

# A SINGLE EUROPEAN REGULATORY AUTHORITY

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## *I. Introduction*

The history of proposals for a single European regulator for telecommunications goes back two decades. It has sometimes been termed the Euro-FCC after the Federal Communications Commission in the USA, which will be 75 years old next year. Lehr and Kiessling argued for greater central power in the federal systems in both Europe and the USA.<sup>1</sup> At various times such an authority has been seen as a necessary precondition for a single market for telecommunications and as a means to bring under control the anarchy and dissonance created by twenty-seven surprisingly creative bureaucracies within the EU and many more around the edges.

The internal or single market was the great project to tear down national borders in order to create a unified market by 1992, one that would deliver benefits for consumers through heightened competition and for manufacturers through the achievement of economies of scale. In a sector that was traditionally a monopoly, this required a considerable number of specific measures for telecommunications which had to be coordinated in order to achieve the internal market.

In 1990, the European Commission pushed the member states to create regulatory authorities.<sup>2</sup> It required them to move licensing and regulatory functions out of their PTTs, as being in violation of Article 86 (then Article 90) of the EC Treaty. National regulators were created relatively quickly on a bureaucratic timescale, but they were all very different, reflecting national administrative traditions, the political expedience of the moment and relatively vague and uncertain understandings of what was being created.<sup>3</sup> They only slowly developed or achieved some measure of independence from the PTTs though even today, some are considered to be too close to government or, at least, to state-owned enterprises, with significant risk of regulatory capture.

It was claimed that regulators would be temporary bodies, lasting only until such times as full competition would be achieved, though the timeframe for this was extremely vague. For some it was almost science fiction, seeming to be far into the future, while for others it was just around the corner. Years later, it is still impossible to specify the conditions for the elimination of regulators, when competition authorities can take over the residual workload. In theory, though not in practice, the present directives lead inexorably to that goal. Yet there is no exit strategy and there is little sense that there would be agreement on how the end game should be played or indeed that it should be played soon.<sup>4</sup>

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<sup>1</sup> William Lehr & Thomas Kiessling (1998) Telecommunication regulation in the United States and Europe: the case for centralized authority. Paper presented to the 26<sup>th</sup> Telecommunications Policy Research Conference, Alexandria, Virginia.

<sup>2</sup> Recital 29 and Article 7 of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services.

<sup>3</sup> For example, in France there debate over whether the term was *régulation* or *réglementation*.

<sup>4</sup> Ken Ducatel of Commissioner Reding's cabinet chose the Churchillian title "European telecoms: the end of the beginning rather than the beginning of the end" for a speech in London 27 February 2008.

Following the review of the telecommunications directives in 2005 and 2006, Commissioner Reding faced proposals from DG Information Society that were devoid of political content. Her response was to add them herself. She caught the attention of governments with the reform of spectrum assignment, of the former PTTs by threatening them with structural separation and of the national regulators by reviving the proposal for a single regulator – something previously considered to be dead and buried.

This paper first reviews the concept of the single market and its application to the telecommunication sector. It then examines the history of coordinative measures and bodies within the European Union, including proposals for a single regulator. It then analyses the various regulatory groupings created over the last decade, together with some of the principal challenges of harmonization they faced. The proposal for the creation of a new authority is then examined, including the responses of the various actors. Finally, conclusions are drawn.

## ***II. The single market***

The Single or Internal Market is a project that is now over twenty years old, embodied in a treaty, the Single European Act of 1986, with a completion date of 1992.<sup>5</sup> It was a broad series of initiatives to break down the barriers between the member states in order to create a single market from which both suppliers and consumers would benefit. It saw a series of exercises in identifying the costs on “non-Europe”, the economic price being paid for failing to create a market that in 1992 represented 380 million and today is very close to 500 million consumers.

The potential benefits for telecommunications markets had been recognized as early as 1980. The EC noted the economies of scale that could be achieved and called for the widest benefits of innovation and choice.<sup>6</sup>

The EC later commissioned two reports on the cost of non-Europe for telecommunications equipment and for telecommunications services.<sup>7</sup> The first noted the lack of exploitation of economies of scale and of specialization in the manufacture of equipment, together with the hampering effects of insufficient standardization and excessive certification, all of which generated costs passed on to consumers. A larger market would also stimulate innovation. In services, two scenarios were considered, with greater and lesser scope for liberalization (i.e., the extent to which services continued to be reserved for the PTT). While significant benefits were identified, still greater rewards would accrue from the further opening of markets.

With the introduction of digital switches the manufacturers faced ever greater development costs which forced them to abandon cosy and even symbiotic relationships in national markets in favour of a single global market. Recent evidence suggests that the relationships with customers sometimes went too far, with bribes being paid in return for contracts.<sup>8</sup>

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<sup>5</sup> Single European Act (1986) *Official Journal* L 169 of 29 June 1987.

<sup>6</sup> Page 5 of EC (1980) Recommendations on Telecommunications. COM(80) 422. Brussels: European Commission.

<sup>7</sup> Jürgen Müller (1988) The benefits of completing the internal market for telecommunication equipment. Brussels: European Commission.

Jürgen Müller (1988) The benefits of completing the internal market for telecommunication services in the Community. Brussels: European Commission.

<sup>8</sup> Siemens. Rechtsstreitigkeiten – Geschäftsjahr 2007. München, 8 November 2007.

Initially the operators sought to create grand alliances of their national interests to meet the needs of multinational corporations.<sup>9</sup> However, these proved ineffective and even disastrous (e.g., Concert I and II, Global One and Unisource).<sup>10</sup> They were eventually disentangled, with the operators building their own core networks and taking domestic leased lines and more recently Ethernet circuits from incumbent operators to reach the non-metropolitan locations of their clients.

The opening of licensing, enforced by the European Commission, saw the operators able to move into national consumer markets by taking GSM licences, in a rather grudging *quid pro quo* of cross-border market entry.<sup>11</sup> As other countries fell under the influence of the EU telecommunications regulatory dogma the operators followed. For example, in South-East Europe Deutsche Telekom and Telekom Austria were both able to build very significant presences.<sup>12</sup> In a similar way they were also able to take unbundled local loops to offer broadband and, combined with GSM or UMTS, multiple play services.

