

# Improving Implementation by National Regulatory Authorities



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## Abstract

National regulatory authorities (NRAs) in the liberalised utility markets have a significant role in policy making and policy enforcement. Much of the debate about them has revolved around their independence from Member State governments, yet independence alone is not sufficient to ensure effective regulation across the internal market. Poor co-operation procedures among NRAs, lack of regulatory impact assessment procedures and weak decision-making procedures between an NRA and the Commission may seriously hamper the functioning of the internal market for telecom and electricity. By bringing the NRAs together and establishing a veto rule, the Commission is on the right track concerning the telecom sector. Yet further improvements can be made by setting general EU regulatory principles in close relation with common transparency obligations in NRA decision-making.

## Introduction

Following the adoption of several EU directives that liberalised important sectors such as telecommunications, postal services, transport and electricity, regulation by national regulatory authorities (NRAs) is 'rapidly becoming the most important mode of regulation, indeed the leading edge of public policy-making in Europe'.<sup>1</sup>

This article will discuss whether the EU regulatory governance structure of the telecommunications and electricity sector provides for sufficient instruments to assure effective implementation of EU policy.

Independence from governmental interference has been regarded as the main concern and has been described and analysed extensively.<sup>2</sup> Yet independence is not sufficient to ensure effective regulation in the internal market. The EU rules should not only require that NRAs are independent but should also facilitate co-operation among them and insist on more transparency of national regulatory decision-making.

## Liberalisation

Since the EU has been granted the responsibility to liberalise the movement of capital, goods, services and workers across Member States, its main policy objective has been to improve the functioning of the internal market and to boost competition. It considers monopolies as harming for the internal market and ensures for that reason that EU competition rules apply, even to public undertakings. Frequently, these monopolies have been formed in the network industries like telecommunications, transport and energy.

In order to be able to apply the competition rules in these sectors, the Commission makes a distinction between network infrastructure and services provided over that infrastructure. It considers it possible and desirable to create competitive conditions in respect to services and has thus initiated legislation to liberalise, among others, the telecom and electricity sector. The Commission has based its liberalisation directives on this concept of separating the network infrastructure from the commercial activities. Since Member State governments often have a stake in the commercial activities of these network companies, the directives require Member States to separate their regulatory function from their ownership function in order to avoid conflicts of interests. If governments want to hold on to their stake in these companies – and since almost all governments do – they have to establish an independent regulatory authority to regulate the network.

## The directives require Member States to separate their regulatory function from their ownership function.

## Implementation

Although it may be beneficial for the EU Member States to agree on liberalisation of their domestic utility markets, each individual Member State has an incentive to interpret the rules in such a way that is advantageous for its own market structure.<sup>3</sup> This is because adjustment to a different – albeit common – regulatory structure involves costs. Therefore, a Member State has an incentive to structure and monitor its NRA so as to ensure that its regulations serve its narrow national interest. This will raise costs for those companies wishing

to deliver services in more than one Member State because they have to adapt to different regulatory structures. For this reason, the debate surrounding the creation of NRAs revolved around institutional independence and the monitoring of these NRAs.

Since the Commission acts as Guardian of the Treaty, it is its task to monitor transposition of EU law and supervise the functioning of the internal market. Yet Member States have 'institutional autonomy' regarding the designing and monitoring of organisations such as NRAs, that have been delegated the task to implement the liberalisation policy. This makes the EU regulatory governance structure rather complex and can create problems for the Commission to assure effective implementation of the policy. As Yatanagas<sup>4</sup>

notes; "...there is an institutional vacuum between EU legislators and the implementation of European laws by the national authorities at the Member State level. The absence of adequate features of conflict resolution and an unequal expertise and independence of the national regulator further undermines the efficiency of the system." Different national institutional settings and monitoring of NRAs, lack of cross-country regulatory impact assessment procedures and weak decision-making procedure between NRA and Commission may impede effective application of EU law or may even lead to possible 'regulatory divergence'. Somehow the Commission has to advocate NRA independence and create appropriate regulatory decision-making procedures between NRAs, Member States and itself and among all sectoral NRAs in the EU to avoid any conflict while respecting the individual Member States' institutional autonomy.

