

Formation of the System of International Legal Regulation of Telecommunications: Correlation of Legal Regulation at the Universal and Regional Levels

Valentina Petrovna Talimonchik*

St. Petersburg State University, Russia; talim2008@yandex.ru

Abstract

Background/Objectives: The research is aimed at determining the system of international legal regulation of telecommunications formed at this stage of the information society development based on the patterns existing at the universal and regional levels. **Methods:** A complex of general scientific and philosophical methods, including the logical, comparative-legal, formal-legal, systemic-structural, problematic-theoretical methods, as well as methods of analysis and synthesis, generalization and description, comparison were used in the research. **Findings:** As a result of the research, two telecommunications regulation systems were found to be established at the universal level: the International Telecommunication Union deals with the technical issues, the World Trade Organization deals with the issues of the telecommunication services market. These systems do not interact sufficiently. At the regional level, telecommunications regulation is basically connected with the activity of integration associations and the experience of the European Union serves as an example of the legal regulation. **Application/Improvements:** The findings can be used in activities of international organizations in execution of their functions of unification and harmonization of the international telecommunication law and by national operators in the process of entering international and foreign markets.

Keywords: International Legal Regulation, Legal Regulation System, Regional Level, Telecommunications, Universal Level

1. Introduction

The scientific and technical progress has brought about radical changes in the modern world. The very system of social relations has changed. The development of the Information and Communication Technologies (ICT) has influenced all spheres of the society life – economy, politics, social sphere and culture.

Modern informational technologies are such that they cannot develop within the limits of one state. They objectively bear a trans-border character.

To date, the theory of the information society has found reflection in a whole range of international documents. Such documents include: Okinawa Charter on

Global Information Society of July 22, 2000, Declaration of Principles, Building the Information Society: A Global Challenge in the New Millennium, and also the Plan of Action of the World Summit on the Information Society of December 12, 2003, Declaration on a European Policy for New Information Technologies of May 7, 1999, etc.

With development of the concept of global information society, tendencies to the formation of international information law as a complex branch of international law and its sub-branch – the international telecommunication law have emerged. Telecommunications pertain to the key elements of the global information society; their development ensures development of the information society.

*Author for correspondence

The issues of telecommunications functioning are addressed in the fundamental research on the information¹⁻⁶.

A number of studies pay great attention to the Internet⁷⁻¹⁰.

Special research concerning legal regulation of telecommunications was performed¹¹⁻¹³.

2. Concept Headings

The objective of the research is to find patterns of the international and legal regulation of telecommunications at the universal and regional levels in order to determine if the system of international and legal regulation of telecommunications has been formed at this stage of the information society development. This requires considering the international and legal regulation of telecommunications.

The notion of telecommunications is uniformly given in a number of international documents (Item 15, Article 1, Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of June 18, 1998, Article 3 of the Model Law of the CIS on Telecommunications, etc.). Telecommunication means any transmission, emission, or reception of signs, signals, writing, images, sounds or intelligence of any nature, by wire, radio, optical fiber or other electromagnetic system. Telecommunications are carried out using ICT constituting the technological basis of the information society. Consequently, the issues of legal regulation of telecommunications acquire the fundamental importance for shaping the information society.

The general issues of telecommunications regulation are reviewed in the Convention of the International Telecommunication Union of December 22, 1992 (hereinafter referred to as "the Convention 1992") with the amendment documents of October 14, 1994 and November 6, 1998, and also in the Constitution of the International Telecommunication Union of December 22, 1992 (hereinafter referred to as "the Constitution") with the amendment documents of October 14, 1994 and November 6, 1998.

The main attention in the specified documents was paid to functioning of the ITU, in particular: its goals, membership, competence of the bodies and their operation procedure.

At the same time, the Convention 1992 and the Constitution contain a number of rules concerning the telecommunication as a means of communications, and also separate telecommunication methods – radio communication, telegrams, etc.

First and foremost, this is the rule of the ITU Constitution for common access to the telecommunication services and equal conditions of this access. The same service terms, tariffs and warranties without provision of any priority or preference should be established for all users in each category of correspondence.

