

**“The Problem of Inconsistent Regulatory
Implementation and the Review of European Union
Regulatory Policy”¹**

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Abstract

The paper starts off by examining the operation of the European Union’s (EU) regulatory framework for telecommunications established by the 1998 and 2002 regulatory packages. The associated competition and regulatory harmonisation Directives established a set of principles and requirements that the Member States have been obliged to transpose into national law and to implement, detailed implementation having been left to the regulators in individual Member States. This ‘subsidiarity’ clearly has the practical advantage that national regulators know their markets best. However, the paper shows that there has been a problem of inconsistency in regulatory implementation. Because of

¹ The first half of this paper draws on research conducted on the telecommunications sector by the author between 2000-2003 as part of a collaborative research project entitled ‘The European Union as a Medium for Policy Transfer; Case Studies in Utilities Regulation’, funded by the UK Economic and Social Research Council (ESRC award number L2162001). The project looked at three sectors, namely air transport, electricity and telecoms, and the findings were reported in Simon Bulmer, David Dolowitz, Peter Humphreys, and Stephen Padgett, *Policy Transfer in European Union Governance; Regulating the Utilities*, London & New York: Routledge, 2007. The telecoms research also contributed to an earlier book by Peter Humphreys and Seamus Simpson, *Globalisation, Convergence and European Telecommunications Regulation*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, 2005.

the degree of discretion allowed the national regulators, there has been a lack of consistency regarding remedies to competition problems adopted in the different Member States. This regulatory inconsistency has hampered the functioning of the internal market and hindered the creation of pan-European players. It has also had a negative impact on the up-take of new technologies and infrastructure competition. The second part of the paper explores the policy debate surrounding the Review of the regulatory framework initiated by the European Commission in 2006. The paper considers the most controversial proposals. It examines the proposal that under certain conditions the national regulators deploy the instrument of functional separation. It discusses the proposal to establish a European Telecom Market Authority and explains the considerable political problems surrounding this proposal, which make it unlikely to survive the legislative process. The paper also discusses the proposal to extend the Commission's own authority, notably by a measure to increasing its power to veto national regulators' decisions. It argues that the latter reform has a certain merit.

Building the EU Telecommunications Regime

EU telecommunications liberalization and the construction of the current EU regime 1988-2003 occurred through a two-stage process of negotiation, involving the member states and institutions of the EU and their committees and working parties. The first stage between 1988-1998 saw the incremental enactment by the Commission, uncustomarily legislating on its own account, drawing on its direct competence for EU competition law (Article 86 – ex 90), of a series of liberalization Directives. This departure from the accustomed 'community method' of negotiation in the Council and European Parliament (EP) provoked a number of member states twice to take the matter to the European Court of Justice (ECJ). However, on both occasions the Court endorsed the Commission's action. This apparent assertiveness of the EU supranational institutions, which had been supported by a number of transnational (notably business) interests, led to a widely shared perception among political scientists that European telecommunications liberalisation was achieved largely through supranational agency, and that the successful

creation of a supranational regime was the result (See e.g. Schneider and Werle 1990; Sandholtz 1993 and 1998; Schneider et al 1994; Schmidt 1998; Levi-Faur 1999).

However, the author's own research confirms Thatcher's (2001) suggestion that, in reality, the Commission acted in partnership with the member states (Thatcher 2001). The Commission was concerned to proceed at each stage on the basis of having achieved a consensus.² Much of the Commission's activity, far from being coercive, actually consisted of skilfully steering the liberalisation agenda, building support through the strategic use of consultations and sector reviews (most notably the crucial 1992 review through which consensus on full liberalisation was achieved), and mediating the member state negotiations surrounding a series of Council and Parliament regulatory harmonization Directives which, from the so-called 'Open Network Provision (ONP) compromise' of 1990 onwards, it was agreed should accompany the Commission's liberalisation directives. A 1990 Framework Directive established the principle of Open Network Provision, that is, harmonised open access to public telecoms networks. This directive was supplemented with application directives for leased lines in 1992 and voice telephony services in 1995. An Interconnection Directive and a Licensing Directive followed in 1997, making up the '1998 package' of legislation which established the basis for the full opening of EU telecoms markets on 1 January 1998. The legislative package was accompanied by comprehensive guidelines on the application of EC competition law. It is important to note that the '1998 regulatory package' was therefore negotiated in the customary manner of the 'community method' even though the Commission certainly drew on its competition competence to exert a degree of pressure.³

The first stage of the process, culminating in the 1998 package, was very much designed to manage the transition from monopoly to competition. The second stage – negotiation of a new electronic communications regulatory framework, agreed in 2002 and applicable

² An interviewee in the Commission (12 July 2000) stated that the Commission was 'quite careful to use this legal instrument [Article 86, ex 90] only once there was a political consensus.'

