

# **After Delegation: The Evolution of European Networks of Regulatory Agencies.**

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### **Regulatory context: From hierarchy to co-ordinated regulation.**

The creation of the single market and the liberalisation of European utility sectors resulted in the rapid expansion of EU regulation and top down economic governance (Majone 1996). This trend was part of wider global phenomena, that saw states switch from economic interventionism to delegated national regulatory authorities (NRAs). (Radaelli 2004, Thatcher 2002, Majone 1999). However, the rise of regulators and regulatory solutions has not followed a uniform path, either in timing or solutions (Coen and Heritier 2005, Thatcher 2004). For example, while there has been an unprecedented explosion in the delegation to independent regulator agencies (Levi-Faur 2004, Gilardi 2001), we also see the increased use of competition authorities (Wilks 2005), and the continued importance of ministries and existence of nationalised industries (Heritier 2001). Under such conditions, the EU has sought to co-ordinate member state regulatory implementation and harmonise regulatory governance. This paper seeks to assess the merits of various co-ordination proposals and the emergence of networks of NRAs. In so doing, the research will primarily assess how these new networks of regulators have altered the principal agent relationships between NRAs and states and NRAs and the EU institutions. In so doing, the paper will also consider the degree to which these organisational forums facilitate the development of EU “best regulatory practice” and convergence in national regulatory design.

Delegation of powers by national governments to NRAs has resulted in the emergence of a new mode of governance in Europe (Majone 2001, Coen & Thatcher 2005). Specifically, NRAs execute several crucial functions: they implement national and European law; they advise policy makers (not only governments but also supra-national bodies such as the EU Commission); they have regulatory powers and discretion; they provide information. However, today we are faced with a redefining of regulatory powers as networks of regulators, the European Commission and National governments attempt to re-exert formal and informal controls on competencies of the NRA (Coen and Heritier 2005, Elberien and Grande 2005)

Most work has focused on how and why NRAs have emerged and on their formal institutional forms (Majone 1999, Thatcher 2002, Kiewet and McCubbins 1991, McCubbins and Schwartz 1984, Huber and Shipan 2002, Noll and Weingast 1987). However, NRAs are not passive after delegation; rather, they can forge links and networks with other actors, including in other countries and supra-national bodies. We examine the evolution of these opportunities and the behaviour of NRAs. Specifically, we will evaluate how European networks affect the relationships between NRAs and national governments, NRAs and NRAs, and NRAs and European Institutions.

In attempting to understand the emergence of networks of European regulators research must explore a number of organisational and principal-agent questions. Thus new regulatory governance studies must explore: What different forms of networks and linkages of national IRAs exist. Do NRAs and their national governments have similar positions on execution of regulatory issues before those issues are discussed in European networks? Do these positions evolve as they are executed by European networks? What resources do these networks provide IRAs in their relations with national governments (for instance, norms, examples, benchmarks). Do IRAs use

those resources available from trans-European networks in their relationships with their governments and if so, how and with what results?

The above questions lead us to explore in this paper whether well resourced, highly independent NRAs have asserted themselves within European networks at the expense of weaker NRAs. This will tell us something about how and in whose interests these networks are constituted. Another hypothesis is that national NRAs which have weaker formal independence from national governments use European networks and linkages to create institutional space from national governments by reacting to “naming and shaming” or convergence of “regulatory norms.” In contrast, regulators with higher formal independence enter European networks, having already negotiated a favourable positive position with their national governments, and hence use European networks less in seeking greater independence from national governments; indeed, trans-European networks may inhibit these NRAs. Finally, the study will explore how NRAs use European networks to justify and legitimize greater autonomy and execution of regulatory goals from governments (for instance, by pointing to European norms). Hence, we see how the opportunity structure of European networks has altered the evolution of NRAs and their relationships with national governments.

## **1. The Emergence of network governance and regulation in Europe**

These networks are potentially significant developments in the evolution of European governance and harmonisation of economic regulation in member states. First and foremost they are based on voluntary performance standards, rather than compulsory regulation (Eberlien and Kerwer 2004). However, already in the first few years, the advent of soft laws and emergence of EU regulatory codes of conduct have raised questions of accountability. Thus it is important that we understand how these norms are established. For example, will we see the emergence of policy transfer between NRA and policy learning at the network level (Radaelli 2003, Lodge 2002, Dolowitz 2000) or will a regulatory epistemic regulatory community emerge (Wilks 2005, Zito 1999).

### **1.1 What are networks of national regulators?**

The 1980s and 1990s saw the growth of regulation in Europe- both at the national and EC levels to such an extent that there have been extensive analyses of a ‘regulatory state’ or multiplicity of regulatory regimes (Majone 1996, Levi-Faur 2006). One of the central aspects of regulatory expansion was the development of EC sector regulatory regimes in major markets previously largely immune from EC action- such as telecommunications, financial services, electricity, gas, railways, postal services, food safety. These involved detailed EC regulation, notably: liberalisation through ending the right of member states to maintain ‘special and exclusive rights’ for certain suppliers; ‘re-regulation’, i.e. EC rules governing competition, ranging over a vast array of matters, such as interconnection of networks, access to infrastructure or universal service. EC regulation said relatively little about the institutional framework for the implementation of regulation within member states, confining itself to insisting that regulatory organisations be separate from suppliers (but not governments) and

that they follow certain decision-making principles such as ‘fairness’ and transparency.

*Rise of National Regulation:* The central feature of regulatory reform, this time occurring at the national level, was the creation and strengthening of independent national regulatory authorities (NRAs) (Thatcher 2005 & 2002, Coen and Heritier 2005). Sector NRAs were established in many domains- often in the very same ones where EC regulation had grown. These NRAs were given powers and functions, notably to implement and enforce liberalisation and then regulate the ensuring competition. Since much regulation concerning liberalisation and re-regulation was based on EC legislation (albeit transposed into national law), NRAs in practice ended up implementing and interpreting EC regulation.