The Constitution has set limitations on spread of certain kinds of information, which are subject to Article 19 of the International Covenant on Civil and Political rights. Member-states in compliance with their national legislation reserve the right to stop transmission of any private telegram, which could be a threat to the state security or contradict its laws, public order or rules of decent behavior. In the same cases, the states can interrupt any private telecommunication.

Special attention is paid to the privacy of messages and security of the telecommunication services. The Constitution lays down the general rule of the secret of international messages. The Convention 1992 establishes the legal regime of encrypted messages.

The ITU Constitution and the Convention 1992 provide certain rules relating to the functioning of telecommunication services. The basics of such functioning are established at the universal level. The Constitution provides the general rule of availability for all telecommunication services. At the same time, special legal regimes are established for separate types of information. It is prohibited to transmit antisocial and obscene information, and also regimes for message privacy and encrypted messages are provided.

The information transmission restrictions envisaged by the ITU Constitution and the Convention 1992 generally meet the provisions of the International Covenant on Civil and Political Rights.

A new subsystem of telecommunications regulation has begun to take shape since the 90's of the 20th century – competence on the telecommunications market, trading conditions for telecommunication services have been subjected to regulation.

Terms of telecommunication services trade are specified in the General Agreement on Trade in Services (GATS).

The GATS has a special Annex on telecommunications. The Annex points out the dual role of the telecommunication services sector: as a special sector of economic activity and as a basic information transmission facility for other types of economic activity. Therefore, this indicates to the basic significance of the mentioned sector for economy as an information transmission facility.

The Annex contains a number of general obligations of the states. The states should make sure that the corresponding information about conditions of access to public telecommunication networks and services was commonly accessible; make sure that any service provider of any other state has access to public telecommunications networks and services and their use on the basis of reasonable and non-discriminatory service provision terms.

Thus, the states assumed a number of obligations on provision of access to telecommunications networks and public services, including foreign services providers' access to them.

The GATS contains general requirements for telecommunication access conditions. The list of these conditions is exhaustive. The states cannot arbitrarily establish restrictions for use of telecommunications services. Conditions of access to telecommunications networks and public services may include: restrictions on resale or separate use of such services; requirement for use of certain technical connections, including rules of connection, for connection to such networks and services; when necessary, requirements for interaction of such services; approval of the type of a terminal or other equipment, which connects to the network, and technical requirements relating to connection of such equipment to such networks; restrictions on connection of a private rented or purchased communication line to such networks or services or communication lines rented or purchased by another service provider; notification, registration and licensing.

Therefore, equal requirements are established in the Annex for all member-states as applied to defining conditions of access to networks and services. Only developing states can set special conditions of access.

Another annex is devoted to negotiations on telecommunications, which provided for negotiations on the main telecommunications and creation of a negotiation group for this purpose. The outcome of such negotiations was signing of the Fourth Protocol to the GATS.

In April 1996, the states participating in the negotiations approved the Reference Paper to the Fourth

Protocol to the General Agreement on Trade in Services, hereinafter referred to as the "Reference Paper". The corresponding Reference Paper is not a part of the Fourth Protocol; it was approved only by 45 states, but a number of states indicated in their specific obligations that, while using the Fourth Protocol to the GATS, they are governed by the provision of the Reference Paper. The corresponding references to the Reference Paper were included in the list of specific obligations of the WTO members, which is an Annex to the Fourth Protocol to the GATS.

The Reference Paper cannot be used as a tool for interpretation of the Fourth Protocol to the GATS in general either, because the Reference Paper was referenced to only by individual states, and there are corresponding references in the list of specific obligations. As a consequence, the Reference Paper is not used by all the WTO member-states, which does not promote the establishment of a unified legal regime in regard to the telecommunications services.

At the same time, the very fact of the Fourth Protocol to the GATS coming into effect marked the start of development of competition on the telecommunications services market. With coming into force of the Fourth Protocol to the GATS, the WTO member states began to provide the highest assistance regime to service providers from other countries on their national markets. Considering that the Fourth Protocol to the GATS was signed by the states controlling almost the whole telecommunication services market, we can make a conclusion that the unified legal bases of the international telecommunication market began to form with the entry into force of the mentioned Protocol.