The ERG has addressed harmonization, rather than the single market, in a consultation in 2006.<sup>13</sup> As it helpfully pointed out, harmonization does not feature in the directives. It stressed the dangers of applying “one size fits all” to the various markets. It proposed to concentrate on the dissemination of best practice as its alternative to uniformity of remedies.

DG Competition has found many of the relevant markets for manufacturing and for the supply of services to corporations to be at least as large as the EU. Yet still many telecommunications markets, somehow, have remained national in scope. This was largely the result of differences created by governments and by regulators, despite the services and the consumer and network equipment being interchangeable and even indistinguishable.

It is not helped by the mechanism for the regulation of trans-national markets in Articles 15 and 16 of the Framework Directive are unworkable and that no attempt has been made to use it.

British Telecom (BT) has funded two reports on the needs of its multinational business customers.<sup>14</sup> These identified very substantial potential benefits to the large network service providers from the supply of consistent inputs across Europe. However, the argument is greatly diminished, if not entirely undermined, by the total lack of support from the other network service providers. Even the virtual network operators have declined to support BT. On its own, the position of BT appears to be special pleading or simply misguided.

There appears to be a single market at the level of electronic equipment, both for operators and for consumers. Equally, the core backhaul networks, between major

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<sup>9</sup> Aysar P. Sussan and Jong-Geun Oh (1996) “Transnational strategic alliances in the telecommunications industry” *Computers & Industrial Engineering* 31 (1-2) pp 41-44.

<sup>10</sup> Svein Ulset (2008) “The rise and fall of global network alliances” *Industrial and Corporate Change* 17 (2) pp 267-300.

<sup>11</sup> Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications.

<sup>12</sup> Ewan Sutherland (2008) Telecommunications in South-East Europe: operators, reforms and outcomes. CTTE 2008 - 7th Conference on Telecom, internet & media Techno-Economics, 17-18 June 2008, Paris.

<sup>13</sup> ERG (2006) Effective Harmonisation within the European Electronic Communications Sector. ERG (06) 68. Brussels: European Regulators Group.

<sup>14</sup> Indepen (2007) The economic benefits from providing businesses with competitive electronic communications services. London: BT.

<sup>14</sup> Indepen (2008) Productivity, growth and jobs: how telecoms regulation can support European businesses. London: BT.

European cities are also a single competitive market with several suppliers of large capacities connections. In the mobile market, there is still a patchwork of operators, but consolidation is gradually filling in the gaps, for example, the recent interest of Deutsche Telekom in acquiring OTE and of France Telecom in acquiring TeliaSonera. The markets that remain fixedly national are in the supply of broadband and telephony to consumers and to SMEs. Regulation limits competition and market entry, thus raising profits for the operators.

### ***III. Coordination within Europe***

The idea of a single regulator is comparatively old, though it has never been particularly specific in its formulation nor has it been pressed through to a conclusion. It is almost presented as a European ideal or myth.

The approach taken in competition law was to centralize control, with most decisions reserved for the European Commission for almost forty years.<sup>15</sup> It has only been in this decade and only after the establishment of a very substantial case law of the European courts, that some powers have been delegated to the authorities in the member states. They are all closely linked to DG Competition both directly and through the European Competition Network. Thus any tendency to diverge from the mainstream of EU competition law is severely constrained, protecting the single market.

In 1994, the Bangemann Report on “Europe and the global information society” was presented to the heads of government.<sup>16</sup> It argued that in order to enable the single market:

The Group recommends the establishment at the European level of an authority whose terms of reference will require a prompt attention.

This was considered necessary in order to develop a common regulatory approach that would create a competitive, Europe-wide, market for information services. In this way private rather than state capital could be used to pay for innovation, growth and development. The idea was too radical and was allowed to fade away.

Bangemann was first Commissioner for the internal market and industrial affairs in the Delors Commission and later a Vice-President of the Commission and responsible for Industrial affairs, Information & Telecommunications Technologies in the Santer Commission. He was succeeded by Erkki Liikanen, who had the title of Commissioner for the Information Society. At that time, DG XIII also became DG Information Society, while DG IV became DG Competition, a move intended to make them more accessible and human. The addition of media came with the Barroso Commission when Viviane Reding brought that portfolio with her. It was presented as being an example of convergence.

Bringing together the many apparently conflicting national interests was far from simple.<sup>17</sup> It required of the EC considerable patience in developing consensus around best practice.

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<sup>15</sup> Council Regulation No. 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty.

<sup>16</sup> Report on Europe and the Global Information Society: Recommendations of the High-level Group on the Information Society to the Corfu European Council. Bulletin of the European Union, Supplement No. 2/94.

<sup>17</sup> Wayne Sandholtz (1992) *High-tech Europe: the politics of international cooperation*. Berkeley: University of California Press.

## Committees of the EC and the member states

The work of the EU is, seemingly inevitably, based on committees and working groups. These have grown in number and complexity over the years, so that today there are byzantine structures understood by few, some governed by the comitology rules and some less formal.

In 1983, Commissioner Davignon and the Information Technologies Task Force (ITTF) created the Senior Officials Group for Telecommunications (SOG-T), composed of representatives of both the PTTs and the ministries of industry and economics.<sup>18</sup> The work of the SOG-T was to provide the programme and initial political support for subsequent initiatives. It led on to the ONP Framework.<sup>19</sup>

The Open Network Provision (ONP) Committee was established in 1990 by the ONP Framework Directive.<sup>20</sup> It was chaired by the EC, with representatives of all the member states, with delegates from the European Economic Area (EEA) and the candidate countries. Its scope included all the issues arising from the full set of ONP directives including leased lines, voice telephony and interconnection. A separate Approval Committee for Terminal Equipment dealt with those issues under a similar procedure.