³ Discussing the ONP compromise, an interviewee in the Commission (12 July 2000) pointed out that the Article 86 (ex 90) Directive liberalizing services was "self standing", having "all the basic elements which would make it possible to function should the Council block the other directives. So there was a strong political push for the Council and Parliament to agree the ONP directive."

from mid 2003 – extended liberalization through the enactment of a very important EU regulation that mandated the opening up of the incumbent’s dominance of the ‘local loop’ (the ‘last mile’ from the local exchange to the household). Beyond this, the 2002 package served, first, to streamline the 1998 regulatory package, reducing the number of Directives (see Table below) and aiming at a reduction of the regulatory burden as markets were judged to become competitive. Second, it sought to adapt the regulatory framework to rapidly changing technological developments in the rapidly ‘converging’ electronic communications sector. Paradoxically, in view of its aim to reduce the regulatory burden, the 2002 package entailed an initial increase in the regulators’ work. Before regulation could be rolled back, NRAs found themselves having to undertake detailed reviews of more differentiated markets to monitor significant market power (SMP). In 2003, the Commission produced a Recommendation outlining 18 markets requiring *ex ante* regulation (for more detailed analysis see Humphreys and Simpson 2005: 93-122; Humphreys and Simpson 2008).

Table: Legislation providing for the 2002 Electronic Communications Regulatory Framework (the currently applicable framework)

EU Liberalization Legislation	EU Harmonization Legislation
<ul style="list-style-type: none"> • 2000: Regulation on Local Loop Unbundling (Regulation 2887/2000/EC); • 2002: Commission Competition (Liberalization) Directive (2002/77/EC) 	<ul style="list-style-type: none"> • 2002 European Parliament and Council Access and Interconnection Directive (2002/19/EC); • 2002 European Parliament and Council Authorisation Directive (2002/21/EC); • 2002: European Parliament and Council Framework Directive (2002/21/EC); • 2002 European Parliament and Council Universal Service and Users’ Rights Directive (2002/22/EC);

	<ul style="list-style-type: none"> • 2002 European Parliament and Council Data Protection and Privacy Directive (2002/58/EC)
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EU telecommunications liberalization therefore involved an important element of *harmonising re-regulation*. Harmonised EU-wide regulations and regulatory instruments were needed to establish a level playing field for the promotion of competition and to prevent the former incumbent operators from abusing the market dominance that they carried over from their former monopoly status to the disadvantage of new entrants. The EU negotiation process allowed the member states, whose policy preferences concerning liberalisation initially varied very considerably, to play a role in shaping the character of the EU regime, which typically they endeavoured to do in such a way as to minimise the anticipated adaptation costs that they would subsequently incur from Europeanisation. At first, member state positions were rather polarised between a pro-liberalisation ‘northern camp’ of member states, led by the UK, and a camp of what might be termed ‘liberalisation-laggards’, led by France, which more concerned to retain a degree of state control of the sector and protect *service public*.⁴ However, over the course of time, an EU-wide consensus in favour of full telecommunications liberalisation emerged, largely due to the effects of globalization and globalizing technologies. In particular, the ambition to emulate the global player strategy of the UK incumbent BT on the part of incumbent operators in a number of other large states (France, Germany, Spain) was a major factor in shifting their own governments’ positions towards full liberalization and, indeed, also part-privatisation of the incumbents (which was not part of the EU package).⁵ France and Germany were crucially important ‘swing states’, which by 1993/4 were lending their considerable political weight to EU Council Resolutions envisaging full EU liberalisation of telecoms services and infrastructures by 1998. The Commission’s 1992 telecommunications review, bringing together all interested parties in the broad telecommunications policy community, had been very important for creating a new consensus on liberalisation. By 1993, a ‘sea change’ in attitudes among the

⁴ Several interviewees confirmed the existence of these two camps.

⁵ Interview in the European Commission, 11 July 2000.

laggards had occurred and it was widely accepted that global and technological realities rendered liberalisation indispensable.⁶ From this point on, the EU negotiations exhibited more of a problem-solving than a hard bargaining style, and disputes tended to be resolved in Council working parties, with the Ministers in the Council concluding the negotiations.⁷

The need to cater to different member state positions had several exceedingly important implications. Firstly, it explains the obvious incrementalism of the EU liberalization process over the period 1988-2003. Secondly, this timing meant that much of the EU telecommunications liberalisation process occurred after the 1992 Maastricht Treaty had strengthened subsidiarity in the EU. This ensured that the member states would not cede control to a centralized EU regulatory agency for telecommunications. Thirdly, the fact that the Commission liberalisation Directives were accompanied by Council and EP regulatory harmonisation Directives meant that the EU regime was inevitably a 'synthesis' of member state influences and also that, significantly, it allowed scope for national discretion at the transposition and regulatory implementation stage.

Implementation of the EU Telecommunications Regime

The EU regulatory regime is characterised by a 'dual-tier' sharing of regulatory competence between the national and the EU level. A number of Directives laid out the EU-agreed principles and requirements that the member states have been obliged to transpose into national law, but detailed implementation was left to the regulators in the member states. The influential 1994 Bangemann report had recommended establishment of a supranational regulatory authority to oversee the liberalised market, an idea which gained some supporters within the Commission and strong support from the European Parliament, transnational telecommunications users and new entrants. However, this idea

⁶ Interview in the European Commission, 11 July 2000.