Such discretion resulted in divergence of institutional developments and interpretation of policy goals (Levi-Faur 2006, Gilardi 2001). In both Telecommunications, Energy and Financial regulation national governments have delegated powers to NRAs – see table 1, but the speed of change and the relative autonomy varied dramatically (Coen 2005, Heritier 2005, Boellhoff 2005). In fact, we still observe, after 20 years of deregulation and liberalization, significant constraints on ownership, diverging regulatory principles and different competing regulatory authorities (Thatcher 2005).

This variance may have significant impact on how NRAs perceive the creation of European networks. In the case of strong NRAs that have established strong credibility with their regulatees and independence from national governments, the creation of a new tier of regulatory governance, maybe perceived as restrictive – as is the case in the UK (Coen and Doyle 2000, Thatcher 2005). In countries like Germany, with multiple regulatory bodies with overlapping competencies, the advent of European network regulation maybe perceive as a means of asserting a more dominant role for the NRA (Coen and Heritier 2005). Finally politically constrained NRAs, as in the French case, may observe that the EU network (and new EU Principal) provides an opportunity to distance itself from the shadow of national Ministries and government (Thatcher 2002). In all these cases, age is also a significant variable in how NRAs view the emergence of EU network governance; with the British NRAs establishing norms and autonomy after 20 years of regulatory gaming with the national governments and regulatees, while newer NRAs maybe willing to look to the EU for credibility and independence vis-à-vis the national principal – as the EU has an established autonomy with Member states (Coen 2005).

Table 1: IRAs in Britain, France, Germany and Italy in key domains

| Domain                         | Britain  | France  | Germany  | Italy   |
|--------------------------------|--|---|--|---|
| <b>General competition</b>     | Competition Commission 1998 (1948) and Office of Fair Trading 1973 | Conseil de la Concurrence 1986 (1977)   | Bundeskartellamt [Federal Cartel Office] 1957  | Autorità Garante della Concorrenza e del Mercato 1990     |
| <b>Tele-communications</b>     | Ofcom 2000 (Ofcom (Office of Telecommunications 1984)              | Autorité de régulation de communications électroniques et des postes (2005) (Autorité de Régulation des Télécommunications 1996)    | Bundesnetzagentur 2005 (Regulierungsbehörde für Telekommunikation und Post (RegTP) 1996) | Autorità per le Garanzie nelle Comunicazioni (AGCOM) 1997 |
| <b>Energy</b>                  | Ofgem (Office of Gas and Electricity Markets) 2000 (1989)          | Commission de Régulation de L'Energie 2003 (2000)   | Bundesnetzagentur 2005   | Autorità per l'energia ed elettrica ed il gas 1995        |
| <b>Water</b>                   | Ofwat (Office of Water Services) 1989                              |   |  |   |
| <b>Railways</b>                | Office of Rail Regulator and Strategic Rail Authority 1999 (1993)  |   |  |   |
| <b>Postal services</b>         | Postal Services Commission 1999                                    | Autorité de régulation de communications électroniques et des postes (2005)   | Bundesnetzagentur 2005 (Regulierungsbehörde für Telekommunikation und Post (RegTP) 1996) |   |
| <b>Media</b>                   | Ofcom 2000 (1954)  | Conseil Supérieur de l'Audiovisuel 1989 (1982)  | Landesmedienanstalt for each Land  | AGCOM (see telecommunications)                            |
| <b>Stock Exchange / shares</b> | Financial Services Authority 1997 (1986)                           | AMF (Autorité des Marchés Financiers) 2003 (COB-- Commission des opérations de bourse 1967 and Conseil des Marchés de Valeurs 1996) | Bafin (Bundesanstalt für Finanzdienstleistungen) 2002 (1995)                             | Consob (La Commissione per le società e la borsa) 1974    |
| <b>Environment</b>             | Environment Agency 1996  |   |  |   |
| <b>Food safety</b>             | Food Standards Agency 1999   |   |  |   |
| <b>Privacy</b>                 | Data Protection Registrar 2000 (1984)                              | Commission nationale de l'informatique et des libertés 1978   |  | Garante per la tutela dei dati personali 1996             |

Notes: 1 Dates refer to the creation of the IRA; dates in brackets refer to the date on which an IRA was first created in the domain.

2 Germany: Media Each Land has a Landesmedienanstalt, which is a legal entity under public law, has a degree of financial and regulatory independence but within the supervision of the Land which ensures that it exercises its powers within the framework of legal and regulatory provisions.

*The Emergence of an EU regulatory regime:* Initially the EU regulatory regime consisted of a number of NRAs, with overlapping competencies that interacted with business, consumers, national governments and European institutions. Under these conditions it is possible to see a hierarchical pattern where business made representation to NRAs – which dealt with pricing, access and consumer issues; national government – which determines the aims of regulation; and the EU institutions – which focus on regulating the national governments and regulators via judgements on competition policy and state aids (Coen and Doyle 2000). EU co-ordination was encouraged via informal agreements and working groups at the EU level, but the Commission struggled to establish regulatory norms and best practice, and soon calls were made for a single independent regulator (Majone 1997). While such calls failed due to a lack of political and economic will by states and business respectively, momentum towards the creation of formal networks of national regulators emerged.

Regardless of the above disputes, by the late 1990s, NRAs became accountable “top down” to European regulation through internal market rules and competition law covering restrictive practices, the abuse of dominant position, exclusive rights and state aid (Wilks 2005). However, in line with open method of co-ordination and subsidiarity, European regulatory harmonization was encourage and fostered through the formation of formal and informal horizontal networks of regulators – see table 2 (Coen and Doyle 2000, Eberlein and Grande 2005).