The ONP Committee had both advisory and regulatory functions. It enabled member states to seek guidance and clarification from the EC when implementing the directives. The EC used the meetings to measure progress and push slower, more reluctant or even recalcitrant member states to move forward. The EC increasingly had to use its powers under Article 226 of the EC Treaty to bring infringement proceedings against member states. The ONP Committee was consulted in the preparation of recommendations and reports, including the annual implementation reports and leased line reports.<sup>21</sup>

Liberalisation was, inevitably, difficult and many member states were often reticent or even truculent when the EC or another member state proposed some change. The EC would then compromise formulating changes that allowed a measure of latitude for the member states to use subsidiarity to go their own way. In doing so it was always careful to ensure that a review was built into the process, allowing it to prepare an analysis of the divergences and the identification of best practice. Often these were embodied in recommendations that continued to give member states some leeway in their implementation, but set out best practice.

The Open Network Provision Co-ordination and Consultation Platform (ONP-CCP) was founded in 1991 to provide a single point of contact for consultation with industry encompassing a range of operators and users. For example, it undertook work on the price of international leased lines. In 1998 it merged with the European Interconnect Forum (EIF) a similar body, to form the European Telecommunications Platform (ETP).

The Licensing Committee was established in 1997 by the Licensing Directive.<sup>22</sup> It was also referred to in the S-PCS Decision<sup>23</sup> and the UMTS Decision.<sup>24</sup> As with the ONP

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<sup>18</sup> EC (1984) Progress Report on the thinking and work done in the field and initial proposals for an Action Programme. Communication from the Commission to the Council on Telecommunications. COM (84) 277 final.

<sup>19</sup> Proposal for a Council Directive on the establishment of the internal market for telecommunications services through the implementation of Open Network Provision (ONP). COM (88) 825 final.

<sup>20</sup> Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision.

<sup>21</sup> <http://circa.europa.eu/Public/irc/info/onp/home>

<sup>22</sup> Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services.

Committee, it was attended by Member States, candidate countries and the EEA countries. It had both advisory and regulatory functions, principally in the harmonisation of conditions for licensing and in the establishment of a one-stop shop procedure, as well as harmonisation of spectrum. It gave formal opinions as a regulatory committee on final proposals for decisions on harmonised conditions to be applied in Member States.<sup>25</sup>

A complication in spectrum and numbering issues was that the EU was only a subset of Europe and that it had to work through the *Conférence Européenne des administrations des Postes et des Télécommunications* (CEPT) and the International Telecommunication Union (ITU). The Commission would issue a mandate to one of the CEPT bodies, such as ECTRA or ERC, then bind member states to support its position. The Licensing Committee was the advisory committee to the EC on mandates submitted to ECTRA and ERC at CEPT.

With the adoption of the Framework Directive in 2002, the ONP and Licensing Committees were replaced with the Communications Committee (COCOM) and the Radio Spectrum Committee (RSC).<sup>26</sup> The Radio Spectrum Policy Group (RSPG) was established in 2002,<sup>27</sup> following the adoption of the Radio Spectrum Decision.<sup>28</sup>

There were complaints from lobbyists about the lack of access to these committees which were eventually resolved by admitting as “experts” representatives of the main industry lobbying groups. This was severely limited, as they were unable to attend sessions when decisions were being taken on advice to the Commission and they had no right to speak at any meeting. In effect, they were expert note-takers, with a little lobbying before the meetings and during the breaks, largely based on their access to working documents. A public account of the meeting was given immediately after at a briefing by the EC and most documents appeared on the web site some weeks later.<sup>29</sup>

With the adoption of the 2002 directives, the practice of issuing recommendations largely ended. The presumption was that NRAs would analyse the competitive problems and bottlenecks in order to determine the remedies they would impose and that the results would be consistent. In the event they were anything but. OFCOM in 2007 suggested a reversion to the practice of recommendations.<sup>30</sup>

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<sup>23</sup> Decision 710/97/EC of the European Parliament and of the Council of 24 March 1997 on a coordinated authorization approach in the field of satellite personal-communication services in the Community.

<sup>24</sup> Decision 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community.

<sup>25</sup> <http://circa.europa.eu/Public/irc/infso/licensing/home>

<sup>26</sup> Working documents relating to COCOM and RSC can be found at:

<http://circa.europa.eu/Public/irc/infso/cocom1/home>

<http://circa.europa.eu/Public/irc/infso/radiospectrum/home>

<sup>27</sup> 2002/622/EC: Commission Decision of 26 July 2002 establishing a Radio Spectrum Policy Group.

<sup>28</sup> Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision).

<sup>29</sup> See <http://circa.europa.eu/Public/irc/infso/Home/main>

<sup>30</sup> Alex Blowers speaking at the Westminster e-Forum “The review of the European Union telecommunications legislative package” 5 December, London.

## Reports on a single regulator

In 1997, the EC received a study it had commissioned on a single regulator from economic and legal consultants NERA & Denton Hall.<sup>31</sup> This looked at the impending full liberalization of telecommunications and the role such a regulator might play.

It summed the fears as follows:

Particular issues related to the risk of excessive red-tape and high administrative costs for operating in several Member States, as well as to whether key resources (e.g. frequency or Europe-wide numbers for value added services) could be allocated in a timely and fair manner for such services. Concerns were also expressed about the burden of up to 15 individual licensing procedures, the problems of resolving interconnection disputes between operators in different Member States and about the lack of teeth in the conciliation-based approach at an EU level. Additionally, some comments raised the issue of past cases of non-implementation or incorrect implementation of Community legislation in the Member States.

Whereas in areas such as the competition rules, there was less need for a new authority. The debate was felt to be in its infancy, as experience of cross-border activity was still limited.

In October 1997, Directive 90/387/EEC<sup>32</sup> was amended to include a new Article 8:<sup>33</sup>

The Commission shall examine and report to the European Parliament and to the Council on the functioning of this Directive, on the first occasion no later than 31 December 1999. The report shall be based inter alia on the information supplied by the Member States to the Commission and to the committee referred to in Articles 9 and 10. Where necessary, the report shall examine what provisions of this Directive should be adapted in the light of the developments in the market. Further measures may be proposed in the report in pursuit of the aims of this Directive. The Commission shall also investigate in the report the added value of the setting up of a European Regulatory Authority to carry out those tasks which would prove to be better undertaken at Community level.