⁷ An interviewee in the German Federal Economics Ministry (28 March 2001) observed that '...the draft directives were all very well prepared within the COREPER, so that the Council itself had very little controversial to bring up and discuss.' Another official said that in the Council working groups 'consensus was created.'

was strongly resisted by the member states, which jealously guarded their national discretion. The 1992 Maastricht Treaty's emphasis on subsidiarity strengthened their case and compelled the Commission to be even more mindful of member state sensitivities. The 1999 review of telecommunications appeared to dismiss the idea once and for all and regulatory responsibility has continued to reside primarily with National Regulatory Authorities (NRAs). Further, it is an important feature of EU Directives that they require transposing into national law by the member states, which allows scope for 'domestication' both in their transposition and in their actual implementation by the national regulators, principally the NRAs. The Commission certainly has powers to initiate legal action against the member states' non-compliance with EU-agreed principles and practices, and it has resorted to this coercive action on a significant number of occasions. However, it has preferred to rely more on 'softer' powers of persuasion. These include: the publication of regular implementation reports (13 since 1997) which serve to identify regulatory shortfalls and 'name and shame' poor performers; drafting guidelines and benchmarks; conducting inquiries into particular markets; issuing reports on particular regulatory issues; and generally encouraging mutual policy learning and the exchange of best practice among the national regulators.

The design of the new regulatory institutions (notably the NRAs) and the way in which the new regulatory principles and instruments have been implemented by the member states has had an impact on the *functioning* - as distinct from the *formal establishment* on 1st January 1998 - of the internal market in telecommunications and, in turn, the creation of globally competitive pan-European telecommunications players and a competitive European information society. Regulatory activity could either be conducted in the pro-competitive spirit of the EU regime to promote new economic activity and investment, or alternatively it could be conducted in more mercantilistic fashion, favouring national champions with a regulatory subsidy (see Humphreys and Simpson 2008).

The regulatory harmonisation Directives established a set of principles and minimum requirements that the member states were obliged to implement, but they were allowed considerable discretion over the means of implementation. For example, the 1990 ONP

Directive required Member States to ensure that the historic regulatory functions of the former public monopolies were now vested in independent regulatory bodies, but it did not prescribe any harmonized shape or form for the new national regulatory authorities (NRAs). These therefore displayed a considerable variety of institutional design. They similarly differed considerably in terms of resources, therefore regulatory capacities, and also in terms of their independence, both politically and, where states retained a stake in the incumbent, vis-à-vis these operators. Another example was licencing. Authorisations were granted at the national level, the NRAs exercising considerable discretion about whether individual licences were required or whether general authorizations would suffice. Although a 1997 Licensing Directive sought to restrict the use of individual licences and thereby encourage market entry, in practice licensing regimes varied considerably on a light-onerous scale in terms of the regulatory burden that they placed on new entrants. This particular inconsistency was addressed by the 2002 Authorisation Directive, which mandated the granting of general (light) authorisations. However, even after this, inconsistency persisted with regard to key areas of discretion left to the member states, notably regarding the use of scarce radio spectrum. This particular inconsistency therefore continued to hamper the introduction of pan-European services. Yet another example was the inconsistent regulatory practice of the NRAs regarding the implementation of the principles of cost-orientation and transparency that were enshrined in the ONP and Interconnection Directives. The NRAs' practice varied considerably, giving rise to repeated complaints (from new entrants) about the lack of transparent procedures for the setting of interconnection tariffs, and suggestions of a regulatory bias towards the incumbents. Yet another issue that caused a certain amount of controversy was the way that certain member states provided for universal service, namely a minimum level of service at an affordable price for all users.⁸ Member states were allowed discretion to impose special national requirements on operators. The French, for instance, required other operators (new entrants) to pay a levy into a universal service fund to compensate the former incumbent France Télécom's provision of service public.

⁸ This included the provision of the public fixed telephone network, supporting voice telephony, fax and voice band data transmission via modems (enabling basic Internet access); the provision of fixed public telephone service; the provision of operator assistance and directory services; the provision of public pay phones; and the provision of services under special terms and special facilities for customers with disabilities and special social needs

In France, this was regarded as a ‘typically French’ measure to ensure the provision of universal service.⁹ Others were inclined to see it as a regulatory subsidy to the former incumbent.¹⁰ Yet another area of inconsistent regulatory practice was dispute resolution and enforcement procedures. In a number of member states procedures for enforcement of NRA decisions on incumbents appeared to lengthy and cumbersome. In some cases enforcement was hampered by low penalties. In others, incumbents appealed systematically against NRA decisions, which – though such appeals were seldom successful – contributed to excessive delay, the incumbents benefiting from the suspension of regulatory decisions during the appeal. New entrants were concerned about lengthy appeals procedures in a number of member states. The NRAs varied, too, in ‘their perceptions of the extent to which competition had developed in telecoms, the need for more competition and even of the desirability of the competition that had developed’ (Dassler and Parker 2004). Finally (though the list is by no means exhausted), a particularly significant area of lack of consistency among the NRAs related to their application of remedies to competition shortfalls. This was recognized as a major problem during the formulation of the 2002 regulatory package. The Commission had called for a veto over of NRA decisions over remedies.¹¹ However, it had had to relinquish this demand in the face of opposition from the member states and their NRAs, which were keen to protect their discretion in this area. This area of inconsistency was one that the Commission remained particularly determined to address in the review of the 2002 regulatory framework.

In order to promote harmonised regulatory implementation, the 2002 regulatory package established a complex network of committees and other organisations to help the Commission. The purpose was to promote cooperation both between the NRAs themselves and between the NRAs and the Commission. The Communications Committee (Cocom), composed of member state representatives and chaired by the

⁹ . ‘franco-français’ - Interview in the telecoms branch of the French Industry Ministry, 25.05.2001.