Table 2: Networks of European Regulatory.

|   |
|---|
| <p>Committee of European Securities Regulators (CESR)<br/>         Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS)<br/>         Committee of European Banking Supervisors (CEBS)<br/>         The ERG- European Regulators Group (for telecommunications).<br/>         Regulatory Bodies Working Group (Rail)<br/>         European Platform of Regulatory Authorities (EPRA- broadcasting)<br/>         European Regulators Group (Electricity and Gas)<br/>         Independent Regulators Group (IRG- telecommunications).<br/>         Council of European Energy Regulators (CEER),<br/>         (‘Florence and Madrid Regulatory Processes’).</p> |
|---|

Significantly, the legal basis and status of these networks varies. Some have been established formally under EC law, sometimes as part of ‘comitology’ arrangements- for example CESR or ERG. Others have been created by independent regulators themselves- for instance the IRG. In addition, there are older pan-European bodies that cover nations outside the EU such as the European Conference of Postal and Telecommunications Administrations (CEPT) and the European Committee for Postal Regulation (CERP- based on CEPT membership). However, all provide opportunities

of regulatees to venue shop and for NRAs to reassess their initial delegations and powers.

In most cases the rationale for the formulation of these networks of NRAs was based upon the grounds of harmonisation of regulatory goals and uniformity of implementation. It was hoped that the creation of such specialist networks would concentrate the expertise and knowledge required to regulate fast changing and increasingly trans-national markets, and in so doing help free member state governments from hard political decisions; on market access and subsidies. Arguably, the creation of a single EU regulator was the “first best” economic solution, but significantly, there was little state or business interest in creating EU sector regulators. Rather, networks of regulators were seen as a functional and informal means of establishing best practice and procedures for sector regulation (Coen and Doyle 2000, Eberlien 2005).

Today we are faced with a new network governance regime based upon expertise and soft law (Radaelli 1999). In all the sectors listed above, regulatory networks have fostered positive forums for information sharing and potential regulatory learning. However, the result of such contacts has varied from limited convergence in rail to significant development of soft regulatory laws and implementation norms in Telecommunication.<sup>1</sup> In terms of good regulatory policy-making, such networks have advantages of flexibility, expertises, credibility and political independence, but conversely they are constrained by limited accountability and transparency in the appeals process.<sup>2</sup>

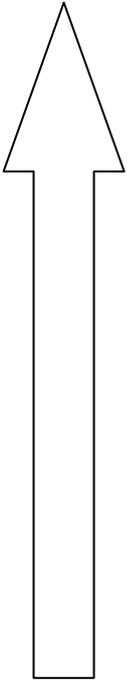
However, like the national regulatory environment, the legal basis, status and roles of new networks varies significantly between sectors. As figure 1 demonstrates different networks can be classified along a spectrum of hard to soft in terms of regulatory capacity – see appendix 1 for coding variables. In terms of this paper we now focus our analysis on the Committee of European Securities Regulators (CESR) and European Regulators Group as these are the two most established and potentially influential regulatory networks.

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<sup>1</sup> The convergence and success of such networks can be explained in terms of the nature of the sectors integration and age of network. See Coen D, and H eritier A. 2005 op cit.

<sup>2</sup> Business concern was expressed at 2 pilot interviews with Telecommunications firms in Brussels January 2004. Coen and Doyle (2000) op cit.

*Figure 1. Classification of networks from 'hard' to 'soft'.*

|                       |   |  |
|-----------------------|---|--|
|                       |   | <b><i>Increasing<br/>powers</i></b>  |
| CESR<br>CEIOPS + CEBS | Direct and extensive role in policy-making<br>increasing powers accorded through Lamfalussy report.       |  |
| ERG                   | Decision-making powers but not as extensive as<br>in Lamfalussy process; slightly compromised by IRG      |  |
| ERGEG                 | Extensive role but compromised by continuing existence<br>of Madrid regulatory forum and CEER             |  |
| CEPT<br>making.       | Accorded a limited role by the Commission in decision-<br>making.   |  |
| CEER                  | Role largely eclipsed by the ERGEG but used as venue to avoid<br>outside intrusions/ commission influence |  |
| IRG                   | As with CEER.   |  |
| EPRA                  | Most of its discussions are reactive to existing EU legislation   |  |
| RBG                   | Appears thus far to have had little impact  |  |
|                       |   | <b><i>Decreasing<br/>Powers</i></b>  |

## 2: Origins and Organisation of key networks of national regulators.

Our first task was to draw up a list of ENRAs and we have found that networks have spread into a host of network industries. Thereafter, we have sought to set boundaries for our study, as a complete analysis of all these networks would not be possible. We have selected two for a comparative investigation, namely the network for securities, CESR- Committee of Securities regulators- and the ERG- the European Regulators Group, which covers telecommunications. In the following sections we map out the origins, legal basis, composition and formal functions of CESR and ERG.

### 2.1 Brief history of ERG

*Legal basis;* The creation of the European Regulators Group was one of the extensive changes made to the regulation of European communications by the introduction of the EU's "new framework for electronic communications services".

A *Commission communication on the 1999 Communications Review*<sup>3</sup> of November 1999 mooted the idea of increased coordination of National Regulatory Authorities' (NRAs') decisions at European Union level, which it claimed was necessary since the NRAs would be 'delegated' more power by the new regulatory framework. The Communication had also noted that existing procedures for cooperation with CEPT (the European Conference of Postal and Telecommunications Administrations) had not worked satisfactorily, with almost all 'deliverables supposed to result from this cooperation' failing to materialise. The Communication also urged the adoption of some form of cosmetology in the communications sector.

The implementing Directive for the new communications framework<sup>4</sup>, which did not appear until March 2002, was more specific. The preamble of the Directive notes that the "Commission ha[d] indicated its intention to set up a European regulators group for electronic communications networks and services which would constitute a suitable mechanism for encouraging cooperation and coordination of national regulatory authorities, in order to promote the development of the internal market for electronic communications networks and services, and to seek to achieve consistent application, in all Member States, of the provisions set out in this Directive and the Specific Directives, in particular in areas where national law implementing Community law gives national regulatory authorities considerable discretionary powers in application of the relevant rules"<sup>5</sup>. None of the additional directives (regarding access and interconnection, the authorisation of electronic communications networks and services, universal service and users' rights relating to electronic communications networks and services, the processing of personal data and protection of privacy, and competition in the markets for electronic communications services) specifically mentioned the new regulators' coordinating body.

