

**Regulation and governance of the European telecommunications
sector: from network to agency?**

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Regulation and governance of the European telecommunications sector: from network to agency?

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Abstract

Over the past two decades, the European telecommunications sector has witnessed a shift from intergovernmental to, partially, supranational governance. On 13 November 2007, the European Commission proposed to take another step in the Europeanization of the telecommunications sector, by establishing an independent European Electronic Communications Market Authority (EECMA), replacing the existing European Regulators Group (ERG), a network facilitating loose cooperation amongst national regulatory agencies (NRAs) and between them and the Commission.

This paper explores the potential added value of a European Electronic Communications Market Authority over existing national and European institutional arrangements, and over possible alternative institutional designs, in particular the Body of European Regulators in Telecoms (BERT) as proposed by the European Parliament in reaction to the Commission's proposal. The paper makes use of theories on regulatory governance, agencies and networks to evaluate the advantages and disadvantages of the proposed institutional design and its possible consequences for the regulation of the European telecommunications sector.¹

¹ As of yet the argument presented in the paper is based on document analysis. It is intended to further elaborate the argument on the basis of interview data currently gathered in the course of research commissioned by the Netherlands Ministry of Economic Affairs.

1. Introduction: next generation regulation of the European telecommunications sector

Over the past two decades, the European sector for electronic communications has witnessed a shift from regulation and governance on a national level to, partially, supranational regulation and governance.

On 13 November 2007, the European Commission published proposals for a review of the European framework for regulation and governance of the sector for electronic communications, which seem to suggest that the Commission is aiming to take this shift another step further. In comparison to earlier proposals of June 29, 2006 these proposals contain some important new elements, in particular a proposal to establish a European Electronic Communications Market Authority (EECMA). In addition, the proposals suggest to have a possibility for a Commission veto on remedies (European Commission, 2007a). Furthermore, the Commission proposes to expand the number of topics where the Commission is allowed to take implementing measures via the comitology procedure to coordinate the application of principles for internal market purposes (European Commission, 2007b).

Several member states have raised concerns over the new proposal. Whereas they generally agreed with the objectives of the Commission's proposals, they expressed doubts in particular with regard to the need to create an EECMA, the extension of the Commission's competence in terms of market regulation and spectrum management.² Also MEPs have, on several occasions, questioned the need for an EECMA.³ In reaction to the proposals of the European Commission, the European Parliament proposed to strengthen the current European Regulators' Group (ERG) and to turn it into a Body of European Regulators in Telecommunications, BERT (European Parliament 2008a, 2008b).

In this paper, we analyse these proposals for the future regulation and governance of the European electronic communications sector. This sector is characterised by a high degree of technological dynamics and political fragmentation. Moreover, the current regulatory framework already contains an extensive and diverse set of institutional arrangements, on the national as well as the international level. A high number of actors is involved in the regulation and governance of the sector and many dependencies exist between these actors. As a result of these characteristics, regulation and governance of the sector for electronic communications is a highly complex matter and the actors involved cannot act unilaterally.

We focus in particular on two dimensions: the degree of institutionalization and the balance of power. What would be the consequences of the proposed structures for the degree

² Presidency Conclusions, Telecommunications Council, 29-30 November 2007.

³ Euractiv, Telecoms review gets chilly welcome in Parliament, 31 January 2008; Reuters, EU telecoms authority plan comes under fresh fire, 20 February 2008.

of institutionalization and the balance of power? The degree of institutionalization can vary between informal cooperation and formal organization. The balance of power involves national governments, national authorities, and EU institutions, in particular the Commission and the Parliament. This balance can vary from purely intergovernmental to supranational. By analyzing the consequences of the proposed regulatory frameworks, we aim to establish whether the proposed structures contain potential added value in comparison to the existing institutional arrangements and, if so, what this added value would consist of.

Section two contains a theoretical overview of regulation and governance in the European Union. In section three we discuss the historical background and current institutional arrangements for regulation and governance in the European telecommunications sector. Section four focuses on the contents of the proposals of the Commission and the Parliament. The two proposals are compared on the basis of proposed roles, tasks and structures for an EU entity. In section five, we analyse the main differences, advantages and disadvantages of the two proposals and the consequences for the degree of institutionalisation and the balance of power.

2. Regulation and governance in the European Union: towards multi-level regulation

Liberalization and (re-)regulation

The European Union (EU) has been called a ‘regulatory state’ (Majone, 1996). Over the last decades it has been a driving force in liberalization, opening up markets (such as the telecommunications market) to competition which before were dominated by state-owned monopolies.

With the development of the single European market, removing barriers between the national economies of the member states, a European approach to (re-)regulation of these liberalized markets emerged. The approach is characterized by the large-scale production of EU legislation, a combination of harmonization and mutual recognition of standards, legal enforcement of the application of EU rules, and the involvement of a wide variety of actors ranging from the European institutions, notably the European Commission and the European Court of Justice, to stakeholders such as economic actors but also social actors (McGowan and Wallace, 1996; Wallace, 2005).