¹⁰ In 1999, UK telecoms minister Michael Wills complained to the Commission about the level of contribution required of new entrants into France’s universal service fund (*Telecom Markets*, 06.05.99, pp. 7-8).

¹¹ The Commission exercises a veto over NRA decisions regarding market definitions and identification of significant market power.

Commission, replaced the former committees that dealt with respectively ONP and Licensing. Conducting its business under the Council Comitology Decision it fulfilled both advisory and executive functions in support of the Commission. The Radio Spectrum Committee (RSC), similarly composed of member state officials, chaired by the Commission and conducting its business under the Council Comitology Decision, advised the Commission on spectrum issues. Under the 2002 regime, the NRAs themselves exchanged best practice within a regulatory network called the European Regulators' Group (ERG), with the Commission providing its secretariat. However, the ERG lacked formal decision-making powers. The 2002 framework granted broad powers to the Commission, including a right to veto decisions on NRA decisions on market definitions and on operators with significant market power, though – as noted – significantly not decisions on remedies to competition shortfalls.

However, despite all this, the decentralised regime quickly revealed shortfalls which have been identified in the regular implementation reports produced by the Commission since 1997 (13 to date)¹² and in four annual regulatory scoreboards produced since 2004 by the European Competitive Telecommunications Association (ECTA), the organisation founded in 1998 to look after the regulatory and commercial interests of new entrant telecoms operators, internet service providers and suppliers of products and services to the communications industry.¹³ This regulatory inconsistency has hampered the functioning of the internal market, which in many respects has continued to function as a set of distinct national markets, and hindered the creation of pan-European players. It has also had a negative impact on the up-take of new technologies and infrastructure competition. For instance, according to the Commission around 89.5% of direct access to broadband is still dominated by the former incumbents (though in certain countries, the UK for instance, there is more direct access competition). Therefore, there is plainly therefore a rationale for strengthening regulatory authority at the European level. The problem, however, is that for the reasons described, there were obvious political obstacles to achieving this.

¹² http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/index_en.htm

¹³ <http://www.ectportal.com/en/basic651.html>

The Review of the EU Telecommunications Regime

On 29 June 2006, the Commission produced a Communication on the Review of the EU Regulatory Framework for Electronic Communications Networks and Services.¹⁴ The Communication reported on the functioning of the 2002 framework, proposed some key changes, and launched a public consultation running until October 2006. The Communication was complemented by a Staff Working Document¹⁵ which outlined in greater detail the possible changes to the regulatory framework, and by an Impact Assessment.¹⁶ Responses to the consultation were published on the Commission's 'Europa' website.¹⁷ The Commission suggested that the framework should be seen, overall, as a success. It had seen the development of more choice, lower prices, innovative products and services, high penetration of mobile services, increasing broadband availability, and investment in the sector was strong. However, progress was distinctly patchy and the overall market remained fragmented. Markedly few operators offered services across several member states. The review aimed to produce revised rules to promote further harmonisation, the development of a more genuine internal market, and the creation of pan-European players. The Commission proposed two, largely uncontroversial, main areas for change, notably spectrum liberalisation¹⁸ and 'streamlining' the reviews by NRAs of the markets susceptible to *ex-ante* regulation.

More controversially, the Commission also proposed some more prescriptive changes. It suggested that EU-agreed criteria should be developed for national courts to apply when granting suspensions of regulatory decisions during legal appeals. In order to encourage

¹⁴http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/com334_en.pdf

¹⁵http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/staffworkingdocument_final.pdf

¹⁶http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/impactassessment_final.pdf

¹⁷http://ec.europa.eu/information_society/policy/ecomms/info_centre/documentation/public_consult/review_2/index_en.htm

¹⁸ The Commission had already outlined a approach in a Communication on spectrum management, COM(2005) 411, 6.9.2005.

the development of pan-European services, the Commission proposed that a new Community procedure be developed – alongside the current authorisation scheme – for reaching EU-level agreement on common approaches to their authorisation, according to which the Commission could in specific cases (such as satellite communication services) adopt Decisions after a member state consensus had been reached through a committee approach. Controversially, the Commission made a recommendation that would very significantly increase its own central authority. It proposed that its power to veto NRA decisions, currently limited to decisions concerned with the definition of relevant markets and the identification of operators with significant market power, be extended to decisions concerning remedies for competition problems. Even more controversially, the Staff Working Paper, accompanying the 2006 Communication, floated the idea of creating a European telecoms agency as something that should at least be considered in the consultation. Such an agency had actually been recommended years before, in the 1994 ‘Bangemann Report’. During the 1990s, the idea had gained some support from within the Commission and had been advocated by the European Parliament, transnational telecommunications users, and some new entrants. However, the member states had been implacably opposed to the concept, and certainly in the aftermath of the 1992 Maastricht Treaty, with its emphasis on subsidiarity, the idea had been a non-runner during enactment of the 1998 and 2002 regulatory packages. It became increasingly clear during the review process that the Commission was now intent on reviving the idea.