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<sup>3</sup> European Commission, 1999, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a new Framework for Electronic Communications Infrastructure and associated services, The 1999 Communications Review* (COM (1999) 539)

<sup>4</sup> European Commission, 2002, *Directive 2002/21/EC on a common regulatory framework*, Official Journal, OJ L 108, 24.4.2002, p.33

<sup>5</sup> Preamble para.36, *ibid.*

The short Decision establishing the European Regulators Group for electronic communications networks and services was published in July 2002<sup>6</sup>. The Decision was amended in June 2004<sup>7</sup>. The new Decision removed the clause in the original Decision which detailed how NRA's independence should be ensured: by separating them legally and functionally from all organisations providing electronic communications, and by ensuring structural separation of the regulatory function from activities associated with ownership or control, where member states retained ownership of electronic communications networks. Instead, NRAs would be deemed eligible for membership of the ERG if they were included in an annexed list to the new Decision, which would be kept under review by the Commission- they would not necessarily have to be legally and functionally independent from the state or from state communications industries.

*Composition:* As at September 2004 there were twenty-five full members of the ERG, with 'experts' from candidate countries and the European Economic Area able to sit in ERG meetings as observers.

The distinction between supposedly 'independent' and 'non-independent' NRAs was a highly controversial issue for the ERG. This was because many of its functions overlap with an existing coordinating body, the Independent Regulators Group (IRG). The IRG has refused to disband until the requirement of legal and functional independence from the state and from the communications industry for membership of the ERG is enforced. In effect, this has allowed controversial decisions to be taken in private in the IRG rather than more openly through the ERG. The distance between the ERG and IRG has lessened over time, however, as national regulatory models have converged, with the organisations adopting a joint agenda for 2005.

The Commission sits as an observer at the ERG. There is some evidence that NRAs accepted the creation of the ERG as it required the Commission to cooperate with NRAs which would reduce the scope for it using its new veto powers from the new framework<sup>8</sup>. Nonetheless, the launch of the ERG was initially delayed as NRAs and the Commission decided over the appropriate power to accord the Commission in ERG meetings. Unlike with the CESR, the Commission is apparently able to remain in the ERG whilst confidential issues are discussed, although it might be assumed that such issues would be kept within the IRG for the time being. Although the Commission is represented on the ERG, it also works 'jointly' with the latter, as when they issued a joint paper on antimonopoly remedies.

*Functions:* The ERG's functions are laid out in Article Three of the Commission decision establishing the organisation. Its role is: "to advise and assist the Commission in consolidating the internal market for electronic communications networks and services. The Group shall provide an interface between national

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<sup>6</sup> European Commission, 2002, *Decision 627/2002/EC establishing the European Regulators Group for electronic communications networks and services*, 30 July 2002, Official Journal, OJ L200, 30.7.2002, p.38

<sup>7</sup> European Commission, 2004, *Decision 2004/641/EC amending decision (2002/627/EC) establishing the European Regulators Group for Electronic Communications Networks and Services*, 16 September 2004, Official Journal, OJ L293, 16.6.2004, p.30

<sup>8</sup> Reported in *Communications Week International*, 4<sup>th</sup> March 2002

regulatory authorities and the Commission in such a way as to contribute to the development of the internal market and to the consistent application in all Member States of the regulatory framework for electronic communications networks and services”<sup>9</sup>.

The ERG’s rules of procedure were provisional until all members were independent NRAs as required by the original Commission Decision establishing the ERG<sup>10</sup>. Decision-making in the ERG operated through a two-thirds threshold. Decisions were not legally binding on members, with “members [only having to] take the utmost account of such positions or opinions”<sup>11</sup>. It thus had a much lesser formal role in the legislative process than did CESR (see below).

The ERG’s consultation procedures governing were set out in ‘ERG and Transparency in Practice’. This proposed that the ERG would decide on a case-by-case basis whether to organise a public hearing. The ‘hearing’ model contrasts with CESR’s apparently less ‘litigious’ consultation style<sup>12</sup>.

The ERG appeared to have a relatively restricted role with regards highly technical matters such as harmonization of standards. Hence, it was the Communications Committee, which possessed legally-binding powers, which drew up lists of technical standards that member states had to respect in line with article 7 of the Framework Directive (that concerning Significant Market Power). In addition, the existence of standards groups such as the European Telecoms Standards Institute and the European Committee for Electro technical Standardization offered alternative fora for resolving technical problems such as the regulation of power line communications (which the Commission decided should be resolved through the adoption of product standards developed by these agencies).

Finally, unlike CESR, the ERG appeared to have a minor role regards monitoring compliance with EU law, with implementation reports put together by the Commission rather than by the regulators’ body.

*Activities;* The ERG developed a number of positions to guide NRAs in the implementation of the various communications directives. These positions mainly laid out the various options for NRAs rather than prescribed particular approaches. Hence the ERG emphasised the importance of national conditions in developing policy, in its Common Position on Bitstream Access<sup>13</sup>, and it noted that its ‘conclusions drawn should be viewed as guidelines’ only concerning remedies<sup>14</sup>.