Delegation

In the last twenty years, the variety of regulatory forms has increased from EU legislation imposed top down to more decentralized and less hierarchical versions of regulation. In particular, member states have created more-or-less independent agencies to regulate liberalized markets. In policy domains such as utilities (Coen and Thatcher, 2001), telecommunications (Thatcher, 1999), and antitrust (Doern and Wilks, 1998; Wilks and Bartle, 2002), public tasks were delegated to so-called “non-majoritarian institutions” at arms’ length from governments and headed by non-elected officials (Majone, 1996; Thatcher and Stone Sweet, 2002; Thatcher, 2002; Coen and Thatcher, 2005).

Especially since the 1990s, tasks have also been delegated to independent agencies at the EU level.⁴ From a principal-agent perspective, such delegation of powers can be explained through its functional advantages (Pollack, 1997; 2003; Tallberg, 2002). Agencies are expected, amongst others, to reduce political transaction costs; to organize independent expertise; to increase transparency; and to enhance credible commitment (e.g. Kreher, 1997; Majone, 1997; Kelemen, 2004; Coen and Thatcher, 2005). Agencies can be more efficient and flexible than the Commission because they are usually smaller organizational entities with more specialized expertise, which allows them to respond to complex and emerging issues.

One particular feature of EU agencies is that they, by facilitating networks of national regulatory agencies, can diffuse regulatory practices and styles across Europe (Chiti, 2000; Dehousse, 1997; Kelemen, 2004). Despite the development of European-wide standards and benchmarks, practices continue to diverge among the different member states. Particularly the recent privatization of industries such as telecommunications, public utilities and transport and the enlargement of the EU with formerly Communist countries in Central and Eastern Europe have highlighted the need to harmonize regulatory styles for the proper functioning of the single European market (Majone, 2002).

In its White Paper on European Governance, the Commission stated that “[t]he creation of further autonomous regulatory agencies in clearly defined areas will improve the way rules are applied and enforced across the Union” (COM(2001) 428: 24). Particularly in areas requiring frequent decisions based on technical or scientific considerations and where uncertainty is great, agencies are expected to contribute to the efficient and flexible implementation of Community policies (Majone, 1997a; 2000; e.g. Kreher, 1997; Vos, 2000; Kelemen, 2002).

Europeanisation

⁴ See the EU’s website for a complete list of all agencies: http://europa.eu/agencies/index_en.htm. For a more detailed overview and analysis of the history of agency-creation within the European Union, see Kelemen, 2002; Vos, 2000; Groenleer, 2006.

Some argue that the concept of delegation is “ill-suited” to situations in which tasks are conferred upon EU agencies (Dehousse, 2002). When creating EU agencies, for example, powers were usually not taken away from the Commission but transferred vertically, from the national to the EU level, instead of horizontally, from Community institutions to agencies. If tasks were not already performed at the EU level, it is claimed, the creation of an agency thus basically amounts to the transfer of sovereignty to the European level, and delegation of tasks to agencies could better be referred to as a process of ‘Europeanization’ (Majone, 1996; 1997). According to scholars as Majone the rise of the regulatory state has thus resulted in a shift of powers from the national to the supranational level.

Once tasks have been delegated to ‘Brussels’, it becomes almost impossible to re-nationalize them (Sandholtz and Stone Sweet, 1998; Sandholtz, 1998: 135-136). What is more, they tend to generate the need for further delegation of tasks: for the more cross-border transactions and communications, the higher the need for supranational decision-making. This has been termed the ‘logic of institutionalization’ (Stone Sweet, Sandholtz and Fligstein, 2001).

The delegation of tasks has, at least initially, been in the interest of the member states. While they perhaps would like to retain their national sovereignty, they also gain with a growth in welfare. Often such a growth in welfare is not possible without cross-border transactions and communications. Moreover, it is more cost-efficient for the member states to delegate regulatory tasks to the European level, as otherwise they would have to engage in costly monitoring activities. So while also in a supranational context the member states remain predominant, if only because they have money, they do not hold the ultimate control over the ongoing process of integration. They can still exert influence but they lack the power to command and control (Sandholtz and Stone Sweet, 1998; Sandholtz, 1998).

Transnational economic but also social actors, increasingly active throughout the EU, spur further integration as they depend on uniform rules for their cross-border transactions and communications. The Commission and the Court, seeking to expand their domain, drive the process through making use of EU rules (Sandholtz and Stone Sweet, 1998; Sandholtz, 1998).

Multi-level regulation

Others argue that even if tasks would be transferred from the national to the supranational level, the member states would not only do so because of functional pressures. They would also have to benefit politically from regulatory measures. Regulatory measures can not simply be imposed by the Commission and the Court. Member states have to agree on them, and

since they often diverge, this hampers the EU's supranational regulatory capacity (Scharpf, 1999). Especially in the field of economic regulation the differences between the member states are such that EU-wide standards are hard to achieve, and, if achieved, as a consequence often reflect the 'lowest common denominator'. In reality, there has thus been much less delegation by the member states to the European level than the 'Europeanization thesis' claims (Eberlein and Grande, 2005: 94-96).