Responses and reactions to the Communication naturally varied considerably. The UK government’s response was very interesting, not least because from the outset the UK had been extremely influential on, and closely aligned with, the Commission on the overall question of liberalisation. The UK had always been a liberalisation-enthusiast, at loggerheads with the laggards, and it had consistently been a high performer with regard to regulatory implementation. The UK had always topped the regulatory scorecards produced annually since 2004 by ECTA, the new entrants’ association.¹⁹ However, despite considerable concern about the poor performers and the continuing barriers to a genuine internal market, the UK response to the Commission questioned the latter’s

¹⁹ <http://www.ectaportal.com/en/basic650.html>

proposals to increase ‘prescription, direction and oversight’. In the UK government’s and Ofcom’s view, ‘an excessive focus on regulatory harmonisation [should] be avoided, given the undeniable heterogeneity of markets....The biggest barrier to achieving the benefits of a single market ha[d] been ineffective, late or inadequate implementation of the framework.....ensuring effective implementation should [therefore] be a Commission priority.’ However, ‘the principle of subsidiarity dictate[d] that [the Commission] must justify any move to increase its role or powers relative to the NRAs for this purpose’. Unsurprisingly, the UK position was typical of other member states, and also of the NRAs, which preferred the *status quo* whereby regulation was conducted by national regulators familiar with their own national market circumstances. The German government even wanted to see the Commission’s existing veto powers removed altogether. It argued that the procedures related to veto powers were time consuming, cumbersome and expensive. From the German perspective, most telecommunications were national markets which did not require EU level regulation.²⁰

The response of ECTA²¹, too, was very different. For ECTA, the Commission’s reform proposals plainly did not go far enough. ECTA was concerned about the inconsistent application of the framework and the cases of ‘sustained resistance, delaying tactics and discriminatory behaviour from dominant players.’ ECTA considered that there was a ‘major omission’ in the Commission’s proposals, namely the power to apply functional separation – of the business activities of running the network and offering services on it – as a threat to promote regulatory compliance on the part of incumbents. ECTA was adamant that monopoly had not delivered Internet or broadband access, and nor would it deliver the new high-speed network. At its annual Regulatory Conference in Brussels, in November 2006, ECTA again called for the Commission to adopt functional separation as a ‘cornerstone’ of its review.²² At the conference, Information Society Commissioner

²⁰ Joachim Scherer, ‘A ‘Super-European’ Regulator? The European Commission is reviewing the EU Regulatory Framework and wants more powers’, *Telecommunications Online*, Thursday, 16 March 2006. Downloaded on 12/04/2006 from http://www.telecoms-mag.com/search/article.asp?HH_ID=AR_1860

²¹http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review_2/comment_s/ecta_2006_review_response_directives_final.pdf

²² ECTA press release - http://www.ectaportal.com/en/news_item.php?id=600 (downloaded 04/05/2008).

Viviane Reding acknowledged 'that functional separation could indeed serve to make competition more effective'.²³ She has since addressed this omission.

The Commission's reform proposals

In November 2007, the European Commission duly published its legislative proposals for reform of the EC telecoms rules in the shape of: 1) a draft European Parliament and Council Directive amending the 2002 package's Framework Directive, Access Directive and Authorisation Directive; 2) a draft European Parliament and Council Directive amending the 2002 Universal Services Directive and Privacy Directives and a later 2006 Regulation on consumer protection co-operation; 3) a draft European Parliament and Council Regulation establishing the European Electronic Communications Market Authority (EECMA); and 4) a Commission Recommendation on relevant product and service markets within the electronic communication sector susceptible to *ex ante* regulation in accordance with the 2002 Framework Directive.²⁴ Some of the proposals were more radical than had been contemplated in the consultation. The proposals included the following elements:

- reducing of the number of regulated markets (not particularly controversial);
- liberalisation of management of the radio spectrum, including provision for spectrum trading (no longer very controversial);
- strengthening the independence and enforcement powers of NRAs (not very controversial apart from the next point);
- introduction of the remedy of functional separation which the NRAs will be able to apply once they have shown the Commission that other remedies have failed (controversial).

²³<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/697&format=HTML&aged=1&language=EN&guiLanguage=en>

²⁴ For a clear summary see PLCIPIT & Communications and Mike Conradi, 'European Commission proposes reform of EC telecom rules', downloaded at 1200 on 5th May 2008 from http://www.kemplittle.com/PDFs/Press_ECProposesReformTelcoRules_Nov07.pdf?PHPSESSID=8a25587cc05324ee89d80fcb35fc35b6.

- introducing a new independent European agency, accountable to the European Parliament, the European Electronic Communications Market Authority (EECMA) to be composed of representatives of the NRAs (a very controversial proposal that had not been signalled as the Commission's preferred option in the 2006 Communication and Staff Report);
- in cooperation with EECMA, the Commission would have the power to oversee NRA remedies in order to ensure a more consistent and efficient implementation of the rules (controversial); and
- further increasing Commission powers by introducing a new Article 19 of the Framework Directive which would empower the Commission to issue a Recommendation or Decision providing for the harmonised application of regulatory provisions to overcome barriers to the internal market (controversial).²⁵

The Commission Recommendation was to reduce the number of telecoms markets susceptible to *ex ante* regulation from eighteen to seven. This was a relatively uncontroversial measure, which the Commission justified by arguing that in most retail markets, effective wholesale regulation had created competition, removing the need for *ex ante* regulation, though if a NRA could demonstrate a need, they could continue to regulate them. The Recommendation was adopted by the Commission on 13 November 2007, entering into force with immediate effect. The rest of the Commission's proposals will need to be negotiated and legislated in the European Council and the European Parliament according to the co-decision procedure. Under this, EU legislation is adopted jointly by the European Parliament and Council. After detailed discussion of the proposals in Committee, the Parliament votes on them. In the Council, detailed discussion is conducted by working parties of member state officials, the Ministers concluding the negotiations. The 'wheels' of this process are continually 'oiled' by informal discussions between Parliament, Council and Commission. Given their controversial character, some proposals were bound to be vigorously opposed, yet the

²⁵ The draft legislation is available at http://ec.europa.eu/information_society/policy/ecommm/library/proposals/index_en.htm);

Commission hopes that they would become law by the end of 2009 and implemented by member states during 2010.