This replaced:

During 1992 the Council, on the basis of a report which the Commission shall submit to the European Parliament and the Council, shall review progress on harmonization and any restrictions on access to telecommunications networks and services still remaining, the effects of those restrictions on the operation of the internal telecommunications market, and measures which could be taken to remove those restrictions, in conformity with Community law, taking account of technological development and in accordance with the procedure provided for under Article 100b of the Treaty.

In 1999, the EC received a report commissioned from Cullen International and Eurostrategies on a single regulatory authority.<sup>34</sup> By then the mood of the operators had changed to offering broad support for regulation at the national level. The

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<sup>31</sup> NERA & Denton Hall (1997) Issues associated with the creation of a European Regulatory Authority for telecommunications. Brussels: European Commission.

<sup>32</sup> Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision.

<sup>33</sup> Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications.

<sup>34</sup> Eurostrategies/Cullen International (1999) Report on the possible added value of European regulatory authority for telecommunications. Brussels: European Commission.

exceptions were the Internet and the development of the market for pan-European services.

The report was presented at a public hearing called by the EC. There was very little support for the creation of a single regulator. The operators, both incumbents and new entrants, expressed their limited satisfaction with the national regulators, despite any shortcomings, and were preferable to the unknown of a new single regulator. There was a fear of a lowest common denominator with the possible degradation in the quality of regulation.

There was also a somewhat optimistic belief that there was unreported competition that would be revealed by the market analyses and that regulation would consequently be rolled back. A single regulator would not be needed because no regulator would be needed, with the provision for the ending of regulation, once markets were found to be competitive, then the need for any regulators would diminish and disappear. The dot com crash caused several new entrants to disappear and the funding for the expansion of others to become impossible.

#### *IV. The clubs of regulators*

The Independent Regulators Group (IRG) emerged in the mid-1990s, being formally established in 1997.<sup>35</sup> A significant driver for the regulators to group together was the desire not to be picked off by the larger operators. It was already clear then, that trans-national operators were quite capable of identifying a country as being more susceptible to giving them a favourable precedent that they could use across the EU or to tie up a decision in an appeal by having it suspended.

In 2000 the EC made its proposal for new legislation, including the provision for the Communications Committee.<sup>36</sup> It additionally proposed the creation of the European Regulators Group which was initially to be created by a legal instrument of the EC. There followed a complex debate, understood by very few people, on the precise competence of the EC and on the correct application of the rules of comitology.

One of the criticisms of the proposal for the creation of the ERG was that the NRAs were all so different in scope that each meeting or each agenda item would require a “variable geometry” like the Euro-fighter aircraft, with the NRAs and ministries switching around depending on the topic under discussion.<sup>37</sup> This could have been solved by working in COCOM where all the bodies were present. Indeed there is considerable and wasteful overlap between COCOM and ERG.

The first version of the ERG was created by an EC Decision in 2002.<sup>38</sup> This was subsequently modified in 2004, narrowing the scope to those areas where the majority of member states has delegated the powers to their regulator.<sup>39</sup> It excluded ministries in all member states and some ancillary regulators in other countries (e.g., ICSTIS in the UK).

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<sup>35</sup> <http://www.irg.eu/>

This should not be confused with e-IRG, an infrastructure research group within FP7 <http://e-irg.eu/>

<sup>36</sup> Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. COM(2000)393

<sup>37</sup> A comment first made by Jean-Michel Hubert of ART. He also called the regulators in the Francophone community “a veritable laboratory of regulatory diversity”.

<sup>38</sup> 2002/627/EC: Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services.

<sup>39</sup> 2004/641/EC: Commission Decision of 14 September 2004 amending Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services.

Spectrum issues were considered by the RSPG which includes a mixture of ministries and regulators and has, generally, been chaired by the head of an NRA.<sup>40</sup>

Article 7 of the Framework Directive requires NRAs to notify the now 26 other NRAs of their draft decisions, in addition to the EC.<sup>41</sup> Yet, the regulators have declined to comment on each other's work, maintaining, at least in public, a strict policy of *omerta*. This has been somewhat reduced in recent efforts to address Phase II investigations by the EC, where a collective view is sometimes put by the other regulators to one of their number being given a hard time by the Commission.<sup>42</sup>

The IRG and ERG set up some links with regulators in other parts of the world. Primarily through the Spanish regulator with Regulatel<sup>43</sup> for Latin America and through ART and later ARCEP with Fratel.<sup>44</sup> However, they have taken little interest in the larger Global Symposium for Regulators (GSR). The lack of enthusiasm for activities outside Europe has been because of the enormous scale of the efforts required to implement the EU legislation and to support the regulators in the new member states and candidate countries.

Following ERG, the EC created ERG for Electricity and Gas, with a remit that is almost identical to the telecommunications ERG.<sup>45</sup> It too has a dual identity, as the Council of European Energy Regulators.<sup>46</sup>

In addition to questions of structures, the regulators had to face serious questions about the implementation of the directives. For the most part, they have chosen to head off in quite different directions.

## Independence

The independence of the regulators was, from the outset, treated with some skepticism by market players and many governments (at least concerning other countries). It was far outside the administrative traditions of most European nations. Moreover, PTTs and ministries were tightly interwoven and even as they moved apart, governments retained significant financial interests in operators which could not easily be or be expected to be overlooked. Criticism was muted, in part due to concerns about infringing the doctrine of subsidiarity and in the hope that gentler forms of persuasion might work.

The issue had first been addressed concerning PTTs specifying terminals and then selling them. The separation of these functions, with an independent body setting standards was required by the EC and upheld by the EU courts.<sup>47</sup> Similarly, the unencumbered power of an incumbent to restrict the choice of customer premises equipment was held to be in violation of the EC Treaty.<sup>48</sup>

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<sup>40</sup> 2002/622/EC: Commission Decision of 26 July 2002 establishing a Radio Spectrum Policy Group.  
see also:

<http://circa.europa.eu/Public/irc/info/rspg/home>

<sup>41</sup> <http://circa.europa.eu/Public/irc/info/ecctf/home>

<sup>42</sup> In October 2007, the IRG published an executive summary of its first Expert Group Report concerning the opening of phase II investigation pursuant to article 7(4) of directive 2002/21 EC on Case PL/2007/0668 – wholesale national market for trunk segments of leased lines in Poland. IRG (07)26.