Perhaps the most challenging task for the ERG was to supplement the EU’s guidelines on defining significant market power. The new regulatory framework had required NRAs to use the principles of competition law in the field of communications, which involved the definition of separate markets and of ‘dominant’ actors within them. The

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<sup>9</sup> European Commission, 2002, *Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services* (2002/627/EC)

<sup>10</sup> ERG, 2003, *ERG Annual report 2003*

<sup>11</sup> ERG, 2003, *ERG Rules of Procedure (interim)*

<sup>12</sup> ERG, 2004, *Note on the hearing on cost-accounting and accounting separation*, 2004-06-10, Ref. (04) 24

<sup>13</sup> ERG, 2003, *Bitstream Access, ERG Common Position*, Ref. 33rev1

<sup>14</sup> ERG, 2003, *Explanatory Memorandum to ERG (03)*, Ref. 30 rev1

ERG's Working paper on the SMP concept went beyond Commission documents 'on the basis of existing NRA practice', and also counselled NRAs to take account of any developing jurisprudence in the area, a new requirement for many NRAs unused to working with competition law. Most controversially, the ERG developed a 'ladder of investments' concept to aid NRAs in assessing SMP. This was criticised by some industry actors such as ETNO (the European Telecommunications Network Operators' Association) and Deutsche Telecom as involving NRAs in managing commercial incentives and subsidising new entrants.

Many of the ensuing market reviews undertaken by NRAs were strongly criticised by the Commission, which was able under the new framework to write 'article 7 letters' informing NRAs to change their approach.

In addition to offering advice on EU directives, the ERG also advised NRAs to adopt international standards such as the international accounting standards and International Financial Reporting Standards [Annex to ERG (04) 15rev1, concerning ERG Opinion on Proposed changes to Commission recommendation of 1998 on accounting separation and cost accounting].

*Resources:* The Commission provided the Secretariat of the ERG, which was based in Brussels. In late 2003, the ERG staff appeared to consist of Heinrich Otriba (Secretary), Marcus Boklund (END) and Lisa Nossek (organisational and clerical assistant)<sup>15</sup>.

The two available Annual Reports for the ERG have detailed the estimated time and financial commitments made by NRAs to the new organisation. In 2003, the average time spent on ERG work for all NRAs was 20,000 hours, or about 12 persons employed full time, not counting the ERG Secretariat<sup>16</sup>. By 2004, this figure had risen to approximately 40 fully employed persons, excluding the Secretariat. Financial expenditure devoted to ERG purposes was estimated at around 33,000 euros per NRA throughout 2004<sup>17</sup>.

A lack of resources appears to have constrained the work of the ERG. Hence, the Chairman of ERG maintained that the organization had a limited ability to undertake additional activities beyond those strictly delegated to it<sup>18</sup>.

## 2.2 Brief history of CESR

*Legal basis:* The initial Lamfalussy report suggested the creation of a 'regulators' group', which would be more palatable for respondents to the Lamfalussy consultation than would a European Securities Regulator. The report noted the drawbacks of the existing regulators' committee, FESCO (the Forum of European Securities Commissions), which had itself advocated the creation of a more formal regulators committee which could be involved in the legislative process<sup>19</sup>. The

<sup>15</sup> ERG, 2003, Annual Report 2003, Ref. ERG (04)04

<sup>16</sup> ERG, 2003, Annual Report 2003, Ref. ERG (04)04

<sup>17</sup> ERG, 2004, Annual Report 2004, Ref. ERG (05)16

<sup>18</sup> As reported in *Communications Daily* 9.12.04

<sup>19</sup> p.16, FESCO, 2000, *FESCO Report 1999-2000*

Lamfalussy committee noted that FESCO had no official status, worked by consensus, and its recommendations were not binding.

The final Lamfalussy report described an EU Securities Regulators Committee (ESRC), which would both act as an advisory committee to the European Commission in developing new law, and act alone as a fully independent committee of national regulators to ensure more consistent implementation of Community Law.

An Ecofin Council communication of November 2000 confirmed the Council's support for the creation of a regulators' body, but also asked that the Council perform a role concerning particularly sensitive issues<sup>20</sup>. A European Council Presidency communication of December 2000 also supported the creation of a regulators' body as a part of the Lamfalussy process, although it noted that prior harmonization of national regulatory functions would be a desirable prerequisite<sup>21</sup>.

The European Parliament expressed its concern that the Commission's powers would be overly extensive following the implementation of the Lamfalussy process, with its extensive use of comitology procedures<sup>22</sup>. This followed advice from the Parliament's legal and constitutional affairs committees, with the latter especially stressing a lack of adequate procedures available for separating legislative from executive acts<sup>23</sup>.

The Commission Decision establishing the Committee of European Securities Regulators of 2001 created CESR as 'an independent advisory group on securities in the Community'. A Commission declaration of 4<sup>th</sup> February 2001 acknowledged the Parliament's concerns by allocating the former a three month period to comment on draft implementing measures proposed by CESR, and conforming with the Parliament's request for a market participants group to be attached to CESR. However, the Lamfalussy Committee's final report had rejected the creation of a 'call-back mechanism' for the European Parliament and/or Council of Ministers<sup>24</sup>, and this was not granted in the Commission's decisions setting up the CESR.

CESR's role was enlarged by an additional Commission Decision in November 2003 which included the work of UCITS in the regulators' committee<sup>25</sup>.

CESR's constitutional arrangements are laid out in its September 2002 Charter<sup>26</sup>. This bears many similarities to FESCO's *Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities*. The Charter is

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<sup>20</sup> Reported on p.43, Annexe 1 of the *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, Brussels, 15<sup>th</sup> February 2001

<sup>21</sup> Reported on p.44, *ibid.*

<sup>22</sup> European Parliament, 2001, *European Parliament resolution on the implementation of financial services legislation*, Ref. 2001/2247(INI)

<sup>23</sup> Committee on Legal Affairs and the Internal Market, European Parliament, 8<sup>th</sup> January 2002, *Opinion on the implementation of financial services legislation* (2001/2247(INI)), Draftsman: Heidi Anneli Hautala; Committee on Constitutional Affairs, European Parliament, 23<sup>rd</sup> January 2002, *Report on the Implementation of Financial Services Legislation*, Rapporteur: Karl von Wogau, (2001/2247(INI))

<sup>24</sup> p. 34, *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, Brussels, 15<sup>th</sup> February 2001

<sup>25</sup> European Commission, 2003, *Commission Decision of 5 November 2003 amending Decision 2001/528/EC establishing the European Securities Committee* (2004/8/EC)

<sup>26</sup> CESR, 2002, *CESR Charter*

accompanied by a *Public Statement of Consultation Practices*<sup>27</sup> which stressed the need for early and extensive involvement of interested parties in CESR's activities, and for CESR to respond fully to all points raised during consultations.