The EU can be an example of successful regulation of competition on the telecommunication market. To date, the general concept of the telecommunication regulation within the EU has changed twice, due to which it is reasonable to consider its historical evolution.

The historical milestones in the legal regulation of the communications within the EU are: 1) formation of the concept referred to as "Open Network Provision" in legal acts of the EU; 2) creation of a common regulatory framework.

Directive 2002/21/EC of the European Parliament and of the Council of March 7, 2002 on a common regulatory framework for electronic communications networks and services (which received a short name of Framework Directive in the EU documents) belongs to the current directives. This Directive bears the general character,

while other accepted directives are called specific. Specific directives include:

- Directive 2002/20/EC of the European Parliament and of the Council of March 7, 2002 on the authorization of electronic communications networks and services (which received a short name of Authorization Directive in the EU documents).
- Directive 2002/19/EC of the European Parliament and of the Council of March 7, 2002 on access to, and interconnection of, electronic communication networks and associated facilities (which received a short name of Access Directive in the EU documents).
- Directive 2002/22/EC of the European Parliament and of the Council of March 7, 2002 on universal service and users' rights relating to electronic communications networks and services (which received a short name of Universal Service Directive in the EU documents).
- Directive 2002/58/EC of the European Parliament and of the Council of June 12, 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

Following the package of the mentioned Directives, Commission Directive 2002/77/EC of September 16, 2002 on competition in the markets for electronic communications networks and services was adopted. It contains a number of references to the previous directives, and also provisions applicable to certain types of communications. This Directive overrides Directive 90/388/EEC 1990 installing the new legal regime of competition.

Distinguish five principles of legal regulation of telecommunications in the EU, which were formed with acceptance of the new regulatory structure:

- Regulation should be based on clearly defined political targets ensuring economic growth and competition and also employment, however these goals should comply with common interests, and not only the needs of market participants;
- Regulation should be minimal requirement in accordance with the regulation objectives;

- Regulation should ensure the legal certainty on the dynamic market;
- Regulation should be technically neutral;
- Regulation should consider the specifics of the regulated activity.

These provisions should hardly be related to special principles of the legal regulation of telecommunications because they do not reflect the qualitative peculiarity of the regulated relations, can be applied to the regulation of any scientific and technical achievements, their determination is not connected with contents of international documents, in which these provisions would be recorded.

Today, we can speak of formation in the EU law of a certain package of norms regulating the basics of the telecommunications market functioning and regulation of such market.

3. Results

Two telecommunication regulation systems have been established in modern international law. The ITU regulates the technical issues of its functioning, and the WTO – the economic issues. At the same time, the technical and economic issues are closely interconnected. While posing the technical specifications, the states thereby regulate the terms of access to the services and networks of the telecommunication. It is for this reason that the Annex to the GATS concerning telecommunications contains terms of access to public telecommunications networks and services, among which are: the requirement for use of certain technical connections; approval of the terminal type and other equipment, which is connected with the network, as well as technical specifications regarding connection of such equipment to such networks; notification, registration and licensing.

As the GATS concerns technical issues in telecommunications regulation, a question of the relation of the GATS norms and treaties adopted within the ITU arises. It should be noted that the coordinating role of the ITU in regulation of telecommunications follows from Article 50 of the ITU Constitution, the issues of telecommunications regulation within the framework of several international organizations, including the ITU, should be coordinated by means of conclusion of agreements between the ITU and such international organizations.

There are certain provisions concerning the ITU in the GATS. Thus, the Annex on telecommunications

says that the members acknowledge the importance of international standards for global compatibility and interaction of telecommunications networks and services and assume the commitment to assist in spreading such standards by means of work of corresponding bodies, including the International Telecommunication Union and the International Organization for Standardization. The members acknowledge the role played by inter-governmental and non-governmental organizations and agreements on assurance of efficiency of functioning of national and global telecommunications services, especially the role of the International Telecommunication Union. The members, when required, reach corresponding agreements to consult with such organizations on the issues arising during the application of this Annex.