<sup>43</sup> <http://www.regulatel.org/>

<sup>44</sup> <http://www.fratel.org/>

<sup>45</sup> 2003/796/EC: Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas.

<sup>46</sup> <http://www.energy-regulators.eu/>

<sup>47</sup> Case C-202/88 *France v. Commission* [1991] ECR I-1223.

<sup>48</sup> Case C-18/88 *RTT v. GB-Inmo-BM* [1991] ECR I-5941.

A fairly obvious way to hobble the functioning of any regulatory system is to fail to create an adequate system of appeals or to have the appeals heard by the minister (as was long the case in Norway). Again in the setting of standards, the EU courts have upheld the right to take decisions to appeal.<sup>49</sup> For regulatory issues, the requirement was set out in the Framework Directive in 2002.

Commissioner Reding attributed some of regulatory problems as arising from an insufficient independence or a lack of the necessary resources and legal instruments.<sup>50</sup> She has been qualified support on this from OFCOM, though without mentioning any names as to which regulators lack independence or specifying what it is they have done.<sup>51</sup> It seems to be an issue of such great delicacy that it cannot be discussed in public, nor even through a report on independence by a third party.

The European Commission has used its powers under Article 226 of the EC Treaty to push member states to strengthen the independence of their regulators. It presently has infringement proceedings open against:

- Bulgaria<sup>52</sup>
- Poland<sup>53</sup>

There have been recently closed cases against:

- Cyprus<sup>54</sup>
- Finland<sup>55</sup>
- Germany<sup>56</sup>
- Luxembourg<sup>57</sup>
- Slovakia<sup>58</sup>
- Slovenia<sup>59</sup>

The EC has proposed further strengthening the independence of regulators:

The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework.

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<sup>49</sup> Case 178/84 *Commission v. Germany* [1987] ECR 1227

<sup>50</sup> Viviane Reding (2007) "Why Greece needs broadband and why it needs it now – a European perspective" speech to the conference "Exploring the Global Dynamics of Broadband Internet" Athens, 1 June 2007. SPEECH/07/355. Brussels: European Commission.

<sup>51</sup> Ed Richards (2007) "European Framework". Speech to the 8th Annual Telecoms Regulation and Conference Law Conference.

[http://www.ofcom.org.uk/media/speeches/2007/10/european\\_framework](http://www.ofcom.org.uk/media/speeches/2007/10/european_framework)

<sup>52</sup> EC (2007) Commission opens infringement proceeding because Bulgaria's telecoms regulator lacks independence and effectiveness. Press release: IP/07/1786. 28 November 2007. Brussels: European Commission.

<sup>53</sup> IP/05/430 IP/06/948 IP/06/1798 IP/06/1798 IP/07/888 IP/08/142

<sup>54</sup> IP/05/1269 IP/06/948

<sup>55</sup> IP/08/519 IP/05/430 IP/05/1585 IP/06/948

<sup>56</sup> IP/05/430 IP/07/888 IP/05/430 IP/07/392

<sup>57</sup> IP/08/142

<sup>58</sup> IP/05/430 IP/06/1798 IP/08/142 IP/05/430 IP/06/948

<sup>59</sup> IP/05/1269 IP/06/948

For that purpose rules should be laid down in advance regarding the grounds for the dismissal of the head of the national regulatory authority in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors. It is important that national regulatory authorities should have their own budget allowing them, in particular, to recruit a sufficient number of qualified staff. In order to ensure transparency, this should be published annually.<sup>60</sup>

The EC has never produced comparative indicators of independence.

### Mobile termination rates

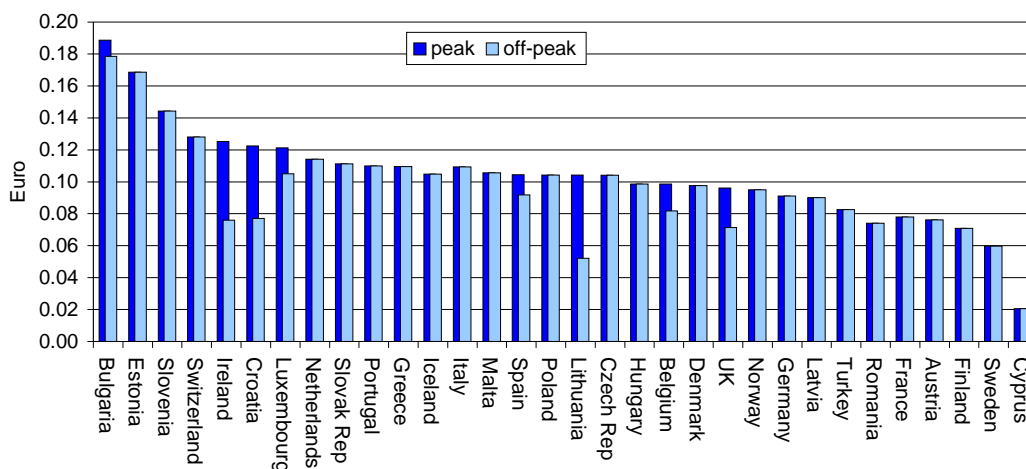
One area where Commissioner Reding has been especially critical of the NRAs is in the wide range of prices set for the termination of calls on mobile networks, which she argues cannot reasonably reflect differences in the underlying costs. This was again raised at the presentation of the 13<sup>th</sup> Implementation Report:

The EU's highest MTR is more than 10 times higher than its lowest: 1.9 Euro cent/min in Cyprus, 22.4 in Estonia.<sup>61</sup>

Reding has also been critical of some of the fixed network termination rates.<sup>62</sup>

It has been the Independent Regulators Group, rather than the ERG, that has provided six-monthly snapshots of MTRs with a wider footprint (see figure 1).

**Figure 1** *Mobile termination rates (July 2007)* <sup>63</sup>



The underlying causes of the divergences begin with very different approaches to cost accounting systems. A report for the EC identified the problems in 2002.<sup>64</sup> However, the subsequent progress was slow, though a recommendation was adopted in 2005.<sup>65</sup>

<sup>60</sup> EC (2007) Proposal for a directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorization of electronic communications networks and services. COM(2007) 697 final. Brussels: European Commission.