#### **Telecommunications and electricity sector**

Both telecom and electricity industries are constructed around extensive and expensive infrastructure. Telecommunication requires (often) wires and cables to transport information. Electricity requires generators and power grids for transport. This infrastructure is necessary to deliver services to end-users but gives the owner of it a strategic asset to control the whole industry, which represents its monopoly characteristic. Despite these similarities, the networks differ in important technicalities. First, the electricity network is normally divided into three systems: generation, transport and distribution, all requiring expensive grids. Furthermore, economically feasible alternatives for cable and wire in the telecom network exist, like mobile telephony and wireless internet, to an extent that does not exist in the electricity network. Moreover, electricity transportation is sensitive to distance. Distance increases electricity losses. Finally, electricity operators must invest for the supply at peak capacity while operating only parts of

this generation capacity under normal demand. These characteristics would suggest that competition in the telecom sector will be more easily achieved than in the electricity sector. Nonetheless, both industries have become the subject of EU liberalisation.

The Single European Act gave the Commission the power to liberalise the Member States' telecom market. At that time, the provisions for telecommunications were entrusted to national telecom operators in almost all EU Member States, often organised as a ministerial unit or as a publicly owned company. They incorporated

the roles of policy-maker, service provider and market regulator at the same time. External and internal pressures led the Commission to initiate legislation to restructure the Member States' telecom

markets however. It accepted in first instance the exclusive rights for the telecom operators, giving them a dominant position in their domestic market, except in the case of cross-border trade. Nonetheless, they had to be subject to the condition that a regulator independent from all public and private undertakings would monitor them. Subsequent legislation in the early '90s removed the exclusive and special rights, granted more responsibilities to the NRAs and put certain obligations on telecom operators. By 1 January 1998, the national telecom markets in the EU have been fully liberalised. Based on a review of the telecom legislation, the EU has adopted a regulatory framework package incorporating all directives in 2002. The package's Framework Directive focuses solely on NRAs. This directive guarantees their independence, lays down a large set of tasks and regulates the relation between the NRA and the Commission.

The electricity industry was deliberately not mentioned in the Single European Act however. Nevertheless, the Commission was keen to liberalise this market too. Its overall plan was to gradually abolish or change the existing monopolies for the import and export of electricity and gas and then move on to production, transmission and distribution, within an EU-wide regulatory framework. The first electricity (and gas) directive set up a regime with multiple options for the Member States to liberalise and regulate their domestic markets. Yet experience demonstrated that this situation lead to distortion of competition in the internal market. The new electricity directive as adopted in June 2003 nullifies to a large extent the deficiencies of the previous directives. It abolishes the choice for network access, lays down the principle of reciprocity concerning market opening and obliges Member States to legally separate the transmission and distribution network operators from other parts of business. In addition, all Member States have to establish a regulatory authority with a minimum set of regulatory powers.

### **Somehow the Commission has to advocate NRA independence and create appropriate regulatory decision-making procedures.**

*Table 1: National Telecommunications and Electricity Regulatory Authorities*

<i>Member State</i>	<i>Telecom NRA</i>	<i>Electricity NRA</i>
<i>Austria</i>	<i>Telekom-Control-Kommission (TCK)</i>	<i>Energie-Control GmbH (E-Control)</i>
<i>Belgium</i>	<i>Institut Belge des Services Postaux et de Télécommunications (BIPT)</i>	<i>Commission de Régulation de l'Electricité et du Gaz (CREG)</i>
<i>Denmark (NITA)</i>	<i>National IT and Telecom Agency (DERA)</i>	<i>Danish Energy Regulatory Authority</i>
<i>Finland</i>	<i>Finish Communications Regulatory Authority (FIORCA)</i>	<i>Energy Market Authority (EMV)</i>
<i>France</i>	<i>Autorité de Régulation de Télécommunications</i>	<i>Commission de Régulation de l'Energie (CRE)</i>
<i>Germany</i>	<i>Regulierungsbehoerde für Telekommunikation und Post (Reg TP)</i>	–
<i>Greece</i>	<i>National Telecommunications and Post Commission (EETT)</i>	<i>Regulatory Authority of Energy (RAE)</i>
<i>Ireland</i>	<i>Commission for Communications Regulation (ComReg)</i>	<i>Commission for Energy Regulation (CER)</i>
<i>Italy</i>	<i>Autorità per le Garanzie nelle Comunicazioni (AGCOM)</i>	<i>Autorità per l'Energia Elettrica e il Gas (AEEG)</i>
<i>Luxembourg</i>	<i>Institut Luxembourgeois de Régulation (ILR)</i>	
<i>The Netherlands</i>	<i>Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA)</i>	<i>Dienst uitvoering en toezicht Energie (DTe)</i>
<i>Portugal</i>	<i>Autoridade Nacional de Comunicações (ANACOM)</i>	<i>Entidade Reguladora dos Serviços Energéticos (ERSE)</i>
<i>Spain</i>	<i>Comisión del Mercado de las Telecomunicaciones (CMT)</i>	<i>Comisión Nacional de Energía (CNE)</i>
<i>Sweden</i>	<i>National Post and Telecom Agency (PTS)</i>	<i>Swedish National Energy Agency (STEM)</i>
<i>United Kingdom</i>	<i>Office of Telecommunications (OFTEL) Markets (OFGEM)</i>	<i>Office of Gas and Electricity</i>