This is reflected in the limited formal powers that EU agencies are invested with. None of the EU agencies can be compared to regulatory agencies in the member states, let alone US regulatory agencies (Majone, 1997; Yataganas, 2001; Geradin, 2005). Indeed, most EU agencies are not regulatory agencies, but have an advisory role. They collect, analyse and disseminate information in their respective policy fields, usually in support of the Commission. They often do not have decision-making powers of their own, and even when they are invested with the power to take decisions, such as in the case of the European Aviation Safety Agency (EASA), they can only take decisions in individual cases. So most EU agencies thus 'regulate by information', whilst the formal power to take decisions still being held by the member states and/or the Commission.

Moreover, in the domain of utilities, telecommunications and antitrust, where the European level has played an important role in driving the liberalization of national markets no EU agencies have been created so far (Eberlein and Grande, 2005). As these policy sectors were already regulated by national agencies, the creation of agencies has not been acceptable to the member states. In the mid-1990s, a European telecom agency was proposed to regulate the liberalised EU telecom market. This proposal, supported particularly by some members of the European Parliament, was blocked by Germany, France and the United Kingdom, unwilling to transfer authority from existing national agencies to agencies at the European level (Kelemen, 2002: 110).

Alongside the creation of national regulatory agencies, it cannot be denied that important regulatory powers have been delegated to the Commission, notably in the field of competition regulation (Schmidt, 1998). On several occasions countries such as Germany, Italy, and the United Kingdom have proposed the creation of an independent European Cartel Office in order for European competition policy to be set independently from political influence. The Commission has always strongly opposed this proposal, fearing a decrease in its powers (Kelemen, 2002; Geradin and Petit, 2004). Its DG Competition is de facto the European competition authority. And through its powers in the field of competition the Commission can also have an influence on other economic sectors (Levi-Faur, 1999).

National regulatory agencies found themselves in what could be called a 'multi-level policy-making system' (Eberlein and Grande, 2005). They are embedded in a transnational regulatory structure comprised of both national and EU institutions. They have therefore

engaged in informal forms of cooperation at the EU level, often working together with the European Commission. They have formed networks through which they “informally, softly harmonize member state regulatory activities” (Eberlein and Grande, 2005: 100; Eberlein and Kerwer, 2004). Examples include the European Competition Network (ECN) through which the national competition authorities and the Commission work with each other on competition issues; the European Regulators Group for Electricity and Gas (ERGEG) that advises the Commission with regard to the completion of the internal energy market; and the Committee of European Securities Regulators (CESR) that acts as an advisory group to the Commission as well as works to ensure the consistent and timely implementation of EU legislation.

While they are embedded in European networks, national regulatory agencies are left with considerable discretion in implementing EU rules given their expert knowledge of local market conditions, for else member states would not have agreed on EU rules in the first place, as is notably illustrated by the case of the electricity sector (Eberlein, 2003). This discretion however also means that these European networks may not necessarily lead to the level of harmonization required for creating a level playing field, because member states not always implement EU rules in an even fashion. Moreover, networks are also vulnerable to ‘re-politicization’. As member states often have divergent interests, and their national agencies may lack the mutual trust and willingness to cooperate, regulatory measures may still be blocked and the functioning of the internal market may be hampered (Eberlein and Grande, 2005: 104; Scharpf, 1999).

Institutionalization and the balance of power

The European regulatory state is thus characterized by the establishment of institutions varying in their level of institutionalization. Not only have formal institutions such as national and EU agencies been created but these institutions have also given risen to informal institutions such as EU-wide networks.

It is often assumed that the more formally organized policy-making is at the EU level, the less the power of the member states (and the more the power of the EU institutions, notably the Commission, for that matter). The creation of independent regulatory EU agencies would thus signify the transfer of formal power from the national to the supranational level, whereas the setting up of informal networks would indicate that important formal powers are retained by the member states. Eberlein and Grande (2005: 105; Eberlein, 2003) have argued that the ‘informalization’ of regulatory policy-making in certain policy areas has however resulted in a higher degree of EU-level regulation than one perhaps would have expected.

But while they do not “rule out the possibility that [...] informal institutions may continue to formalize procedures and strengthen formal institutions”, they remain silent on

this process of formalisation. In order to be able to understand multi-level regulation, we argue that it is necessary to look into both the process of informalization and the process of formalisation, examining more comprehensively alternative design options – in our case European agencies as well as networks - and their consequences for the balance of power between the member states and the EU institutions (Coen and Doyle, 2000; Kelemen and Tarrant, 2007).⁵

We contend that neither a high nor a low level of institutionalization automatically points to a decrease or an increase in the power of the member states or the EU institutions, notably the Commission. Whereas the creation of an informal network of national regulatory agencies might spur EU level regulation and de facto result in enhancing the power EU institutions, the establishment of an EU agency might very well be in the political interest of the member states because leading to a re-nationalization of previously delegated tasks. We therefore cannot simply assume that member states or the Commission can wield more influence and exert more control on EU regulation through either the creation of European agencies or networks.

If it is not simply a high or a low degree of institutionalization that matters it becomes important to distinguish more ‘fine-grained’ conditions upon which a shift in the balance of powers is likely to be dependent. We distinguish the following: (a) the role and function of a regulatory institution: to what extent does a body have decision-making powers or merely have an advisory role, and, if it has an advisory role, to what extent can it provide advice on its own initiative and to what extent is the advice taken into account; (b) its tasks and competences: to what extent does the body have tasks that were already delegated to the European level or are still performed nationally; and (c) its structure and governance: to what extent are NRAs involved in providing advice, for instance, through their membership of a more or less formal network, and to what extent are member states, for instance, part of the institution’s decision-making processes?