*Composition:* CESR is composed of one senior member from each member state's competent authority in the securities field, with EEA representatives as observers. The identification of 'competent authorities' with the requisite degree of independence was a problem for CESR as it was for ERG. As at 2002, countries such as France, Finland, and Ireland all lacked a single NRA for the financial sector, with responsibilities being split between different bodies<sup>28</sup>. However, by 2002, CESR had members from most member states, leading the then chair to claim "If you put 17 and, after enlargement, 27 regulators around the table and they agree on something, that's influence"<sup>29</sup>.

The chair of the Committee is elected by secret ballot by the Committee for a period of two years. As with FESCO, the Commission was an observer at CESR, although IOSCO Europe lost its seat at the table in the new organization. The Commission was enabled to "participate actively in all debates, except when the Committee discusses confidential matters relating to individuals and firms in the context of improving cooperation among European Regulators"<sup>30</sup>.

*Functions:* The Commission Decision establishing CESR defined its role as "to advise the Commission, either at the Commission's request, within a time limit which the Commission may lay down according to the urgency of the matter, or on the Committee's own initiative, in particular for the preparation of draft implementing measures in the field of securities" [Art.2]. CESR was required to consult extensively with market participants, consumers, and end-users, to present an annual report to the Commission, which would also be sent to the Parliament and Council.

This role was expanded in CESR's Charter. There its tasks included, in addition to advising the Commission on legislative matters, the reviewing of implementation and application of Community legislation, the issuing of guidelines, recommendations and standards for its members to introduce in their regulatory practices on a voluntary basis, and the development of effective operational network mechanisms to enhance day-to-day consistent supervision and enforcement of the Single Market for financial services.

The Lamfalussy Committee advocated that CESR use a voting procedure modeled on Qualified Majority Voting where it was not possible to reach consensus, and this was adopted in CESR's operations.

*Activities:* As with ERG, the main bulk of CESR's work concerned the development of guidelines on the implementation of directives.

The first legislation with which CESR was directly involved was that on market abuse. CESR's advice on article 6 of the Market Abuse Directive was heavily

<sup>27</sup> CESR, 2001, *Public Statement of Consultation Practices*, Ref. CESR/01-007c

<sup>28</sup> p.8, CESR, 2002, *CESR Annual Report 2001-2002*

<sup>29</sup> Financial Times, 7.11.02

<sup>30</sup> Article 3.1, CESR, 2002, *CESR Charter*

criticized by the press, as it appeared to extend the scope of regulations to cover journalists, many of whom were already regulated through bodies such as the Press Complaints Commission. CESR also developed guidance on the implementation of the Single European Prospectus, and on the regulatory regime for Alternative Trading Systems. CESR's proposals on ATS were delayed following splits within the organization concerning whether the EU should continue to allow the requirement that trading in a particular security should be done through a particular exchange ('concentration requirements').

A set of implementing measures concerning CESR retail stockbroking incurred the opposition of the British stockbrokers' association for failing to acknowledge small trades, but this was resolved following negotiation between this body and CESR. The final main area where CESR provided guidance to NRAs concerned the implementation of International Financial Reporting Standards.

Aside from guidance on implementing measures, CESR was also increasingly asked to contribute to non-regulatory committees. Hence, it was asked to contribute to the bi-annual analysis on macro-economic trends of European financial markets conducted by the Economic and Financial Committee (an advisory body of the European Council)<sup>31</sup>.

A Commission Working Document of 2004 assessed the work of CESR up to that point. It noted that there had been differences in approach between the CESR and the Commission; that the CESR had been criticised for a lack of transparency, which could be remedied with different procedures; that national regulators were still inadequately consulting with each other, but that this was a matter for national governments; and that consumers had been particularly left out of consultation arrangements, compared with other actors<sup>32</sup>. CESR began its own internal review of operations in September 2004, through the 'Himalaya Task Force'<sup>33</sup>.

*Resources:* The Secretary General of CESR was appointed by the Committee itself, rather than staff being appointed by the Commission as was the case with the ERG. The budget was supported by the members of the Committee, again in contrast with the ERG where the secretariat's costs were born by the Commission. The individual contributions of members were set by an internal rule which fixed the amount of payments CESR Report 2001-2002.

From August 2002, CESR had premises in Paris, with initially seven staff under the Secretary General Fabrice Demarigny, who had also performed this function for FESCO. By 2003 the number of staff had grown to fifteen, and CESR made the policy decision to restrict job opportunities to 'employees of members in order to preserve the spirit of the network'<sup>34</sup>. In 2002-3, the budget for CESR was increased by a third, apparently due to a willingness by members to contribute more. This followed comments from Baron Lamfalussy, summarizing the progress made thus far

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<sup>31</sup> p.5, CESR, 2003, *CESR Annual report 2003*

<sup>32</sup> European Commission, 2004, *Commission Staff Working Document: The Application of the Lamfalussy Process to EU Securities Markets Legislation*, Ref. SEC(2004)

<sup>33</sup> CESR, 2004, *Interim Report on the Activities of CESR*, Ref.: CESR/04-382 S

<sup>34</sup> CESR, 2003, *Interim Report on the Activities of CESR*, Ref.: CESR/03-174b

in the implementation of the Action Plan on Financial Services, that CESR lacked sufficient staff to make sure that the new regulatory framework worked properly<sup>35</sup>.

