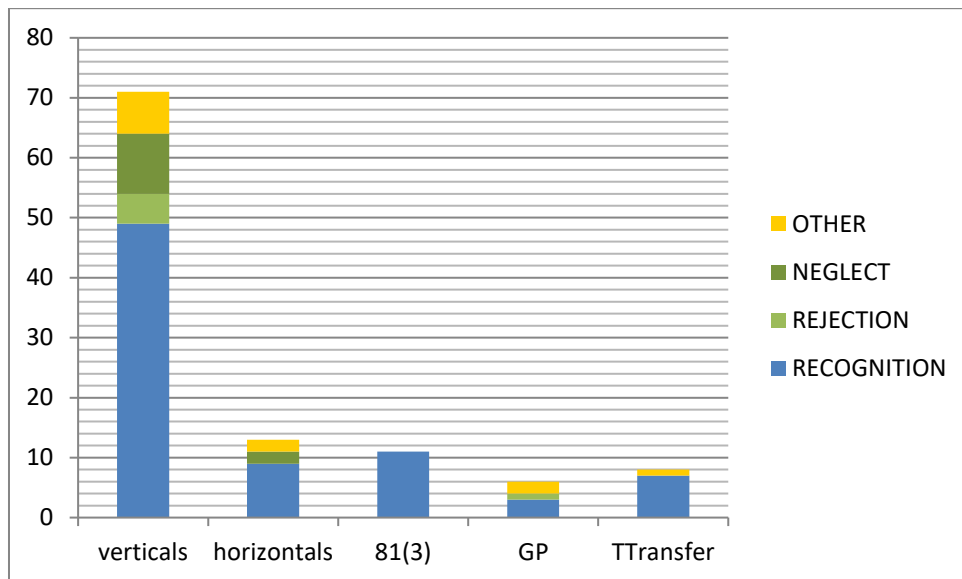


methodology on two occasions, which, as seen above, triggered massive litigation from local telecommunication providers over two consecutive regulatory periods. Because the issue of call termination rates is so important for the profit margins of telecommunications providers, and given the Commission's relative weakness in setting the rules of the game in this domain, the new developments regarding the legal status of the recommendation have likely arisen – namely, the adoption of the 2020 Commission Delegated Regulation on Call Termination Rates. As stated above, at the next stage of research for this project, this claim will be further nuanced with quantitative and qualitative findings.

#### **| Section IV | Implications of the narrative and concluding remarks**

The above developments have implications for the debate between the transitory/non-transitory nature of Commission-issued soft law instruments in the EU administrative space, but also tell a narrative of a reactionary Commission when the institution is not able to condition enforcement on its understandings of what the 'right' policy is. With respect to the first – theoretical – issue, we have seen that whether soft law has a transitory or non-transitory character likely depends on the policy domain at hand and in particular on the position the Commission occupies in that policy domain. If the institution has strong enforcement powers, soft law is used in the 'shadow of hierarchy' and is unlikely to transition to hard law; conversely, when the powers of the Commission are lower, it tends to use soft law to 'mark' a territory that it then subjects to hard regulation through instrumental lobbying of the Parliament and Council as happened with the introduction of Article 75 of the European Electronic Communications Code that then allowed for the adoption of the Delegated Regulation of Call Termination Rates. That last observation also ties in with the second implication of the above-described developments – namely, the Commission is the main power player in EU economic regulation and is willing to go to great lengths to maintain this apex position. In this ambition, the Commission is – to a greater or smaller extent – constrained by the institutional design of the policies within which it operates. This, in turn, elicits the above-described two different strategies for achievement of the Commission's establishment as a main power player in the field of EU Economic Regulation (through soft law in the domain of competition and through soft-law-turned-hard-law in the domain of telecommunications regulation).

## | Annex |



Annex: Total soft law references per type of soft law instrument in the period 2003-2017. Recognition of soft law instruments seems to prevail over the rest of the identified judicial attitudes by about 70%.

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