So we essentially look at the relationship between two dimensions, the level of institutionalization and the balance of power. The challenge is to link institutional issues and matters of power in order to come to an acceptable solution for the ‘problem’ of regulation and governance in the case of the European electronic communications sector.

3. Telecommunications regulation in the EU: historical background and current institutional arrangements

⁵ In this version of the paper, we do not yet deal with another design option, regulation through comitology procedures (see Joerges and Neyer, 1997; Pollack, 2003; Egeberg et al., 2003). A revised version of the paper will also include this option.

Limited European involvement

Over the last two decades, the European regulatory framework for telecommunications has witnessed substantial changes. These changes have also had significant consequences for the balance of power between the member states and the European institutions, in particular the European Commission. In this section, we will first highlight the key changes. Next, we will discuss the current institutional arrangements in the sector.

Telecommunications were not mentioned in the 1957 Treaty of Rome, which established the European Economic Community. In 1959, it was decided to establish an organization to cooperate internationally in the field of telecommunications outside of the framework of the EEC: the Conference Européenne des Postes et Telecommunications (CEPT). The CEPT was a highly intergovernmental organization, which served mostly as a lobby group for the national telecommunication operators (Eliassen et al., 1999; Ungerer and Costello, 1990; Noam, 1992).

Commission assumes a leading role

Since the late 1970s, the European Commission has assumed a leading role in stimulating the development of a European telecommunications policy. In the beginning, European involvement was limited to the encouragement of harmonization of networks and equipment, R&D programs, and the setting of standards for telecommunications. At this time, harmonization and coordination measures could be based on Article 94 EC (ex 100). In addition, softer legal instruments, such as recommendations were used (Larouche, 2000; Eliassen et al., 1999).

In 1987, the European Commission published a Green Paper on telecommunications, which marked the beginning of a new phase in European telecommunication policies (European Commission, 1987). The Green Paper presented a framework for the future regulation and liberalization of the European telecommunications market (Larouche, 2000). Three pillars can be distinguished in the Green Paper and in the further development of European telecommunications policy (Boyle, 1998).

The first pillar consists of liberalization measures. Liberalisation has been carried out by means of the adoption of several directives. In order to achieve liberalization of terminal equipment, the Commission adopted Directive 88/301 on 16 May 1988. The Services Directive of 1990 (90/388/EC) constituted the basis for liberalizing telecommunications services. It was followed by other directives, which took the form of amendments to the Services Directive. A highly significant feature of these liberalization directives is that they

have been adopted by the Commission on the basis of Article 86(3) EC (ex 90(3)), which allows the Commission to adopt legislation without the approval of either the Council of Ministers or the European Parliament (Larouche, 2000).

The second pillar contains so-called Open Network Provision (ONP) measures. ONP refers to all kinds of harmonization measures that have been taken in order to ensure fair, transparent, and non-discriminatory access conditions to networks and services. It has been regulated by means of the adoption of the ONP Framework Directive (90/387) and has been further developed through a series of implementing instruments. ONP measures have been adopted by means of normal decision-making procedures. They have been based on Article 95 EC (ex 100a), which is concerned with the harmonization of national laws relating to the establishment of the internal market (Larouche, 2000; Boyle, 1998).

The third pillar of European telecommunications policies focuses on the application of competition rules. The objective of applying European competition rules to all aspects of the telecommunications sector has been developed by means of guidelines and individual cases (Boyle, 1998).

Cooperation or power struggle?

The changes that took place in the 1990s with regard to the regulation of European telecommunications were significant. Views differ as to the degree to which the European member States supported these developments, in particular the use of Article 86 (ex 90) as a basis for liberalization and the corresponding increasing influence of the European Commission.

Sandholtz claims that the Commission was generally ahead of the member states with respect to reform initiatives in this period. The Commission, supported by transnational actors, was pushing through liberalisation measures, even though the member states disagreed. Member states were not able to impose their preferences on the Commission (Sandholtz, 1998).

Thatcher paints a rather different picture. He argues that the Commission and the Member States were engaged in a cooperative relationship rather than in a struggle for power. National governments supported and even actively participated in the expansion of European regulation. Member states were involved in all phases of the decision-making process, formally as well as informally. Conflicts were limited and were solved by compromises. Developments were characterized by incrementalism and member states were given a high degree of freedom regarding the implementation of European regulation (Thatcher, 2001; 2004).

Schmidt claims that the successful liberalization on the basis of Article 86 (ex 90) in the telecommunications sector has been the result of favourable circumstances: member states as well as private actors supported the Commission, because they agreed with the importance of reform, with regard to the growth of the sector and the rapid technological changes. Schmidt makes a comparison with the electricity sector and the post sector, where the Commission did not succeed in liberalizing in a similar manner. In the electricity sector, the member states were fiercely opposed to the use of article 86 (ex 90) as a basis for liberalisation. In addition, at that time the electricity sector was not characterized by the strong reform pressures that were present in the telecommunications sector. In the post sector, the Commission did not have the support of the member states nor of private actors. Schmidt concludes that “the Commission’s use of Article 90 directives can be better understood as a controlled delegation of rights than as a significant example of agency loss” (Schmidt, 1998, p. 181).