### ***2.3 Business interests perspectives to networks:***

One of the major criticisms of FESCO, CESR's predecessor, was the narrow character of its consultation with industry in the regulatory process (Lamfalussy initial report: 35). There was a substantial emphasis in the final Lamfalussy report on the mechanisms through which the ESRC (later renamed the CESR) could improve such consultation. Market practitioners were to be "involved.. at every level.. in a continuous process... with particular weight given to those with knowledge and expertise on the subject in question...using, inter alia, the Internet... (and) with end-users views being considered at the same time" (Lamfalussy final report: 31-35).

In December 2001, the CESR set out publicly its 'consultation practices'. CESR maintained that the "aim of consultation is to build consensus where possible between all interested and affected parties on what legislation or regulation is appropriate and to improve the decision making process of the Committee" through gaining expertise from industry, 'discovering' regulatory problems and solutions, ascertaining the likely impact of regulation, obtaining feedback on CESR's work, and promoting understanding of the role of CESR and of its activities. CESR committed itself to both making public and giving due consideration to all comments received, bar when these had been made confidentially. It would also consult once again if substantial disagreements or technical problems had arisen during the first consultation period.

A review of controversial issues dealt with by CESR helps illuminate the role of industry in the committee's consultations. The first legislation with which CESR was directly involved, was that concerning market abuse. The first conflict concerned differences between CESR's advice on market integrity, and the initial proposal from the Commission on market abuse [ft 22.3.02]. However, the most significant aspect of CESR's advice on the market abuse directive in terms of the response from industry, was that concerning secondary legislation on Article 6. This related to whether or not members of the press were to be treated as complicit in insider dealing. Amendments were made to the original directive in the European Parliament to prevent coverage of the press by this article, unless the journalist also gained from the mistake; and, the legislation's reach was confined to investment analysts in an assurance given by the EP's rapporteur for the directive [Guardian 26.8.02]. However, the CESR implied in its consultation document on the article that it would cover the press much more extensively. In addition, it failed to actively seek out press associations for their views on this. The CESR maintained that it had, nonetheless, given any association which wished to comment the opportunity to do so, through its internet-based consultation process [ft 27.9.02]. The episode led to a greater scrutiny of CESR and involvement in its consultation procedures by large media interests such as Reuters.

It is possible to analyse the overall role of industry in CESR consultations compared to that of other actors, through a quantitative analysis of responses submitted. Out of the fifty consultations completed by mid-August 2005, 602 out of 1736 responses were submitted by individual firms. A cluster of big firms and of stock markets regularly submitted evidence to CESR consultations. However, consultations did

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<sup>35</sup> Financial Times 13.3.02

sometimes attract relatively smaller firms' responses; this appears especially to be the case concerning legal matters (where, for example, Shepperd and Wedderburn, a Scottish company, frequently contributed). In addition, specific issues attracted 'clusters' of responses from particular industry segments, such as the ethical investment sector and the financial press. It was, of course, the case that professional and trade associations regularly submitted evidence and that this may have "crowded out" responses from individual firms. However, some firms were not content to be covered by their trade associations, and interesting configurations emerged. One of these was the 'AFEPJoint', which consisted of the Union of Athens Stock Exchange-listed companies, the Quoted Companies Alliance, and the Deutsches Aktieninstitut, amongst other bodies. Finally, it should be noted that respondees were not only based in Europe but operated in all parts of the global financial market.

The creation of the High-Level Communications Group (HLCG, which later became the ERG) was seen as an opportunity for extending and formalizing consultation with industry (Results of consultation on 1999 communications review). The HLCG was to cooperate with peak associations for the communications sector such as Industry Round Tables, the European Telecommunications Platform and the Digital Video Broadcasting group. It was initially also suggested that such bodies could prepare complementary measures like codes of practice which the HLCG might endorse. Unlike CESR, it was previewed that the HLCG would be required to help resolve disputes between consumers and operators where there was a cross-border dimension involved (*ibid.*: 84).

Industry was divided over the creation of the ERG. Newer operators had hoped for the creation of a single European telecoms regulator, whilst accepting that the idea did not have "much political resonance". Nonetheless, the ERG was seen as a step in the direction of greater regulatory harmonization by groups such as ECTA [Communications Daily 12.12.03]. Other firms were concerned that harmonization of regulation across the EU via the ERG might damage their commercial prospects. Many 'older' German mobile operators were concerned that the creation of the ERG would override their domestic moratorium on additional regulation. The German regulator and Economics Ministry had refused to regulate mobile services, due to their view that mobile operators paid such large sums for their 3G licences that they should be able to operate without prior constraint in the mobile market [ASAP 1.10.03].

The ERG's consultation procedures were set out formally in the document "ERG and Transparency in practice". It indicates a number of contrasts with the CESR's approach to consultation. Whilst CESR consulted on all major decisions, and was open to firms suggesting new avenues of enquiry, the ERG itself was to decide on a case-by-case basis whether to organise a public consultation or hearing. The consultation was to be restricted in principle to one round of comments, unlike CESR's commitment to two rounds if the first consultation revealed the presence of significant unresolved or complex issues. In addition, the ERG made a distinction between experts and firms, whilst CESR appeared to treat all respondents on the same level, making no judgment as to whether they possessed or lacked expertise. Finally, the ERG was to more frequently invoke the mechanism of a public hearing than was CESR. This might have implied a more litigious atmosphere in ERG consultations than if the 'normal' consultative procedure had been used.

It could be suggested that the Commission itself had a rather limited view of the ERG's capacities. The Information Society Commissioner, Erkki Liikanen, appeared prepared to conduct negotiations on 3G rollout outside the mechanisms of the ERG when he invited 14 major company CEOs to a meeting on this subject in 2004. In addition, Liikanen claimed that 'normal commercial negotiation' was 'preferable to a regulated outcome', suggesting that the ERG might become redundant if it could be supplanted by a more competition-based regime [Erkki Liikanen, speech 10.5.04].