**NRA independence and monitoring**

It is vital for utility markets that regulation comes from an organisation independent from all interested parties. Since most Member State governments still have a share in their incumbent utility company, EU law does not consider them as independent. Recent EU telecom legislation therefore requires them to establish a legally and functional independent regulatory organisation and delegate certain powers to it. The telecom framework directive even states that those Member States that retain ownership or control over a telecom company have to ensure effective separation of its regulatory function from its ownership or control function.

The majority of the EU Member States had already opted to establish a regulatory authority in the telecom sector before the Framework Directive comes into force. These national regulatory authorities are organisationally separate from the central government and operate independently from the ministry responsible for their

sectoral policy. Some regulators in the electricity resemble more ministerial agencies though, realising the requirements in the present legislation but lacking the decision-making discretion telecom NRAs have. The new electricity directive obliges them to establish regulatory authorities similar to those in the telecom sector. Table 1 shows the NRAs by Member State in both sectors.

Luxembourg has a single institution endowed with regulatory powers for the telecommunications, post, electricity and gas markets. Germany has not established a regulatory authority for electricity. Its approach is based on general instead of sector specific regulations. Issues like prices and access to the electricity network can be brought before the German Federal Cartel Office. The system is supplemented by voluntary agreements among electricity companies. North-Ireland has its own electricity NRA but is not incorporated in the list.

Analysis from national legislation shows that all

telecom NRAs have sufficient statutory independence either provided by specific or general laws, except perhaps the Belgian BIPT.<sup>5</sup> Regarding the monitoring instruments, they are rather similar across the NRAs. The authorities are almost all financed by fees paid by market companies they regulate, although some are still partly or fully financed by the state budget. The head or college members of the NRAs are most of the time appointed by the national government for a period longer than four years and sometimes even indefinite. Nonetheless, the German Reg TP, for example, has to cooperate with a *Beirat* consisting of MPs appointed by the government. Reg TP is obliged to respond to proposals of the *Beirat*. And in Italy, the procedure to elect AGCOM commission members is rather politicised with each House of Parliament electing four commissioners.

#### **Co-operation among national regulatory authorities**

Sufficient independence says little about the other problems mentioned above by Yatanagas. Of course, each NRA focuses on regulating its domestic market yet they also have to support the development of the internal market. In order to do so they need to know how other NRAs regulate in order to be able to take account of each other's decisions.

The Framework Directive is quite unambiguous about it. In cases concerning market definition, market analysis procedure and regulations affecting trade between Member States, a NRA has to inform and state its arguments about its draft regulation to the Commission and the other NRAs so they can make comments about the draft. However, national telecom legislation mentions only in a few cases co-operation with foreign NRAs. Consequently, the Commission has sought to institutionalise this co-operation obligation into a formal network of telecom NRAs. The NRAs already established the informal Independent Regulators Group (IRG), including those of the EFTA countries, in 1997 to coordinate and to develop an integrated information system. The voluntary activities of the IRG have now been formalised with the Commission decision to establish the European Regulators Group (ERG). The Group will act as an interface between the NRAs and the Commission. Its main tasks are to give advice to the Commission and to organise the consultation procedure regarding the above mentioned topics. The Commission is represented at appropriate levels and will possibly give secretarial support. What is exceptional about the ERG is that it is a European group of national representatives who do not represent the Member State, but the national regulatory authorities instead.

Similar actions have occurred among the electricity NRAs. They have established the informal Council for European Energy Regulators (CEER) in 2000. Its aim is

also to exchange information, experience, and views and to establish common policies among its members towards the electricity and gas market. Representatives of the Commission may attend the CEER's meeting.

An additional advantage of these EU network organisations, other than co-operation, is that they provide peer group review. They evaluate each other's functioning by means of best practice reports. The IRG/ERG has conducted several studies in the form of a 'principles of implementation and best practices'. The CEER has carried out similar studies. These networks can improve the functioning of the internal market for electricity and telecom.

#### **European Commission**

In order to prevent possible deadlock between an NRA and the Commission, or even regulatory divergence, some form of a hierarchical relation is considered necessary. Although it is legally possible for the Commission to centralise regulatory decision-making in the telecom sector by establishing a European Regulatory Authority for telecommunications, it has abstained from doing so. A single European authority is politically too sensitive and bureaucratically too cumbersome.<sup>6</sup> It would simply lose the current flexibility to include national market circumstances in its regulations. Nonetheless, some active involvement of the Commission in national regulatory decision-making is desired.