The Commission’s liberalisation’s programme culminated in the adoption of the Full Competition Directive in March 1996, also based on Article 86 (ex 90). In this directive, the Commission set the timetable for the complete liberalisation of the telecommunications market. The directive abolished all remaining exclusive and special operator rights by January 1, 1998, including all remaining restrictions on the provision of voice telephony services and the underlying infrastructure (Kiessling and Blondeel, 1998; Eliassen et al., 1999).

Opposition to pan-European regulator

In the 1999 Communications Review, the European Commission made several proposals for the reform of the European regulatory framework, which eventually resulted in the 2002 Regulatory Framework for Electronic Communications.⁶ Some of these proposals were highly controversial. First of all, the Commission proposed to establish a Communications Committee, COCOM, which would be a comitology committee consisting of national representatives and chaired by the Commission. This proposal was supported by the member states (Michalis, 2007; Goodman, 2006).

However, the Commission also proposed to establish a pan-European regulator, the High Level Communications Group. This proposal was a reaction to the creation in 1997 of the informal Independent Regulators’ Group (IRG). The IRG had been established to serve as a discussion forum for NRAs in order to share practices and discuss issues of common

⁶ The 2002 regulatory package consisted of a Framework Directive on electronic communications networks and services (Directive 2002/21/EC), and directives on access and interconnection (Directive 2002/19/EC), authorisation and licensing (Directive 2002/20/EC), universal service obligations (Directive 2002/22/EC), a decision on a regulatory framework for radio spectrum policy (Decision 676/2002/EC), and a directive on competition in the markets for electronic communications services.

interest. However, it is also regarded as “a defensive move to fend off calls for a pan-European regulator” (Michalis, 2007: 157). The proposed HLCG would consist of representatives of all relevant national regulatory bodies and the Commission and it would bring the national regulators under the Commission’s structures and control. National governments, NRAs and the IRG were strongly opposed to the creation of such a body. In the end, a compromise was reached and a European Regulators Group (ERG) was established instead. The ERG is composed of the heads of the NRAs of the member states. Its aim is to facilitate cooperation between the NRAs and the Commission and to promote consistency in regulation across the European Union (Michalis, 2007; Goodman, 2006).

Another Commission proposal that met with a high degree of opposition was the Commission proposal for a Commission veto on proposed draft regulatory measures of national regulators. In the end, this proposal was unanimously rejected by the national governments. The compromise that was reached contains Commission powers over the definition of markets and the designation of operators with significant market powers, but not over the associated imposition of regulatory measures by national regulators (article 7 of Directive 2002/21/EC; Michalis, 2007; Goodman, 2006).

In the Commission proposals of November 2007, the lack of consistency in the application of EU rules and the regulatory fragmentation of the internal market are indicated as important problems that need to be solved. In order to overcome these problems, the Commission proposes to introduce a Commission veto on remedies and to replace the ERG by a European authority (European Commission, 2007a). It is to the latter proposal we turn now.

4. The proposal for a European Electronic Communications Market Authority and alternative proposals

European Electronic Communications Market Authority (EECMA)

In order to solve in particular “the lack of consistency in the application of EU rules and the regulatory fragmentation of the internal market”, the Commission proposed the establishment of an independent European Electronic Communications Market Authority (EECMA). Commissioner Viviane Reding, responsible for telecommunications, was quoted saying: “In the U.S. you have got one market, one network from east to west, from San Francisco to New York. Here in Europe you have 27 scattered markets with 27 regulators with rules which

sometimes oppose each other.”⁷ The EECMA would have to contribute to making Europe one market. How would it have to do so?

(i) Role/function

The role of EECMA would be primarily advisory. As ‘specialized and independent expert body’,⁸ it would advise the Commission in preparing regulatory decisions, notably those under the so-called ‘Article 7’ procedure in which the Commission would have a veto on the implementation of so-called ‘remedies’ such as ‘functional separation’ between networks and services.⁹ The Authority would also advise the Commission on common procedures for pan-European authorisations and would provide the Commission with technical support in the selection of applications for radio frequency licenses. Regulatory measures to harmonize spectrum management would be taken through comitology procedures. On a limited number of issues, the Authority would be able to deliver opinions on its own initiative.

(ii) Tasks

The Commission would retain the power to take decisions, however. Only in relation to the issuance of rights of use for number from the European Telephone Numbering Space (ETNS) the Authority is able to take individual decisions against which appeal can be lodged. More in general, the Authority would have to enhance the consistency of the regulatory approaches of the 27 NRAs, acting as a ‘centre of expertise’ for electronic communication networks and services at EU level.¹⁰ To overcome the problems confronted by the ENISA, the Authority would also be transferred the tasks of this agency with regard to network and information security. The Authority, finally, would have several tasks in the area of consumer protection.

(iii) Structure/governance

⁷ International Herald Tribune, EU Commissioner seeks to shake up telecom industry, 11 November 2007, available at <http://www.ihf.com/bin/printfriendly.php?id=8286932>, consulted on 12 November 2007.