Thus, the agreements within the ITU and the GATS do not establish the relation between the mentioned agreements immediately and do not regulate the issues of their application. Solution of these issues depends on agreements and consultations between the GATS and the WTO.

In the 20th century, the gradual transition from technical and economic issues of telecommunications regulation to the issues of telecommunications application in other spheres of cooperation takes place at the universal level.

Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of June 18, 1998 is dedicated to the special issue of cooperation between the states. The Convention covers all methods of telecommunications. It implies using telecommunications in conditions of disasters when help of other states is required. Cooperation of states in rendering assistance using telecommunications is not limited by the methods indicated in the Convention. The convention introduces the idea of telecommunication assistance, which covers a wide circle of actions, including provision of telecommunications, specialists, equipment, and other support. Then the Convention regulates the very procedure of the application and provision of telecommunications assistance.

The established systems of international and legal regulation of telecommunications acquire development at the regional level.

A number of regional telecommunication unions were established at the regional level. The Asia-Pacific Telecommunity, the Caribbean Telecommunications Union, the African Telecommunications Union, the Conference of European Post and Telecommunications can be examples.

In particular, the Asia Pacific Telecommunity (APT) adopted a number of measures for the development of the information society concept. Thus, notably the Asia Pacific Summit on the information society was held at the level of ministers of information and communications in Tokyo in the period from October 31 through November 2, 2000. The ministers discussed the prospects of the ICT development, electronic options with account of the proposals of the private sector. At the end of the summit, the Tokyo Declaration: Asia Pacific Renaissance through ICT in the 21st century was approved. As regards the essential contents of the Tokyo Declaration, it is dedicated to various aspects of the information society. The Tokyo Declaration states that everyone should have access to ICT. Besides, in order to ensure economic, social and cultural development, all the states, and also the public and private sectors should cooperate in implementing ICT. The Tokyo Declaration provides for measures for development of the information society including overcoming electronic break between persons depending on their income, age, gender and physical capabilities, and also between states, urban and rural regions, sectors of economy; development of information and communication infrastructure. It should be noted that the most of the provisions in the Tokyo Declaration were reproduced in the documents of the World Summit on the Information Society.

The idea of ICT utilization got further development at a conference in Bangkok on the 1st – 2nd of July, 2004. The Bangkok Agenda for development of large-scale networks and ICT in the Asia-Pacific Region was approved at this conference. The main difference of the Bangkok Agenda from the Tokyo Declaration is that, alongside the software provisions in the Bangkok Agenda, it provides for certain measures to be introduced by the states in order to enhance the utilization of ICT. Therefore, the APT, as a development of the provisions of the information society adopted at the universal level, paid attention to development of the information society in the Asia-Pacific Region.

The concept of legal regulation of telecommunications within the EU changed in 2002. The system of permissions to carry out the corresponding activity on the market was replaced by a general permission. The functions of the regulatory bodies were harmonized. Their main goal is observation of the market state. Unless the market causes apprehensions, they do not take any measures. If a dominating subject appears, the regulatory bodies have a package of necessary measures at hand.

The change of the legal regulation concept is objectively determined by the changed state of the market. As the market in the most of European states had been monopolized by one operator in state ownership by the moment of adopting the Open Network Provision, the gradual shift from monopoly to competition took place by the end of the 90's of the 20th century. What the Directives of 2002 reflected was the objective state of the competitive environment.

It should be noted that the existing general regulatory framework for telecommunications within the EU, as well as the Open Network Provisions, is presented as the result of a compromise in the legal doctrine.

General regulatory framework for telecommunications created within the EU can be defined as administrative and civil and legal basics of regulation of the telecommunications services market, in which the freedom of access of new providers to the market, minimum state regulation of activity on the market, service consumer rights protection find reflection. The new Regulatory Framework does not set the goal of regulating all problematic issues connected with telecommunications because other issues are regulated outside the general regulatory structure (for example, a separate directive is adopted concerning the copyright and related rights protection in the information society). The goal of the general regulatory framework is to support competition on the telecommunications services market, settle technical and economic issues of functioning of telecommunications in their interaction. It is with interconnection of technical and economic problems that telecommunications regulation in the EU differs from the regulation within the WTO. The focus on economic aspects is characteristic of the latter.