Early telecom directives simply stated that the NRAs should co-operate with the Commission. The Framework Directive gives more comprehensive provisions to settle any conflicts between a NRA and the Commission though.

### **Effective implementation of the EU regulatory policy can still be improved in both sectors.**

If the latter considers that an NRA draft regulation concerning market definition, market analysis procedure or trade would create a barrier to the internal market or if it has doubts about its compatibility with Community policy objectives, regulatory principles or law, then it can suspend the draft regulation for a period of two months. Subsequently the Commission may take a decision in accordance with the necessary committee procedure requiring the NRA to withdraw its draft regulation. In other words, the Commission can veto a NRA when it regards a draft measure incompatible with internal market rules. And if necessary, it can choose to open its own investigation under the Treaty's competition rules.

#### **Transparency**

Another instrument the Commission can use is enhancement of transparency in regulatory decision-making. Transparency obligations will force a NRA to make its arguments public. Undue reasoning or even government influence will be easier to detect. Moreover, transparency is already a deterrent enough to prevent governments to try to sway outcomes in their own

benefit. Consequently, more transparency reduces the uncertainty for market companies. The Commission has followed this course from the beginning of the liberalisation processes. Each directive contained provisions that the NRA has to proceed in decision-making process in an 'objective, non-discriminatory and transparent' manner. The Framework Directive states that the NRAs have to establish a consultation procedure to give interested parties the opportunity to comment and to publish regulations and outcomes of dispute resolutions. The electricity directive is less outspoken about transparency procedures. Both directives are silent about how the NRAs organise their regulatory decision-making procedure though.

### Conclusions and policy implications

The EU is on the right track as regards the telecom sector with the Framework Directive. It sets out a clear obligation for the Member States to establish an organisationally independent regulatory authority, it institutionalises NRA co-operation and it gives the Commission the possibility to veto a NRA decisions. The Electricity Directives is not that far yet partly due to the fact that national ministries still play the most significant role in regulating and the later start of the liberalisation process.

Yet effective implementation of the EU regulatory policy can still be improved in both sectors. Analogous to the American Regulatory Planning and Review Order, the Commission should set general regulatory principles. Although the Framework Directive outlines regulatory principles, these principles concentrate on sectoral regulations instead on general regulations. Such general regulatory principles should include determination of the market failure that the regulator wants to address, regulatory impact assessments and regulatory planning.

These regulatory principles are in the American regulatory governance system closely linked to the Administrative Procedure Act. This Act lays down clear transparency obligations concerning decision-making,

publication and consultation procedures for all federal agencies. Similar European legislation would help to provide consistent transparent regulatory decision-making of NRAs in all Member States and provide companies with more certainty. Strong NRA independence, the establishment of network arrangements and enhanced transparency will diminish the role of the Member States and strengthen the direct link between Commission and NRA in the EU regulatory governance structure. Ultimately, new relations between national regulatory authorities, Member State governments and European Commission will emerge.

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### NOTES

\* Arjan Geveke was a trainee at EIPA in 2002-3. In addition, he undertook research for the completion of his Masters thesis. This article is an excerpt from that thesis.

<sup>1</sup> Majone, G. (ed.) (1996), *Regulating Europe*, London: Routledge, p. 47.

<sup>2</sup> See Gilardi, F. (2002), 'Policy Credibility and Delegation to Independent Regulatory Agencies: A Comparative Empirical Analysis', *Journal of European Public Policy* 9, pp. 873-893, Organization for Economic Cooperation and Development (2000), *Telecommunications Regulations: Institutional Structures and Responsibilities*, Paris: OECD, or International Energy Agency & Organization for Economic Cooperation and Development (2001), *Regulatory Institutions in Liberalised Electricity Markets*, Paris: IEA Publications.

<sup>3</sup> See Ph. Nicolaides et al. (2003), *Improving Policy Implementation in an Enlarged European Union*, Maastricht: EIPA.

<sup>4</sup> Yatanagas, X.A. (2001), *Delegation of Regulatory Authority in the European Union*, Jean Monnet Working Paper 3/01, p. 35.

<sup>5</sup> See footnote 2.

<sup>6</sup> Eurostrategies and Cullen International (1999), *Final Report on the Possible Added Value of a European Regulatory Authority for Telecommunications*, Brussels: Eurostrategies/Cullen International. □