

REVIEW OF THE EU'S ELECTRONIC COMMUNICATIONS REGULATORY
FRAMEWORK: THE SIGNIFICANCE OF A POSSIBLE EUROPEAN ELECTRONIC
COMMUNICATIONS MARKETS AUTHORITY

Seamus Simpson
Manchester Metropolitan University, UK

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Contact:

Seamus Simpson,
Department of Information and Communications,
Manchester Metropolitan University,
Geoffrey Manton Building,
Rosamond St. West (off Oxford Rd.),
Manchester, M13 6LL.
UK.

Phone: ++44 (0) 1612473013
Email: s.simpson@mmu.ac.uk

INTRODUCTION

In 1987, the European Commission in a landmark Green Paper declared its aspiration to create the Single European Market (SEM) in telecommunications. Given the historic path of development of telecommunications across the then 12 members of the EU, this was a radical statement of intent. Until the early 1980s, the provision of telecommunications services was almost exclusively state-centric, in the hands of a series of monopoly state-owned Postal, Telegraph and Telephone (PTT) administrations. However, by the late 1980s, there were signs of disruptive change to what was one of the most stable of the utility sectors. First in the UK, and, thereafter, across a number of the leading economic members of the EU, telecommunications came to be considered a sector in which market competition could be developed in new service areas and internationalisation countenanced, to some extent at least. For the EU, a policy 'window of opportunity' thus materialised which the European Commission, interested in expanding its *acquis* where feasible, proved keen to exploit (Schneider, Dang-Nguyen and Werle 1994). Thus began a by now well-documented policy journey in pursuit of the SEM in telecommunications.

Twenty years on, in the Commission's current review of the state of the telecommunications sector, it is clear that whilst a transformation has occurred in the governance of telecommunications across a by now 27 member EU, the completion of the SEM is still a policy goal. At the national level, monopoly state ownership has been replaced by comprehensive and detailed independent regulation of a complex, differentiated series of telecommunications markets (Thatcher 1999). At the EU level, a plethora of legislation – the Electronic Communications Regulatory Framework (ECRF) in its current incarnation – sets the broad conditions for competitive functioning of these telecommunications markets across Europe (Humphreys and Simpson 2005). However, the European Commission, charged with the task of monitoring the development of the ECRF, has articulated in its review the existence and stubborn persistence of a number of core impediments to competition. Its proposed solution is the creation of a European Electronic Communications Markets Authority (EECMA), the background to and nature and implications of which are the subject of this paper.

The paper argues that EECMA, if agreed to by EU Member States, would amount to a new European regulatory body in telecommunications with supranational dimensions, having already been likened by the current European Commissioner for Information Society and Media to a "European FCC" (Reding 2007). EECMA would be made up of regulatory experts from across Europe, would have an as yet unspecified-in-detail relationship with the European Commission, and would be directly answerable to the European Parliament. The paper argues that such a development would mark a qualitatively significant departure from the kind of telecommunications governance which has developed to date at EU level. Though the idea of creating a European regulatory authority for telecommunications has been floated in the past by the Commission (Bartle 1999), its creation has been quite firmly resisted by Member States. Instead, as witnessed in the series of regulatory committees created by the ECRF, not least the European Regulators Group (ERG), EU telecommunications governance is much more 'intergovernmental' than 'supranational' in nature, that is, decision making power is mostly in the hands of national level interests.

Early signs suggest that there is considerable opposition to EECMA from regulatory quarters at the national level and the ERG itself. It is the latter's status - which would be

to a considerable extent 'supra-nationalised' into EECMA – which would alter most radically with EECMA's creation. The paper contends that a move in this direction would strengthen significantly the European 'regulatory' state (Majone 1996) in telecommunications along supranational lines, a major qualitative shift of approach to that developed thus far in EU telecommunications policy. However, should EECMA be rejected by EU Member States - perhaps the most plausible outcome of the current debate - then the ERG's and the European Commission's regulatory powers are likely to be increased in telecommunications nonetheless. This outcome would constitute a much more path-dependent development of EU telecommunications policy and, whilst possibly considered sub-optimal by the Commission, would nevertheless be to its institutional advantage in pursuing the SEM in telecommunications.

The paper proceeds as follows. The next section provides a brief resume of the core politico-institutional features of the development of EU telecommunications policy to the point of the current review, emphasising the predominantly (though not exclusively) 'intergovernmental' nature of the system and highlighting the key junctures at which the possible creation of a European regulatory authority for telecommunications emerged to prominence. The third section of the paper focuses on inter-institutional politics that developed between the European Commission and the ERG in the lead-up to the final proposal of EECMA in November 2007. From this, the proposed core structural and functional characteristics of EECMA are explored. The final section of the paper draws some conclusions on the significance of the proposal of EECMA and provides some tentative predictions on the likely outcome of the current debate around its creation or otherwise.