⁸ Explanatory memorandum to proposed Regulation; EUobserver, Reding to take on telecom firms through new EU body, 12 November 2007, available at <http://euobserver.com/9/25125/?print=1>, consulted on 12 November 2007.

⁹ Commissioner Reding reportedly planned to copy the model applied to the energy sector, where Commissioner Kroes, responsible for competition, pushed for ownership ‘unbundling’ of production and distribution activities. She was however warned against modeling the proposal for functional separation by other Commissioners because the telecommunication sector would already be more competitive, and subsequently had to dilute her plans, leaving more discretion to NRAs. See Euractiv, Commission split over telecoms ‘unbundling’, 26 September 2007; International Herald Tribune, EU Commissioner seeks to shake up telecom industry, 11 November 2007, available at <http://www.ihf.com/bin/printfriendly.php?id=8286932>, consulted on 12 November 2007.

¹⁰ Explanatory memorandum to proposed Regulation

The Authority's organizational structure is supposed to include a number of bodies. The main body of the Authority is its administrative Board, composed of in total twelve representatives of the Commission and the Council who are supposed to fulfil the 'highest standards of competence and independence, and a broad range of relevant expertise'.¹¹ The Administrative Board is responsible for appointment of the director and the members of the Board of Regulators. It adopts its decisions on the basis of a two-thirds majority.

The role of the Board or Regulators is more limited. The Board of regulators is comprised of the heads of NRAs and would have to ensure the 'pooling of expertise'¹², reinforcing their capacities without replacing their functions or duplicating their tasks. The Board of Regulators would also have to guarantee close cooperation between NRAs and the Commission. It provides an opinion to the Director before he adopts the Authority's opinions, recommendations and decisions. The Board of Regulators adopts its opinions by a simple majority and is chaired by the director.

The Director would be responsible for the day-to-day management of the Authority. He would have the power to adopt all its opinions, recommendations and decisions, "subject to the assent of the Board of Regulators".¹³ He also prepares a draft work programme, a draft budget and a draft annual report. The director is also responsible for the implementation of the Authority's budget and for its staffing. In order to ensure its autonomy, the Authority's budget would primarily come from a Community subsidy. The budget would increase from 10 million Euros in its first year to 28 million Euros in its third year. When the Authority is fully operational it is supposed to have around 134 staff members who would be Community officials. A Chief Network Security Officer, a Permanent Stakeholders Group, and a Board of Appeal complete the organisation of the Authority.

Body of European Regulators in Telecoms (BERT)

The European Parliament is opposed to the establishment of an EECMA as proposed by the Commission.¹⁴ MEPs have questioned the added value of the agency and raised concerns about the increase in powers for the European Commission. As an alternative the EP has suggested strengthening the ERG and transforming it into a Body of Regulators in Telecoms (BERT). The EP's 'compromise' proposal strongly resembles earlier proposals by the ERG

¹¹ Proposed Regulation

¹² Explanatory memorandum to proposed Regulation

¹³ Proposed Regulation

¹⁴ Euractiv, Telecoms review gets chilly welcome in Parliament, 31 January 2008; Reuters, EU telecoms authority plan comes under fresh fire, 20 February 2008; Euractiv, MEPs shift focus of telecoms review, 25 April 2008

for enhancement of its role and is supposed to meet the criticism of member states that have opposed to the creation of an EECMA.¹⁵

(i) Role/function

BERT, like EECMA, would also primarily be an advisory body. As an ‘independent expert adviser to the Commission’,¹⁶ it shares many of the features of the EECMA but does not have the legal form of an agency. Moreover, instead of advising the Commission on its veto on remedies, BERT would be part of a new co-regulation procedure, closely cooperating with the Commission and NRAs. Only if the Commission and BERT agree on the necessity of amending a draft measure proposed by an NRA the Commission can use its veto. Otherwise, the NRA would have to take “utmost account” of the comments made by the Commission and BERT. “The proposed procedure aims at reaching a solution through peer review rather than imposing a “sanction” veto from above.”¹⁷

Furthermore, as different from EECMA, the Commission has to consult BERT in carrying out its functions under the regulatory framework and has to take the “utmost account” of the opinions delivered by BERT.¹⁸ BERT would also act as an advisory body to individual NRAs in order to promote the consistency of regulatory approaches throughout the EU. Also NRAs have to take “utmost account of BERT’s advice. In order to improve transparency the Commission and the NRAs make public “the manner in which its opinions have been taken into account”.¹⁹ As EECMA, BERT would not only advise the Commission or NRAs at their request but would provide an opinion on its own initiative. Differently from EECMA, BERT would be able to do so on all matters regarding electronic communications as set out in the proposed regulation.²⁰ But similar as with EECMA, BERT does not have the power to enforce decisions upon the Commission or NRAs.