<sup>61</sup> EC (2008) 8 EU Member States ahead of the US in broadband deployment says Commission's Telecoms Report. Press release: IP/08/460. 19 March 2008. Brussels: European Commission.

<sup>62</sup> EC (2008) Telecoms: Commission supports move to lower termination rates in Italy, highlights inconsistency across EU. Press release: IP/08/551. 10 April 2008.

<sup>63</sup> MTR update snapshot. <http://www.irg.eu/admin/attachs/496.pdf>

Even today, there are still significant variations in the approaches to cost accounting. On top of this regulators have constructed widely differing economic models to determine the costs of mobile termination. Faced with a significant difference between the current price and the cost model, they have generated a number of interim arrangements, such as glide-paths, effectively forcing consumers to continue paying the mobile operators. Some regulators were extremely slow to address the issue, including some of the newest member states, so that they have not moved very far down their particular glide-path.

The concatenation of divergences in practice can hardly be expected to result in anything other than the observed wide discrepancies in prices. Doubtless some measures of harmonization could still be pushed through, though it would take years to bring the prices into line.

In the mean time, a report for the EC has considered abandoning the practice of MTRs in favour of Bill and Keep.<sup>66</sup> While this is a fairly dramatic change, it might be faster than waiting for the MTRs to be brought into alignment.

### International mobile roaming

The potential regulation of international mobile roaming is an issue of considerable complexity and one dating back many years.<sup>67</sup> The Framework Directive required the NRAs to conduct an analysis of wholesales roaming markets, as soon as possible after 25 July 2003. The ERG adopted a common position on the analysis of such markets in September 2005.<sup>68</sup> Most of the NRAs failed to conduct these analyses.

The proposal for a roaming regulation split the ERG into three groups, one regulator that favoured no regulation, the rest favouring control of wholesale prices, which then split, relatively evenly, between those in favour of retail price controls and those against. Several regulators were of the view that operators would pass on wholesale price reductions, while others took the view that this would not happen unless there were also retail price controls. Many of these positions were hypothetical, since the regulators had not conducted their market analyses and thus had no empirical evidence on which to base a position.

There is no reason to think that ERG could ever have reconciled these divisions, indeed the ERG was silent in public about the position of the Spanish regulator, perhaps from embarrassment over its position that was indistinguishable from regulatory capture. CMT declared its own position by filing comments with the EC, basically in line with those of the Spanish operators.

Once the EC had indicated its intention to adopt legislation on roaming charges, the ERG Chairman joined Madam Reding in a press conference in March 2006.<sup>69</sup> The ERG and IRG then jointly responded to the consultation on the draft regulation.<sup>70</sup>

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<sup>64</sup> Andersen Consulting (2002) Study on the implementation of cost accounting methodologies and accounting separation by telecommunication operators with significant market power. Brussels: European Commission.

<sup>65</sup> European Commission Recommendation (C(2005) 3480 final) and explanatory memorandum of September 19, 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications.

<sup>66</sup> WIK-Consult (2008) The future of IP interconnection: technical, economic and public policy aspects. Brussels: European Commission.

<sup>67</sup> Ewan Sutherland (2008) The regulation of international mobile roaming. *info* 10 (1) 13-24.

<sup>68</sup> ERG (2005) European Regulators Group common position. ERG (05) 20Rev1. Brussels: European Regulators Group.

<sup>69</sup> 26 March 2006.

Once the legislation was enacted, the ERG issued “guidelines” on

- process and timing of offers<sup>71</sup>
- identification of special tariffs<sup>72</sup>

These were revised to cover wholesale charges and the text messages with the obligatory pricing information in August 2007.<sup>73</sup> They were again revised in January 2008.<sup>74</sup>

The ERG also produced a data specification model to assist operators with a consistent reporting and monitoring of the regulation by NRAs.<sup>75</sup> The first report in January 2008 covered the first six months of the Regulation.<sup>76</sup>

While the ERG has collected data and done so in a relatively consistent fashion, the “added value” of some of its document appears to be modest. However, this may have been a method of reaching agreement amongst the various regulators, without engaging in too much publicity.

In contrast to this support for the EC the ERG and individual regulators have been anything but supportive on proposals for expansion of the Regulation to include mobile Internet services. Who they are representing in such statements is unclear, since there are national governments, operators and customers all able to contribute their own views. The regulators have not conducted neither analyses of the mobile Internet market nor public consultations and thus do not have regulatory experience to contribute, there is nothing to distinguish their positions from those of lobbyists or, perhaps, think tanks.

## Transparency

The ERG considers that it conforms to best practice in regulation, including transparency.<sup>77</sup>

Over a number of years this has come to mean that it publishes a draft work plan, on which it receives comments from a few trade associations and a couple of operators, which may or may not be taken into account in the final work plan. It has published annual reports since 2004, though these are not reviewed by any democratic body. The ERG has maintained a practice of closed meetings, allegedly to allow the NRAs to discuss individual cases. However, it has the effect of concealing disagreements and dissent from the public record. The larger operators find out such details from leaks, which they are able to cross-check from different sources. Two weeks after the meeting, a skeletal press release is issued, stripped of anything interesting thus ensuring minimal press coverage.

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<sup>70</sup> ERG (2006) Press release 11 May 2006. A practical approach to reducing roaming prices.

<sup>71</sup> ERG (2007) International Roaming Regulation - offers to customers concerning roaming tariff options. ERG (07) 40.

<sup>72</sup> ERG (2007) International Roaming Regulation – Article 4(3): Identification of consumers on ‘special’ tariffs for the purposes of the Euro Tariff “opt-in” regime: ERG Guidelines - 1st Release. ERG (07) 41.

<sup>73</sup> ERG (2007) International Roaming Regulation - ERG Guidelines - 2nd release. ERG (07) 46.

<sup>74</sup> ERG (2007) International Roaming Regulation - ERG Guidelines - Final release. ERG (07) 86.

<sup>75</sup> ERG (2007) data model specification on Roaming regulation. ERG (07) 47 Rev 1

See also Explanatory Memorandum. ERG (07) 47 Rev 1b.