A brief survey of controversial consultations by the ERG allows an assessment of the role of industry in this process. ETNO, the European Telecommunications Network Operators' Association, was a frequent critic of the ERG's consultative procedures. It maintained that "compared to the original promises of observership and consultation, industry's participation in the ERG has been revised to one of simply providing blind input to its annual work programme". ETNO presented its criticisms to the EC and to MEPs (M2 press wire 15.11.02; European Report, 20.11.02; Washington Internet Daily, 11.7.03).

### **3. Conclusion:**

Networks of national regulators have been established in economically and politically strategic sectors, notably network sectors. We have examined two such networks in crucial industries- securities and telecommunications. Both required Commission involvement in their creation and the formation of small permanent secretariats. Both indicate the central role of the Commission in their initial goals and mandates. However, while the Commission continues to play a role, albeit as an 'observer', it is clear that the networks have asserted themselves vis-à-vis the Commission, and proved space to distance themselves from national. But the creation of these networks has also drawn our attention to the potential issues of overlapping organisational competencies – such as those between the IRG and ERG – and variance in the role played by the Commission in steering agenda. This in turn raised important questions of accountability and appeal processes.

It would appear that the aim of the regulatory networks was for European guiding principles to emerge under consultation, and NRAs to implement and enforce these rules. However, as our preliminary findings show these networks have evolved very quickly beyond what the Commission and the member states envisaged in terms of organization and goals. It is clear that the bulk of all networks of NRAs work concern the development of guidelines on implementation of directives. Moreover, these networks appear to be emerging as highly significant actors in the development of European regulation.

Yet, for all the new regulatory functions of the European networks, the development and deviation from delegated goals are constrained by financial resources and the limited size of their secretariats. This continues to give a large role to the Commission in agenda-setting, and encourages the policy targets to be low hanging fruits such as identifying poor transposition of regulations and implementation score boards. Under such conditions much of the EU policy developments have occurred through policy transfers and identification of best practice rather than development of distinct EU solutions. At a positive level the networks bring together sector regulators, national

governments and the Commission in new multilevel and complex principal-agent relationships.

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## Appendix 1: European Regulatory Networks

Committee of European Securities Regulators (CESR)

Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS)

Committee of European Banking Supervisors (CEBS)

The ERG- European Regulators Group (for telecommunications).

Regulatory Bodies Working Group (Rail)

European Platform of Regulatory Authorities (EPRA- broadcasting)

Independent Regulators Group (IRG- telecommunications).

Council of European Energy Regulators (CEER),

European Regulators Group (Electricity and Gas)

| Name                                  | CESR  | ERG   | CEIOPS   | CEBS   | EPRA  | RBG   | ERGEG   | CEPT  | CEER  |
|---------------------------------------|---|---|--|--|---|---|---|---|---|
| Creation                              | Created in June 2001 as a 'less worse option' than a European securities regulator, as part of the Lamfalussy process.  | Created in July 2002 as a balance to the increased delegation of decision-making to NRAs., with a view to ensuring the implementation of the framework as close as possible to the market in the member states. | Created in late 2003 after the extension of the Lamfalussy process to banking and insurance. | Created in late 2003 after the extension of the Lamfalussy process to banking and insurance. | Created in April 2005 as a forum for discussion and exchange of opinions between regulatory authorities primarily in the field of broadcasting. | Created in ? as a sub-group of the Developing European Railways Committee set up by the Commission to look at practical issues arising from implementation of the first railways package.   | Created in November 2003 to advise and consult on the achievement of the single market in energy. | Created in 1959 by 19 countries, which expanded to 26 during its first ten years. Original members were the incumbent monopoly-holding postal and telecommunications administrations.   | Created in March 2000 through a "Memorandum of Understanding for the establishment of the Council of European Energy Regulators" signed by ten national energy regulatory authorities.  |
| Role                                  | To improve coordination among European Securities Regulators, act as an advisory group to assist the Commission and work to ensure better implementation of community legislation in the Members' States- includes a role in helping draft secondary legislation. | To improve coordination between NRAs in the field of electronic communications and to advise the Commission on related matters.   | As with CESR except for insurance regulators.  | As with CESR except for banking regulators.  | To act as a fora for regulators mainly concerned with broadcasting. No binding powers.  | The working group does not normally make decisions itself but remits matters to the main Committee, which also has representatives from the Ministries of the various Member States and has been set up under the Commission's comitology arrangements. | Similar to ERG but for electricity and gas.   | To coordinate regulatory decision-making on communications matters. CEPT's activities included co-operation on commercial, operational, regulatory and technical standardisation issues. Decisions are not binding on members.  | To further the opening of electricity and gas markets to competitive, non-discriminatory access.  |
| Relationship with European commission | A representative of the Commission attends meetings except where they are deemed confidential by members.   | Creation of ERG was first time EC had formal involvement with NRAs' implementation of EU directives- so, EC's observer status on other EU regulators' groups not seen as particularly extensive, I presume.     | As for CESR.   | As for CESR.   | The Commission and the Council of Europe are permanent observers. DGX described as contributing 'substantially' to the EPRA budget              | Meetings are chaired by the Commission.   | Commission can attend meetings. Commission has role of informing EP of ERGEG's activities.        | The Commission could, through its Radio Spectrum Committee, issue 'mandates' for the Electronic Communications Committee of the CEPT to develop reports or recommendations for spectrum allocations and services. There is some inevitable jostling as the Commission and the ECC strive to develop decisions, because the two must be compatible- EU member states cannot adopt ECC decisions that are incompatible with the Commission decision, but the Commission could have difficulty adopting its own decisions without political support from the ECC process. Memoranda of understanding have been created between the CEPT and Commission covering such issues.<br><br>In 1990, the Commission took action against CEPT, which had assumed that its actions lay outside the scope of Community law. The Commission decided that even though a pricing recommendation put out by CEPT on international leased telephone lines was not binding, it was nevertheless an illegal agreement between companies to restrict competition. | The Commission did, formerly, consult with CEER, for instance it asked it to 'put forward guidelines on how to regulate and financially reward the construction of infrastructure' in March 2003, for which CEER created a white paper. |