(ii) Tasks

BERT would not take over ENISA’s tasks. Also with regard to spectrum management tasks currently performed by the Radio Spectrum Group (RSPG) and the Radio Spectrum Committee (RSC) would not be transferred to the body. Neither would BERT take individual

¹⁵ Presidency Conclusions, Telecommunications Council, 29-30 November. For the Dutch position, see ‘Aanvullend standpunt herziening EU-reguleringskader voor de telecomsector, 4 January 2008, Tweede Kamer, vergaderjaar 2007-2008, nr. 597

¹⁶ EP, A Guide from EECMA to BERT, Pilar del Castillo, MEP, 25 March 2008, p. 3

¹⁷ Amendment 17 to proposed Framework Directive

¹⁸ Amendment 47 to proposed Regulation

¹⁹ Amendment 47 to proposed Regulation

²⁰ Amendment 40 to proposed Regulation

decisions in relation to the ETNS. However, it could advise the Commission, “as appropriate”, in the selection of undertakings to be granted rights of use of radio frequencies and numbers.²¹ As is noted in the EP’s draft report of 23 April 2008, only the direct application of the rules set out in the framework or the addition of ‘non-essential elements’ should be subject of Comitology procedures. Any other harmonisation measures would have to be dealt with in a legislative proposal.²²

(iii) Structure/governance

BERT’s organization is significantly different from the proposed EECMA. The body would continue to be comprised of representatives from each of the member states’ NRAs, the same as in the current ERG. The Board of Regulators would therefore be the central organ; an Administrative Board would not be created. The Commission would not be represented in the Board but would have observer status, as is also the case in the ERG. This structure recognizes that “expertise concerning national telecom markets will still remain at the national level and as national conditions differ there should not be a “one size fits all” approach.”²³ The Board would take its decisions on the basis of a two-thirds majority and is supposed to carry out its tasks independently from external influences.²⁴ It adopts the work programme, after consulting the Commission. It also provides an opinion to the managing director before the adoption of the opinions, recommendations and decisions of the Authority.²⁵

The Authority’s managing director is appointed by the Board “on the basis of merit, skills and experience relevant for electronic communications networks and services. The candidate selected by the Board could be heard by the Parliament and the Commission. The director is responsible for setting the agenda of the Board, implementing the work programme and drafting an annual report. Both the chairperson of the Board and the managing director could be requested to address the Parliament on the annual report of the body.

Funding would not only come from the Community as in the proposed EECMA or from the NRAs as in the current ERG, but would both be received from NRAs and the Community. This would enable the EU institutions “to exercise a level of control and oversight over the budget, strengthening the accountability of BERT vis-à-vis the institutions”.²⁶ It would however require that member states ensure that their NRAs are

²¹ Amendment 37 to proposed Regulation

²² Amendment 6 to proposed Regulation Framework Directive

²³ EP, A Guide from EECMA to BERT, Pilar del Castillo, MEP, 25 March 2008, p. 3

²⁴ Amendment 85 to proposed Regulation

²⁵ Amendment 100 to proposed Regulation

²⁶ EP, A Guide from EECMA to BERT, Pilar del Castillo, MEP, 25 March 2008, p. 5

adequately funded in order to be able to properly fund BERT. BERT staff, like EECMA staff, is subject to Community staff rules. But BERT would probably have a limited number of staff.

5. Analysis: a comparison of EECMA and BERT

(i) Role/function: advice or co-regulation

As was discussed in section four, both the EECMA and BERT have an advisory role. Even though the exact nature of this role would have to become clear over time, it seems that the advisory role of BERT would be more substantial than that of EECMA. This is suggested by the proposed co-regulation procedure as well as by the proposal that the Commission would have to take utmost account of the opinions of BERT. This seems like a more substantial involvement than the purely advisory role of the EECMA.

However, it is important to realise that it is hard to determine at this stage how these proposals would turn out in practice. As a result of the greater involvement of the European Parliament in the case of BERT, the dependencies between the various actors would be larger than in the case of EECMA. The role of the EP could of course increase the accountability of the body. But it is not unlikely that it, instead, blurs responsibilities. Furthermore, and somewhat paradoxically, this might give BERT the possibility to follow its own path, independently of the Commission and the EP as well as of the member states. For with an increased number of actors involved, it would become easier for the body to play off actors, having different interests and needs, against each other.

(ii) Tasks: market regulation and spectrum management

A difference between EECMA and BERT is that BERT would not include the tasks of ENISA or executive tasks with regard to spectrum management. Moreover, EECMA would be allowed to take binding decisions with regard to ETNS. At first sight, this might suggest that in the case of the EECMA, more tasks and competences are transferred to the European level than in the case of BERT. However, the proposal for BERT does provide a possibility for BERT to give advice to the Commission in the area of spectrum management “as appropriate”, which makes it hard to conclude whether the actual tasks of the two organisations would really be that different.

In the case of BERT, a dispute resolution procedure would be applied with regard to remedies instead of the proposed Commission veto in the case of EECMA, where EECMA

would have to advise the Commission on this veto. This also seems to suggest that EECMA would imply a larger shift of powers to the European level than BERT. However, again, several factors are uncertain. First of all, it cannot be determined in advance in what way the Commission would actually make use of a possible veto on remedies. It matters whether the veto is used substantially or only as a threat or 'last resort'. Second, if the Commission would consider to make use of its veto, the question remains whether the advice of EECMA would have a high impact on the Commission's actions. Finally, a lot of uncertainty remains with regard to the nature and effects of the dispute resolution procedure.