Functional Separation Remedy

One of the most controversial of the proposals, and one as noted that had not been included in the Commission's earlier proposals for consultation, was that providing for the possibility of functional separation. This remedy had already been successfully embraced in the UK, where BT voluntarily, albeit under Ofcom's threat of a referral to the European Commission over its dominance of the local loop, had created a separate access business division called BT Outreach. The UK is reportedly in favour of the Commission's proposal to make functional separation an NRA remedy of last resort so long as it is done in cooperation with companies. However, other large member states – including France, Germany and Spain - are opposed.²⁶ A number of member states and their former incumbents have warned that functional separation could reduce the incentives to undertake risky investment in new access networks.²⁷ A report published in November 2007 by the incumbents lobby ETNO argued that 'vertical integration of access and services [was] a key driver behind the decision to invest in next-generation networks'. Mandatory separation 'may lead to losses in efficiency and the ability to coordinate complex investment decisions.'²⁸ Some – most notably the German government and former incumbent Deutsche Telekom - have strongly argued in favour of a 'regulatory holiday' for the incumbent in order to promote investment in new high-speed networks. French Socialist MEP Catherine Trautmann, who sits on the European Parliament's Committee on Industry, Research and Energy, which is responsible for telecoms, and who is the Parliament's rapporteur on the telecoms framework directive, is currently preparing a report which according to a recently circulated paper seeks to 'sidestep' the proposal on functional separation and to 'refocus' the debate on investment

²⁶ Simon Taylor, 'London calling the shots on network rules', *European Voice*, 6-12 December, 2007, p. 19.

²⁷ Mike Conradi, 'United Kingdom: European Commission proposes reform of EC telecom rules', downloaded at 1200 on 4th May 2008 from <http://mondaq.co.uk/article.asp?articleid=54610>

²⁸ Lorraine Mallinder, 'Reding takes on telecom monopolists', *European Voice*, 8th November 2007.

in next-generation networks.²⁹ Prior to the publication of the current draft legislative proposals, Information Society and Media Commissioner Reding had even faced criticism within the Commission from officials in DG Competition under Commissioner Neelie Kroes, who had argued that ‘functional separation risk[ed] harming investments in a sector which [wa]s crucial to the EU’s competitiveness’.³⁰

The Commission rejects the argument that functional separation risks holding back investment in competitive infrastructures, arguing that ‘experience from countries that have already introduced functional separation shows that this remedy enhances overall investment in services and in network infrastructures.’ The Commission points to the UK where ‘functional separation has spurred a new wave of investment and infrastructure-based market entry as evidenced by the explosion of local loop unbundled lines in UK which has jumped from less than 100,000 in June 2005 to 3.3 million by the end of October 2007.’ Furthermore, the Commission points out that the proposed reform ‘requires a thorough cost-benefit analysis by national regulators before introducing functional separation.’ They will be able ‘thereby ensure that the incentives to invest for both the largest and smallest operators are preserved.’³¹ These arguments notwithstanding, this particular issue is bound to incite further controversy during the forthcoming legislative process.

Controversy over a European Telecoms Agency

Just as controversial, the Commission’s plan for the creation of a European telecoms market authority, EECMA, represents an obvious challenge to the NRAs and their network the ERG, which it is planned to subsume, concerned as they have been to

²⁹ Lorraine Mallinder, ‘MEP takes issue with Reding: French MEP targets next-generation investments’, *European Voice*, 10 April 2008, p. 5. Reportedly, Trautmann’s report will also call for the Commission’s planned veto on remedies to be ditched

³⁰ ‘EU officials debate plan to split telecommunications companies’, *International Herald Tribune*, 25th September 2007. <http://www.ihf.com/articles/2007/09/25/business/telecom.php> (downloaded 04/05/2008).

³¹ See the Commission’s press release download 05/05/2008 from: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/458&format=HTML&aged=0&language=EN&guiLanguage=en>