<sup>76</sup> ERG (2007) report on the implementation of the roaming regulation. ERG (07) 85.

<sup>77</sup> See, for example, the speech of Dániel Pataki, ERG Chairman to the ITRE Committee Hearing on 27 February 2008 at the European Parliament.

There are number of mysterious ERG working groups, identified only by their titles and references in the work plan. There is no transparency for their activities, with no publicity to their membership or minutes.

The ERG issues collective opinions on subjects not included in its work plan and on which it has not conducted public consultations. Other than in highly technical areas of which NRAs have professional experience it is not clear whom they purport to represent in these documents.

The ERG is not accountable to anyone and appears not to conform to the principles of better regulation.

## V. *Madam Reding*

Article 26 of the Framework Directive placed an obligation on the European Commission to conduct a review of the telecommunications directives by mid-2006.<sup>78</sup> In November 2005, the EC issued a first call for contributions, followed by a workshop in January 2006.<sup>79</sup> There were also the annual implementation reports and reports on the market analyses of the regulators to be considered.

The results of the analysis by DG Information Society were that the changes required should be relatively modest – tinkering, rather than anything radical. This presented a problem for Commissioner Reding since the results were, effectively, apolitical. She sought to add some political spice with her Regulation on roaming, by proposing reforms to spectrum management, structural separation of incumbent operators and by reviving the idea of a single regulator.

In June 2006, she spoke to a meeting of the German ICT industry:<sup>80</sup>

The most effective way to achieve a real level playing field for telecom operators across the EU would of course be to create an independent European telecom regulator that would work together with national regulators in a system, similar to the European System of Central Banks. In such a system, national regulators would continue to act as direct contact points with operators and could directly analyse the market. At the same time, a light European agency, independent from the Commission and from national governments, could ensure by guidelines and, if necessary, instructions that EU rules are applied consistently in all Member States. I have personally insisted that the idea of creating a European telecom regulator is also included as a policy option in the impact assessment of the Commission Communication that I will present this week to allow a broad debate on all these issues.

The ECB had been created by means of inclusion in an EU treaty, giving it a very solid legal basis and one that was not available for a telecommunications authority. Subsequently, a parallel was drawn with the much more obscure European Medicines Agency, which fosters scientific excellence in the evaluation and supervision of medicines, created by a regulation.<sup>81</sup>

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<sup>78</sup> 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.

<sup>79</sup> [http://ec.europa.eu/information\\_society/policy/ecommm/tomorrow/roadmap/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecommm/tomorrow/roadmap/index_en.htm)

<sup>80</sup> Viviane Reding “The Review 2006 of EU Telecom rules: Strengthening Competition and Completing the Internal Market” A speech at the Annual Meeting of BITKOM, Brussels, Bibliothèque Solvay, 27 June 2006.

<sup>81</sup> Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.

See also: <http://www.emea.europa.eu/>

There are parallel debates in financial services and in energy about means to coordinate the work of national regulators. Consequently, even if member states were willing to see the creation of a pan-European regulator for telecommunications some could be expected to oppose this because of the fear that it would be a precedent used to create a single regulator in energy or transport, even in broadcasting. A harmonization of such structures would seem appropriate and necessary.

For example, the EC has proposed the creation of an institution for energy regulators.<sup>82</sup> The European Parliament responded that it was dissatisfied with this and suggested further strengthening.<sup>83</sup>

Once the proposal for a European regulator was made, the ERG quickly engaged in correspondence with Madam Reding and her Director-General. It offered to strengthen its secretariat in Brussels, to strengthen mechanisms to reduce inconsistent impositions of remedies on operators with SMP. It claimed that the single market for harmonisation did not apply to telecommunications, as most could not be traded across borders.<sup>84</sup>

Commissioner Reding has also indicated that there was already a single regulator:

... the roaming story should have shown you that we have a European telecom regulator already – it is the European Commission, which is a truly independent and supranational European institution. If we really believe in an internal market for telecom companies and users, the reform of the EU Telecom rules will thus have to strengthen the oversight of the European Commission over the national telecom markets.<sup>85</sup>

In some respects she gives the game away in these remarks, suggesting that EECMA might be a front for an increase in the power of the EC. While ERG or EECMA might give advice to the EC, it would be the latter and not the former that had the power.

In 2007 the EC made its formal legislative proposals at the conclusion of its review of the legislative framework and following public workshops and consultations. It proposed a regulation to create the European Electronic Communications Market Authority (EECMA).<sup>86</sup> The initial reaction from the Council of Ministers indicated that several member states were unpersuaded of the need for a new agency.<sup>87</sup>

In some respects, the ERG had succeeded in deflecting Commissioner Reding from pressing for a single market in telecommunication. Instead, there were only some vague expressions about arrangements for future pan-European services, including the dead European Telephony Numbering Space (ETNS) project. It ignored the existing demand for pan-European services from multi-national corporations and the substantial trans-national presences of mobile and fixed operators.

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<sup>82</sup> EC (2007) Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators COM(2007) 530 final. Brussels: European Commission.

<sup>83</sup> EP (2008) Working document on a proposal for a regulation (COD) establishing an Agency for the Cooperation of Energy Regulators. Committee on Industry, Research and Energy. Rapporteur: Renato Brunetta. PE400.297v01-00. Brussels: European Parliament.

<sup>84</sup> ERG letter from Roberto Viola to Commissioner Reding of 27 February 2007.

<sup>85</sup> Viviane Reding (2007) "Why Greece needs broadband and why it needs it now – a European perspective" speech to the conference "Exploring the Global Dynamics of Broadband Internet" Athens, 1 June 2007. SPEECH/07/355. Brussels: European Commission.

<sup>86</sup> Commission proposal to the European Parliament and the Council establishing the European electronic communications market authority. COM(2007) 699

<sup>87</sup> Council of the European Union (2007) 2835th Council meeting Transport, Telecommunications and Energy, Brussels, 29-30 November/3 December 2007. Press release: 15891/07 (Presse 274).