THE POLITICO-INSTITUTIONAL CHARACTER OF EU TELECOMMUNICATIONS POLICY

Any decision by Member States to create and develop a new area of policy at the EU level is always underpinned by consideration of the extent to which loss of sovereignty can be sanctioned - the current debate on EECMA is conditioned by this as much as anything else. The then novel telecommunications policy context of the 1980s and early 1990s in Europe made this a particularly significant consideration then too. At the national level, a number of states, most notably the UK as a forerunner, had begun to cede direct control over telecommunications to new independent public national regulatory authorities (NRAs) (Thatcher 2002) whose role it was to manage the evolution of the sector along competitive lines. The emergence of this US-style approach to telecommunications vested great responsibility in, and thus give great power to, the regulatory authority to create and police the set of detailed rules required to deliver even a minimum level of competition. It also unleashed a growing number of large, increasingly commercially oriented, telecommunications service providers which tended to be the main subject of regulation given their status as incumbents in well established and newly emerging markets. Though in the first instance tentative in their approach, these companies soon became international in outlook and corporate ambition, whilst still keen to protect home commercial territory as much as possible. New entrant telecommunications service providers – including ambitious overseas companies from the US – most accustomed to neither the traditional lack of competition in telecommunications nor its national commercial 'inwardness' – added to the expectation

that telecommunications should develop along international lines (Curwen and Whalley 2004). On the demand side, the intensification of the most recent phase of economic globalisation through the 1980s prompted multinational enterprise telecommunications customers to exert pressure for telecommunications services – both traditional basic and newer value added – to be made available to them to facilitate their international corporate function.

All these important changes combined in the EU to suggest to the European Commission that the coordination of telecommunications market regulation might be at the very least explored as a means of facilitating the future development of the sector (European Commission 1984). Given the nature of the EU, with 10 and, as the 1980s proceeded, 12 different telecommunications sectors, the Commission quickly came to the opinion that a legislative package would be required to frame the internationalisation of telecommunications governance to the EU level. However, it was also clear that any movement towards the Europeanisation of telecommunications through the EU route was likely to be conducted tentatively. The European Commission's 1987 Green Paper on creating the SEM in telecommunications (European Commission 1987), whilst bold in its overall goal, was more modest in the proposed measures to achieve it. The paper was deeply equivocal in nature in terms of its reflections on telecommunications liberalisation. On the one hand, it argued for EU-wide competition in the markets for telecommunications terminal equipment and value-added services. It also called for the separation of what were then termed operational and regulatory functions, the implication being that the PTT administration, or evolving variant thereof, could no longer determine the conditions for a sector in which it was, or would become, a market player. On the other hand, the Green Paper declared the right of Member States, where desired, to maintain on a monopoly basis so-called reserved services, principally voice telephony.

The tentativeness of the European Commission reflects the classic position of political fragility which any EU institution keen to effect Europeanisation in a policy area faces (Humphreys and Simpson 1996). It is also indicative of the power differential existent between the national and the European level. The especially deep national centricity of telecommunications added resonance to the situation. Yet within merely seven years of the Green Paper's publication, EU Member States had agreed to liberalise all their telecommunications markets and infrastructures (European Council of Ministers 1993; European Council of Ministers 1994). What factors can explain such a swift and remarkable transition and what were its operational consequences for the governance of telecommunications in Europe? Most importantly, certain of the most powerful Member States of the EU – the UK, Germany and then France - became convinced that there were more opportunities than threats from the liberalisation of telecommunications domestically and internationally. Such views on the neo-liberal agenda in telecommunications were by no means identical (Hulsink 1999). Differences existed regarding the extent to which liberalisation should occur, as well as its timing (Humphreys and Simpson 2005). However, by the end of 1994, even the French, who were initially deeply reticent about liberalisation of voice telephony, became convinced that their domestic sector and its companies stood to benefit from telecommunications market opening internationally. The EU policy arena provided an important and relatively secure and controllable context for this to take place initially. The EU also allowed Member States like France, which still valued the public service traditions of

telecommunications even in an increasingly competitive environment (Humphreys 1990), to ensure that legislative provision was secured at EU level to protect universal service in telecommunications. For the less enthusiastic of the EU liberalisers, the position was somewhat different. The smaller EU states, as well as Spain and Italy, were initially reticent about liberalisation. However, whilst for some there seemed little or no realistic chance of their domestic telecommunications service providers striking out successfully in international telecommunications markets, they became aware of the perceived material benefits of liberalisation from the early experiences of the forerunner in change, the UK. Here, rapidly modernising and competitive telecommunications services markets appeared to be instrumental in attracting large volumes of inward international foreign direct investment and in ensuring lower prices and improving quality in the offerings made available to customers, corporate business and private individual. The protections that were to be afforded too to universal service served to assuage further any concerns about deterioration in the public service underpinnings of telecommunications. However, a concern still remained about possible demise of the incumbent PTT in a new competitive environment, an issue which to some extent reverberates through the current debate on the creation of EECMA.