maintain national regulatory independence. A number of member states, including France, Germany and the UK, have voiced their firm opposition. The UK government and Ofcom have argued that, instead, the existing NRAs' network, the ERG, should be allowed to continue its work to improve the exchange of best practice among national regulators.³² The EECMA proposal has also encountered opposition from members of the European Parliament (MEPs). Reportedly, Angelika Neibler, the German centre-right MEP and chair of the Parliament's industry committee, has claimed, following a European Parliament hearing on the telecoms proposals, that the majority of MEPs from across the political spectrum are opposed to EECMA. She has argued instead in favour of reinforced cooperation of the NRAs, who were closer to their respective domestic markets.³³ Spanish centre-right MEP Pilar del Castillo Vera, the European Parliament's rapporteur specifically on the Commission's proposal for EECMA, has argued that the plan is too bureaucratic.³⁴ Arguing that 'there is a huge agreement among political groups' in the European Parliament that EECMA be dropped, she has proposed instead the creation of a new advisory body constituted of national regulators, to be called the Body of European Regulators in Telecoms (BERT), which is not discernably very different from the current ERG. The creation of EECMA, she has argued, would be in direct contradiction of the Commission's better-regulation policy, which aims to cut red tape, and – echoing a longstanding argument against a European agency – against the principles of subsidiarity established in the 1992 Maastricht Treaty. MEPs are due to vote on Del Castillo's proposal in July 2008.³⁵ As with the issue of functional separation, Information Society and Media Commissioner Reding had even faced criticism from within the Commission. Officials working on cutting red tape for Commission Vice President Günter Verheugen, Commissioner for Enterprise and Industry, had questioned the need for a new agency requiring an extra 110 staff.³⁶ More recently, since publication

³² Simon Taylor, 'London calling the shots on network rules', *European Voice*, 6-12 December, 2007: 19.

³³ Simon Taylor, 'MEPs opposed Reding's regulator plan: chairwoman of Parliament's industry committee says MEPs are opposed to the creation of a European telecoms market authority', *European Voice*, 6-12 March, 2008, p. 25.

³⁴ <http://www.theparliament.com/latestnews/news-article/newsarticle/telecoms-package-comes-under-fire-from-meps/>

³⁵ Lorraine Mallinder, 'Review rejects idea of European super-regulator', *European Voice*, 16 April 2008.

³⁶ 'EU officials debate plan to split telecommunications companies', *International Herald Tribune*, 25th September 2007. <http://www.iht.com/articles/2007/09/25/business/telecom.php> (downloaded 04/05/2008).

of the Commission's telecoms reform proposals, in March 2008, the President of the European Commission, José Manuel Barroso has called for a halt to the creation of EU agencies, of which there are currently twenty nine employing nearly 4000 staff and costing the EU budget around €500 million annually, until new rules on their governance and operation have been agreed with the member states. This announcement could hardly have come at a more sensitive time, from the point of view of the Commission's proposals for telecoms (and also energy, another liberalised utility sector for which such an agency has been proposed).³⁷

The Commission justifies EECMA on the grounds that it would 'be an independent centre of excellence for regulatory issues linked to market analysis, remedies and the provision of EU-wide services and assist the Commission and national telecoms regulators in their work'. In the Commission's view it would 'strengthen the independence of those national regulators which come under undue pressure from their national governments', thereby 'level[ing] the playing field for a competitive pan-European telecoms industry, creating stronger cross-border competition and increased consumer benefits.' The Commission rejects the criticism that EECMA would be overly bureaucratic, claiming that it would be 'a small, but efficient and professional agency that [would] work together with national regulators'. EECMA's proposed circa 130 officials 'contrasts, for example, with the 800 employees of the UK telecoms regulator OFCOM known to be one of the most efficient regulators of the EU.' The core rationale for EECMA was that a common approach to regulatory issues 'was essential for a successful telecoms economy', yet 'telecoms issues of cross-border interest (such as internet access, data roaming, Voice over Internet Protocol, mobile phone usage on aeroplanes or business services) risk[ed] being dealt with in 27 different ways in Europe' EECMA was needed because '[so] far the loose form of cooperation currently tested inside the European Regulators Group (ERG)...ha[d] failed, in spite of many efforts and good intentions, to result in concrete regulatory responses to cross-border and has been criticised by industry for its "lowest common denominator" approach.' EECMA would not replace national telecoms regulators, rather it would 'work closely with, and build

³⁷ Simon Taylor, 'Barroso calls for a halt to agencies', *European Voice*, 13-18 March 2008, p. 6.

upon the existing national telecoms regulators – which ha[d] a deep understanding of their national markets – and also with the European Commission.’ This would therefore ‘contribute to the coordination and harmonisation of telecoms regulation and ensure that it is consistently applied across all EU Member States.This partnership between national and European regulators [would] strengthen regulatory independence.’³⁸

One thing is certain: the EECMA proposal faces a highly uncertain future. It is quite likely that it will meet the same fate as earlier proposals for a pan-European telecoms agency. Meanwhile, however, there can be little doubt that the proposal is serving to increase the pressure on the ERG ‘to show how much it can deliver on its own’.³⁹

The extension of the Commission’s veto powers to cover NRA decisions on remedies

The proposal to extend the Commission’s power of veto of NRA decisions to cover remedies was welcomed by new entrants and also by certain former incumbent operators, notably BT, which operated in highly competitive markets and which were keen for less competitive markets to be opened up. Thus, at a Westminster eForum consultation on the EU telecommunications review in 2006, BT’s Director of European Affairs Stephen Crisp noted that: ‘one of the weaknesses of the current framework – or at least it has been implemented in practice – [was] the inconsistent application of remedies and use of remedies that do not match the market problem identified.’ Crisp noted the efforts of the ERG to address the issue, but ‘believe[d] that there [was] a need for a stronger Commission role, through extension of the veto to cover remedies.’⁴⁰ However, there was likely to be considerable opposition on the part of member states and their NRAs to a measure that would see their national discretion weakened to such an extent. At the same Westminster eForum consultation Alex Blowers, Ofcom’s international director, admitted that there was ‘legitimate concern’ that implementation in a number of member states

³⁸ See the Commission’s press release download 05/05/2008 from:
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/458&format=HTML&aged=0&language=EN&guiLanguage=en>

³⁹ Lorraine Mallinder, ‘Reding turns screw on telecoms watchdogs’, *European Voice*, 6-12 Decemberr, 2007, p. 21.