The European Network and Information Security Agency (ENISA) had been created in 2004 and located in Heraklion.<sup>88</sup> A panel of external experts reviewed its performance.<sup>89</sup> This led to an EC Report and to a public consultation.<sup>90</sup> The EC eventually proposed merging ENISA into EECMA. The Parliament made proposals to retain ENISA.<sup>91</sup>

The European Parliament gave the lead responsibility on the draft Regulation on EECMA to the Industry Committee (ITRE) which appointed Pilar del Castillo Vera as rapporteur. She alleged that EECMA would “hinder European competitiveness, adding red tape by creating a large bureaucracy” (c.f., projected staff level of 135 FTE). She considered the proposal to be counter to the principle of subsidiarity, would be “unnecessarily remote” from the markets being regulated and increase regulatory uncertainty. Moreover, its mere existence would contradict the goal of migration to competition law. The proposed merger with ENISA would degrade its functioning.

Her draft report, of April 2008, was a hatchet job, proposing to strip out all the powers of the new body, including the functions previously held by ENISA.<sup>92</sup> The resulting organization, bizarrely named BERT (Body of European Regulators in Telecom), was to be the ERG by means of a regulation, rather than a decision.<sup>93</sup> In some respects her proposals increased the capacity of the NRAs to offer advice to the EC. A strangely circular arrangement was proposed by which the NRAs, through BERT, would advise the RSPG to which many NRAs are already delegates. Given the track record of dissonance and the lack of agreement amongst the regulators, the proposal for BERT would appear to be nothing more than a “talking shop”. There was to be some self-serving monitoring of BERT by the EP. The Regulation would require to be renewed within five years or BERT would automatically disappear.

At the time of writing, the debate in Brussels is fully engaged.<sup>94</sup> The European Parliament seems committed to the side of the NRAs. The position of the Council is, as ever, a more secretive business, with the meetings of its working groups closed to public scrutiny, an enduring democratic deficit.<sup>95</sup> The outcome seems likely to be ERG 3.0, a strengthened group of regulators.

## VI. Conclusion

The proposal to create a single European regulator for telecommunications has had a consistent effect of causing national authorities to scurry around in order to appear busy, effective and, even, consistent. However, it is not an especially effective threat, since the member states are unlikely to be willing to cede power to the EC. Nonetheless, the ERG toughened up its monitoring of “common positions”, beefed up its secretariat and strengthened its lobbying links to the European Parliament.

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<sup>88</sup> Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency.

More details at:

<http://www.enisa.europa.eu/>

<sup>89</sup> IDC EMEA (2007) Evaluation of the European Network and Information Security Agency: final report by the Experts Panel. Brussels: European Commission.

<sup>90</sup> EC (2007) Communication from the Commission to the European Parliament and the Council on the evaluation of the European Network and Information Security Agency (ENISA). COM (2007) 285 final.

<sup>91</sup> Angelika Niebler is rapporteur on the ENISA Report from 2007.

<sup>92</sup> Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)) Committee on Industry, Research and Energy. Rapporteur: Pilar del Castillo Vera.

<sup>93</sup> Bert, short for Albert, is a name that today suggests someone of a previous generation, almost an anachronism.

<sup>94</sup> There were to be discussions in ITRE and IMCO committees of the European Parliament on 6 May 2008.

<sup>95</sup> Some information can be obtain ex post facto by means of freedom of information legislation.

The argument made in the European Parliament that EECMA is incompatible with the end of regulation is disingenuous. There is no evidence of moves by regulators to wind themselves up, nor have member states hinted that they will pension them off. Although NRAs were held to be an interim measure, the achievement of competitive markets remains mythical. Calls from the incumbent operators to end sectoral regulation in 2012 or 2015 are seen as self-serving and barely treated seriously. It could be decades before regulation is ended, not least because there is no exit strategy and no political support for one. There is even a plausible argument that networks require indefinite regulation.

It is similar to privatization, which ought to have been completed long ago. It is the exceptions, those that have completed the process, that are remarkable, for example, the United Kingdom and Bulgaria. There is no pressure to complete the process of privatisation, nor even any recent analyses of the effects or of the conflicts of interest.

Little value is assigned to the completion of the single market, especially by the ERG which considers telecommunications to be location specific.<sup>96</sup> For the manufacturers it has largely been achieved, with the possible exception of divergences over mobile television. For the operators they have been consolidating for more than a decade, a process that could take another decade to complete, but has allowed them to achieve economies of scale. In some countries, they still face irrational desires to retain markets as national, limiting market entry and takeovers. Multinational corporations are well-served on their own market by a small number of global and European service providers.

It is the consumer and the SME that is left in a national or sub-national market, making the best of the available services which vary enormously in choice, price and quality of service. Thanks to Madam Reding, consumers are at least getting concessions on their roaming bills.

There remains a strong underlying tendency of the NRAs to diverge. They have different goals, different scopes and come from different administrative traditions. There have been some surprisingly creative uses of the legislation, notably Article 5 and 8 of the Access and Interconnection Directive. The regulators in Italy, Poland and Sweden have even tried to achieve functional separation under the present legislation, which was never envisaged. Rather than pursue pro-competitive policies, the NRAs have been engaged in the much broader regulatory tasks. The focus on identifying and eliminating competition problems that was anticipated seems to have proved too dull and too abstract for the NRAs.

Reding's proposal of June 2006 was not one to which she was irrevocably committed, she could sacrifice all or part of it. What was important was that she changed the debate on regulation, forcing the NRAs and member states to make counter-offers and discuss the belated completion of the internal market. It was a game that ultimately strengthened the position of the EC and of harmonization, keeping the spotlight on the Commissioner. The loss of the draft regulation might do some political harm, but a compromise is always probable, especially as both she and the European Parliament race to complete business before the end of their respective terms.

It also means that her successor, due quite soon, might remember that a single regulator was a useful club with which to beat the regulators. Perhaps with a plan to wind up NRAs and to take their few residual tasks into a central body for the economies of scale it would offer, as an alternative to merging the NRAs into national

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<sup>96</sup> See, for example, Frances Cairncross (1997) *The death of distance: how the communications revolution is changing our lives*. London: Orion business.

competition authorities. This might require winding up DG Information Society, transferring regulation to DG Competition, policy and research to DG Industry. It may be the only way to get an internal market.