Based on the results of consideration of telecommunications regulation at the WTO and the EU, we can make a conclusion that telecommunications regulation at the WTO and the EU has the only goal – to ensure competition on the telecommunications services market. However, harmonization of conditions of the regulation of telecommunications services markets has not been reached in the framework of the WTO. The general regulatory structure for telecommunications has been created in the EU where freedom of new providers to access the market, minimum state regulation of activity on the market, service consumer right protection is reflected.

Regulation of telecommunications in other integration associations is developed less than regulation in the EU. Thus, the North American Free Trade Agreement

of December 17, 1992 (NAFTA) contains Chapter 13 Telecommunications. NAFTA declares access to public telecommunications networks and services, which means such services as telegraph, telephone, telex, and data transmission. Such access is provided under reasonable and non-discriminatory terms. In particular, the prices for services should reflect costs directly pertaining to such services. The access conditions do not regard the measures taken by the states to ensure safety and confidentiality of messages and privacy protection.

Note that licenses for telecommunications services are preserved in the framework of NAFTA unlike the EU. Such licenses provide for transparent and non-discriminatory conditions, availability of information about financial costs for licensing.

Special prescriptions of NAFTA concern the measures on setting standards for telecommunications equipment. As standardization measures must not restrain competition, their establishment is possible if there is a need to prevent technical damage to public telecommunications networks; prevent wear-out of public telecommunications networks; ensure safety of consumers, etc.

Thus, NAFTA holds an intermediate position between regulation in the WTO and the EU. Just like the acts of the WTO, NAFTA aims at liberation of the market of telecommunications services and contains market access rules. A number of prescriptions of NAFTA concerning competition on the telecommunications services market bring regulation of NAFTA and the EU closer together.

The Caribbean Community (CARICOM) took up the experience of the EU concerning the initial stage of the telecommunications services market regulation. Like the EU, CARICOM has accepted the Green Paper Action Plan for Telecommunications and ICT Services in CARICOM, 2007. The Green Paper contains mostly economic analysis of the telecommunications services market. It contains such issues as access to infrastructure, price relation, regulatory, administrative and other barriers to investments. This document represents the experience of the CARICOM member-states.

Regulation of telecommunications in the Southern African Development Community (SADC) approached the general regulatory framework most of all in the framework of the EU. The SADC passed the Protocol on Transport, Communications and Meteorology in the Southern African Development Community (SADC) region in 1996. The Protocol 1996 includes two important provisions. First, the legal status of national regulatory

authorities is established. Their status has a similar status to the corresponding bodies established in the EU documents. The main thing for national regulatory bodies is their independent status. The responsibilities of SADC regulatory bodies include: provision of universal services; monitoring of using the universal services; licensing of providers of telecommunications services, users of radio-frequency spectrum; monitoring of compliance with licensing requirements; control of radiofrequency spectrum; regulation of prices, etc. As we can see, in contrast to the EU, the SADC has preserved licensing of telecommunications services. Another difference is that the Protocol 1996 does not contain general requirements for procedures applied by national regulatory bodies.

Second, the users are not guaranteed the minimal scope of services. The concept of universal services as ones reasonably accessible for all persons in the region on the non-discrimination basis exists in the SADC. Unlike the EU, the Protocol 1996 does not contain a list of universal services; it contains only criteria of referring to the services as universal. Telecommunications Regulators Association of Southern Africa (TRASA), which adopted documents concerning the policy in the field of telecommunications and the model law on telecommunications, was created within the SADC in order to ensure cooperation in the field of telecommunications.

Measures aimed at provision of competition on the market of telecommunications services are taken in all reviewed integration associations. An example of legal regulation at the regional level is the law of the EU.

4. Discussion

Consideration of the system of international legal regulation of telecommunications is impossible without the fundamental work under the editorship of Dennis Campbell – International Telecommunications Law (2009), which sets forth the specific features of telecommunications regulation in 38 states, the European Union, Mercosur, and the North American Free Trade Agreement. Without diminishing the role and importance of this fundamental research, we should speak out our own judgment about the subject of the international telecommunications law.