⁴⁰ Westminster eForum, *EU Review of Telecoms Regulation*, November 2006, p. 37.

appeared ‘dilatory’ and ‘half-hearted’, but that it was not a concern that could be addressed through the introduction of a veto on remedies. The problem, Blowers stated, was ‘not over-regulation, but under-regulation by particular national regulators. A veto on a remedy that does not exist isn’t going to get us very far.’ According to Blowers, the real problem was whether ‘the quality of regulation overall across 25 National Regulatory Authorities (NRAs) [was] actually fit-for-purpose.’ Therefore, Ofcom’s favoured approach was for the ‘regulators to work more effectively between themselves and with each other to exchange best practice, to learn from each other’s experience.’ Ofcom had been arguing through the ERG ‘for a much tighter and more prescriptive approach to the application of remedies’ but at the same time recognised that ‘a one-size-fits-all approach’ was unsuitable given the diversity of national market conditions.⁴¹ More recently, Ofcom chief executive officer Ed Richards, made the same point at a European Parliament hearing on the telecoms reform package, suggesting that the veto would upset the balance of power between states and Brussels. The veto, Richards criticised, would imply ‘that a single answer can be simply rolled out top down.’⁴²

The Commission, however, denies that its proposal implies a ‘one-size-fits all’ solution, insisting that ‘in a single market in which telecoms operators offer their services to consumers in several countries, similar competition problems need to be addressed by similar remedies.’ Moreover, the Commission points out that the proposed new European Telecoms Market Authority would assist the Commission in exercising this responsibility, ‘allow[ing] it to draw on the expert advice of national telecoms regulators.’⁴³ It is highly uncertain whether this proposal to increase the Commission’s power will survive the legislative process in the Council and Parliament. It is worth recalling that, like the proposal for a European regulatory agency, a proposed Commission veto on remedies had been rejected during the 1999 review (Michalis 2007: 214). Both proposals beg the question: what has changed politically since then?

⁴¹ Westminster eForum, *EU Review of Telecoms Regulation*, November 2006, p. 10-11.

⁴² Huw Jones, ‘EU’s Reding, telecoms watchdogs clash over reform’, *Reuters UK*, 27th February 2008.

Downloaded 05/05/2008 from

http://uk.reuters.com/article/UK_SMALLCAPSRPT/idUKL2719765520080227

⁴³ See the Commission’s press release download 05/05/2008 from:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/458&format=HTML&aged=0&language=EN&guiLanguage=en>

Conclusion

EU liberalisation of telecommunications, culminating in the current 2002 framework, produced a complex multi-tier regulatory regime. This regime was characterised by a sharing of regulatory competence between the national and the EU level. The EU regulatory regime established through a number of Directives a set of EU-agreed principles and requirements that the member states have been obliged to transpose into national law and implement, but detailed implementation has been left to the regulators in the member states. This had the practical advantage that national regulators knew their markets best. However, partly due to the way the Directives were negotiated, partly due to differing national regulatory styles and legal traditions, the NRAs have plainly enjoyed a large measure of discretion in how they have implemented these rules and principles. Some member states have appeared reluctant to give real regulatory power to the NRAs, and some national champions appear to have been favoured. The Commission certainly enjoys powers to enforce formal compliance, but its veto powers over particular NRA decisions have been limited and, significantly, they have not extended to NRAs' remedies for competition shortfalls. The Commission has had to operate through a complex network of organisations at EU level, composed of comitology committees responsible for certain functional activities (ONP, licensing issues, radio spectrum issues, etc), and notably the ERG, a forum for the NRAs in which the Commission has placed a lot of hope that it would serve to promote the exchange of best practice between them.

However, it is very clear that there has been a gap between the rhetoric about the success of EU telecommunications liberalisation and the reality of inconsistent and in some cases 'half hearted' and 'dilatory' regulation of national markets. This regulatory inconsistency has hampered the functioning of a genuine internal market and it has hindered the creation of pan-European players. In view of persistent regulatory shortfalls, there would appear to be a strong case for strengthening formal regulatory authority at the EU level. In view of the economic stakes, 'no change' is simply not a realistic option. One solution might be to create a European regulatory authority. However, this has been contemplated

in the past, and rejected. It has been consistently resisted by the member states, and they can be expected to oppose the Commission's proposal at the legislative stage. Nor are the signs coming from the European Parliament at all encouraging for the Commission. This leaves the other options, increasing the independence and the powers of the NRAs, and increasing the powers of the Commission. Of these options, the latter is also controversial. Yet, if the Commission is not granted more authority to override the discretion of the NRAs, it is difficult realistically to see how harmonisation might be further progressed. As seen, the Commission already works within a complex regulatory network, advised by policy committees and working groups, and also the ERG. Its decisions, too, are ultimately challengeable in European law. The Commission, clearly, would have to be very careful in its exercise of such authority. A 'one-size-fits-all' approach would not be appropriate, but the Commission recognises this. Moreover, the veto on remedies would have to be a 'backstop measure', to be wielded only when an NRA is 'half-hearted' and/or 'dilatory'.

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