(iii) Structure: consensus building versus hierarchical intervention

An important difference between the two proposals is the role of the Board of Regulators. Whereas this Board plays a key role in the BERT proposal, therewith acknowledging the expertise of NRAs on specific local market conditions, the Board in the EECMA proposal could merely agree with the opinions of the Administrative Board. The composition of the EECMA Administrative Board, in combination with the proposal for a Commission veto on remedies, suggests that EECMA would result in a shift of powers in favour of the Commission. Moreover, although the Commission claims that one of the objectives of the creation of the agency is its independence, the proposed structure with Commission and Council representatives would in effect suggest a very political body.

Another difference between EECMA and BERT concerns the funding of the two entities. Since EECMA would be entirely funded by the Community, this might strongly reduce member state control over the EECMA and increase the power of the EU institutions. By combining Community funding with funding by NRAs, member states would probably have more control in the case of BERT. It should be noted that, in comparison to the current situation in the ERG, both BERT as well as EECMA could constitute an improvement in terms of transparency and accountability. Since they are (partially) funded by Community funding, they are also accountable vis-à-vis the European Parliament (but see under i).

However, there is another side to these arguments as well. As a result of its composition, the Administrative Board of EECMA would arguably be more independent than BERT's Board of Regulators. Not only have some NRAs in the past been slow and ineffective in implementing EU rules, many NRAs are still not completely independent from government ministries, and governments have meddled in regulatory affairs. As a consequence, it is possible that EECMA would be more effective than BERT in making decisions, and less likely to reflect the lowest common denominator.

Moreover, in the case of BERT the Commission has less means of intervening hierarchically, since it does not have a veto on remedies. Even though BERT's Board of

Regulators would formally take its decisions on the basis of a two-thirds majority, this could still mean that the Board in practice would take decisions by consensus. This would reduce the effectiveness of BERT and could, in turn, undermine the position of the NRAs vis-à-vis the Commission. The Commission currently criticizes the lack of effectiveness of the ERG. One might argue that an entity that is more effective and decisive in its actions than the current ERG is not only in the interest of the member states merely because of its effectiveness, but also because it deprives the Commission of an argument or reason to propose the establishment of an entity that is more supranational in its nature.

6. Preliminary conclusions: balancing power through institutional design?

Whereas the likelihood of the creation of an European Electronic Communications Market Authority as proposed by the Commission in November 2007 seems to have decreased over the last few months, it appears to be inevitable that ‘some’ European telecom entity, be it an independent EU agency or a more or less formalized network of national regulatory authorities, will be set up in the foreseeable future.

This paper sought to demonstrate that neither a high nor a low level of institutionalization automatically points to a decrease or an increase in the power of the member states or the EU institutions, notably the Commission. The creation of an informal network of NRAs in the area of telecoms, the ERG, has definitely spurred EU level regulation, but not in the way we would have expected on the basis of Eberlein and Grande. Moreover, the establishment of a formal EU agency such as the proposed EECMA or a less formal BERT might very well be in the interest of the member states, if at least their NRAs are in some way involved in the agency’s work. A shift in the balance of powers between the member states and the Commission, then, at least formally, is dependent on the institutional design of a future European telecom entity. What conditions affect whether the member states or the Commission can wield more influence and exert more control on EU regulation?

We have distinguished the following conditions. First, the role and function of a regulatory institution: to what extent does a body have decision-making powers or merely have an advisory role, and, if it has an advisory role, to what extent can it provide advice on its own initiative and to what extent is the advice taken into account by the Commission? Both the EECMA and BERT have an advisory function: they are supposed to give advice either on request or on their own initiative. In the case of BERT, the Commission has to take “utmost account” of the body’s advice. Only practice can however provide exact answers to the above questions. The role of an entity will have to become clear over time, as well as the relationship between the entity and the Commission.

Second, its tasks and competences: to what extent does the body have tasks that were already delegated to the supranational level, such as market regulation, or that are still performed at the national or intergovernmental level, such as spectrum management? The proposed EECMA would cover both market regulation and spectrum management, thus signifying a transfer of competences to the supranational level, whereas BERT would only be active in the field of market regulation. The differences between EECMA and BERT are not that clear-cut as BERT, although it would not have executive tasks, would still have the possibility to advise the Commission in the field of spectrum management. So, again, practice will have to show to what extent the proposed tasks reflect a shift in the power balance.

Third, its structure and governance: to what extent are NRAs involved in providing advice, for instance, through their membership of a more or less formal network, and to what extent are member states, for instance, part of the body's decision-making processes? Whereas EECMA's design seems to be favouring the position of the Commission as it hardly allows for NRAs to be involved, BERT reserves a much greater influence of NRAs in the agency's operations, and thus would mean less of an increase in supranational power.

In sum, the proposed EECMA would probably not lead to a balancing of power; it would seem to cause an even further imbalance of power between the member states and the Commission. Its added value over existing national and European institutional arrangements can therefore be questioned. But a high level of institutionalization does not automatically lead to, as many member states fear, increased power for the Commission. So even if the creation of BERT appears to lead to further centralization at the EU level, by given the EP a greater role, an EU entity may have added value in that it can coordinate networks in which member states' experts play an important role.

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