Within the framework of this research, we use the approach to international relations developed in the theory of international relations in the second half of the

20th century. A number of scientists^{14,15} marked qualitative change of the whole system of international relations in the 20th century. If earlier the international relations were the synonym to inter-state relations, then their content and entities' membership have considerably changed at the modern stage of development of international relations. In the international relations, non-state actors as well as state but not sovereign actors began to participate more actively. This tendency is characteristic of the whole system of international relations including the sphere of information. International relations include relations connected with information content, its creation, storage, distribution and transmission, and other relations of this kind, in which states, inter-state organizations, International Non-Governmental Organizations (INGO), Transnational Corporations (TNC), legal and physical persons, administrative and territorial formations of states, subjects of federations and municipalities participate. The modern international law regulates mostly informational relations, although there are individual international treaties setting the rules for legal and physical persons (European Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, 1981, the United Nations Convention on the Use of Electronic Communications in International Contracts 2005).

International information relations always arise during trans-border data transmission (international telephone connection, international telegraph messages, trans-border television and radio broadcasting, trans-border data transmission on the Internet). For example, according to Article 3 of the European Convention on the Trans-border Television 1989, the corresponding convention is applicable to any program broadcast or rebroadcast by organizations, or with technical facilities under jurisdiction of its participant, both on cable television, and a ground-based transmitter or satellite, and which can be received directly or indirectly in one or more member-states. Regulation of trans-border data transmission is the subject matter of the international telecommunications law. Such regulation is carried out at the universal, regional and two-way levels.

5. Conclusion

As a result of the carried out analysis, we can make the following conclusions.

First, the similarity in the legal regulation of telecommunications at the universal and regional levels is determined by the specifics of the subject of international telecommunication law regulation. It governs international information relations, which are created during trans-border data transmission (international telephone communication, international telegraph communications, trans-border television and radio broadcast, trans-border data transmission on the Internet).

Second, differences in legal regulation of telecommunications at the universal and regional levels do not testify to the fragmentariness of the international law. The norms of international law are created as a result of harmonization of the states' positions at the universal, regional and bilateral levels. As a consequence, system connections in the international law are more complex than in the national law. The international and legal regulation of telecommunications at the universal and regional levels is formed within the framework of the two systems: the ITU and regional telecommunication unions (the Caribbean Telecommunications Union, the African Telecommunications Union, the Conference of European Post and Telecommunications) deal with the issues of technical regulation and development of telecommunications; the WTO and regional integration associations deal with economic issues.

6. References

1. Bainbridge DI. Introduction to information technology law. Edinburg: Pearson Education Limited; 2008.
2. Campbell D, Ban C. Legal issues in the global information society. New York: Oceana Publications Inc; 2005.
3. Lloyd IJ. Information technology law. Oxford: Oxford University Press; 2008.
4. Murray A. Information technology law: law and society. Oxford: Oxford University Press; 2010 May.
5. Marsden CT. Regulating the global information society. New York: Routledge; 2005.
6. Rowland D, Macdonald E. Information technology law. Abingdon: Cavendish Publishing Ltd; 2005.
7. Reed C, Angel J. Computer law: law and regulation of information technology. Oxford: Oxford University Press; 2007.
8. Dickie J. Internet and electronic commerce law and the european union. Oxford: Hart Publishing; 1999.
9. Smedinghoff T J. Online law. New York: Pearson Education Corporation; 2000.
10. Schwabach A. Internet and the law: technology, society and compromises. Santa Barbara: ABC-CLIO Inc.; 2006.
11. Bell R, Ray N. EU electronic communications law. Richmond: Richmond Law and Tax Ltd; 2004.
12. Black SK. Telecommunications law in the internet age. San Francisco: Morgan Kaufmann Publishers; 2002.
13. Cheltenham JJ. Governing telecommunications and the New Information Society in Europe. Edward Elgar Publishing Limited; 2002.
14. Merle M. Sociologie des relations internationales. Paris, 1974.
15. Rosenau J. Linkage Politics: essay on the convergence of national and international system. New-York; 1969.