The EU institutional level, through the activities of the European Commission principally, played a major role in the relatively short journey to agreement on full liberalisation in telecommunications. A debate has arisen among communication policy scholars and political scientists on the roles which 'supranational' forces played in the move towards agreement among Member States to liberalise comprehensively their telecommunications sectors. Some emphasise the entrepreneurial role played by the European Commission in driving the EU telecommunications policy agenda forward (Sandholtz 1998). Others stress the essential 'intergovernmentalism' of the process, Thatcher (2001) arguing that, whilst a significant player, the European Commission acted much more as a partner of EU Member States. There is no doubt that the Commission was prepared to 'take on' Member States, as evidenced in its use of the article 86 procedure of the EU Treaty to force through liberalisation directives in terminal equipment (European Commission 1988) and services (European Commission 1990). This process effectively by-passed the Council of Ministers and was deemed universally by EU Member States to be undemocratic. However, the Commission was aware that most Member States – not least the most powerful in politico-economic terms – were in favour of the substance of the directives. The legal challenges presented to the Commission's action were rejected by the European Court of Justice (European Court of Justice 1991; 1992) thus raising the possibility of significant power to force through further telecommunications liberalisation being available to the Commission to exercise.

However, in practice, it has proven more anxious to pursue compromise and consensus among EU Member States. Since 1990, liberalisation directives have only been passed using article 86 as a matter of procedure, as a consequence of the legal cases of the late 1980s. Equally, the different developmental phases of EU telecommunications policy, which can be viewed as a successive series of policy equilibria (Simpson 2008), have been prefaced by major consultation exercises, these having taking place in 1992, 1999, and 2006 respectively. Such exercises have prefaced a major reorganisation and development of EU telecommunications policy pursued through the legislative route. In July 1993 Member States agreed to liberalise all voice telephonic services across the EU

by 1998 (European Council of Ministers 1993), proceeded a year later by similar agreement regarding telecommunications infrastructures (European Council of Ministers 1994). This required a battery of subsequent legislation, both liberalising and harmonising in scope, including legislation setting minimum standards for universal service (Natalicchi 2001). In 2003, as a result of the review launched in 1999, the EU undertook a legislative rationalisation telecommunications regulation where the by then expansive number of directives framing the functioning of the sector was reduced from 20 to 7 in a newly named Electronic Communications Regulatory Framework (ECRF). The current ECRF review aims to undertake further significant rationalisation, the aim being to remove as much sector specific ex-ante regulation from the system as possible, instead leaving the governance of most telecommunications markets to the general EU competition law framework, an area in which the EU's powers are particularly well-developed.

Thus, since the late 1980s, it is clear that a well established, developing system of legislation has couched the evolution of the telecommunications sector across the expanding EU. In this respect, EU telecommunications policy can be described as 'supranational' in nature. However, the vast majority of the legislative measures agreed by Member States are in the form of directives which give considerable scope to Member States to interpret them within the relevant national legal tradition. Much more significantly, an examination of the implementation and day to day functioning of the regulatory framework yields important insights into its character. The more well established and detailed EU telecommunications policy has become, the more elaborate is the regulatory apparatus and more intensive the regulatory workload across the EU to deliver its various parameters, despite recent moves to legislative rationalisation. Here, it is possible to argue that telecommunications provides a clear example of the creation and functioning of a 'regulatory' state in Europe (Majone, 1996; Seidman and Gilmour 1986). A complex two-level, pluri-lateral governance network (Humphreys and Simpson, 2008) has developed across the EU in which a variety of public regulatory actors interact in the functioning of the sector. This network, operating at national and EU level, is predominantly, though not exclusively, intergovernmental in nature, even regarding policy deliberation which occurs in European level contexts. Therein lies the key to understanding the proposal by the European Commission, whose motivations are inherently European, of EECMA.

In practice, the substance of the legislation comprising the ECRF is implemented on a 'day to day' basis by a series of National Regulatory Authorities (NRAs). At the EU level, the European Commission has played an important role in policing the implementation of the telecommunications regulatory framework, though its scope for action is de-limited by the institutional resources at its disposal. Since the agreement to liberalise fully telecommunications across the EU, the Commission has taken considerable pains determine the degree to which Member States have fulfilled their obligations under the framework. It has required regular reports from NRAs on the competitive conditions in their telecommunications markets and has published regular reviews of the telecommunications sector, in which concerns about various aspects of the development of competition in the markets of its Member States have been voiced (see Humphreys and Simpson 2005, Chapters 5 and 6). An important feature of the EU telecommunications regulatory framework has been the existence of regulatory

committees of experts at the EU level. One of the earliest of these, the Open Network Provision committee was particularly influential in developing agreed positions on the regulatory functioning and subsequent development of telecommunications at EU level. As the telecommunications regulatory framework has become more substantive, these committees have increased in importance.

A major development was the creation of the European Regulators Group as a consequence of the 1999 review of electronic communications. This independent (i.e. not established as part of the formal EU decision-making framework), advisory committee contains representatives from the EU's telecommunications NRAs and is, importantly, resourced - and Chaired in a non-voting capacity - by the Commission. The ERG's *modus operandi* is essentially 'intergovernmental' in nature, though the presence of the Commission has afforded the latter a kind of supervisory perspective which has proved fundamentally important in influencing the proposal to create EECMA. In essence, the Commission has, by its own admission, aimed towards the creation of some kind of regulatory partnership with Member States' NRAs. By contrast, the relationship between the ERG and the European Commission has been recognised as difficult in the first instance, though improving (Reding, 2007) reflecting the tension that has existed between the national and the EU level for a considerable part of the history of EU telecommunications policy.

Thus, EU Member States and the European Commission though having resolved to pursue the common goal of liberalisation in telecommunications have often been uneasy co-participants in the enterprise. The Commission has been motivated by the functional goal of creating and administering the EU telecommunications regulatory framework, as well as cementing politically its institutional role in the European and global telecommunications policy landscape. National Member States - and to a lesser extent their NRAs - have struggled with a core dilemma of neo-liberalism: the pursuit of internationally competitive markets holds the attendant risk of damaging national commercial interests. As a consequence, often Member States have aimed to create only the degree and pattern of competition that is perceived to be in the national, not necessarily the European, interest. The consequence has been efforts by the Commission to see transferred to the European level (not necessarily its own institutional quarters) sufficient policy leverage to make the neo-liberal project in telecommunications across the EU a 'European' project. The corollary generated has been efforts by Member States at resisting this.

The 'article 86' controversy of the late 1980s was the first sign of such tension, and though legally 'victorious' the Commission emerged from this incident clear that it needed to pursue the development of telecommunications in a consensual manner. Nonetheless, the 1994 Bangemann Report recommended the creation of a European level regulatory authority for telecommunications (Bangemann Report 1994). This idea was not pursued by Member States, yet it re-surfaced in two subsequent, related, reviews of the mid to late 1990s, the 1997 review of the regulatory consequences of ICT convergence (European Commission 1997) and the subsequent 1999 Review of Electronic Communications (European Commission 1999). As part of the negotiations leading to the ECRF which the latter review prefaced, the Commission proposed the creation of a High Level Communications Group, composed of members of NRAs, on which it would be granted have voting rights. This proposed injection of 'Commission

supranationalism' was fiercely resisted by Member States, resulting in the creation of the ERG by way of compromise, a much more path dependent outcome in structure and function.

The negotiations leading to the ECRF also witnessed a struggle for regulatory power between the Commission and Member States over the right to veto NRA decisions related to the designation of Significant Market Power in domestic telecommunications markets. Here, the Commission gained highly significant ground, accruing right to veto NRA decisions regarding the designation of operators as having SMP and the designation of new telecommunications markets requiring ex ante sector specific regulation. The Commission, did not, however, acquire a much coveted right of veto over regulatory remedies prescribed by NRAs (Humphreys and Simpson 2005), something which has re-surfaced as key issue of contestation in the current review of the ECRF.

THE 2006 REVIEW OF THE ELECTRONIC COMMUNICATIONS REGULATORY FRAMEWORK AND THE EUROPEAN TELECOMMUNICATIONS MARKETS AUTHORITY

The EU's latest review of its regulatory framework in telecommunications illustrates two contrasting features of the evolving system. On the one hand, the extent to which the regulatory state in telecommunications has become embedded at the national and European levels is strikingly in evidence. Yet on the other, it is also clear that a comprehensive, efficiently functioning SEM in telecommunications has by no means been completed. In June 2006, the Commission launched a by now familiar (this time two phase) consultation process on further possible modification of the ECRF, through laying out a series of proposals for interested parties to reflect upon. These modifications had six main dimensions: the creation of a new approach to regulation of the radio spectrum; action to rationalise and make more efficient the well-established system of telecommunications market reviews undertaken by NRAs in conjunction with the Commission; a series of measures with the goal of consolidating the SEM in telecommunications, prominent among which was the proposal of a right of veto for the Commission over market remedies; a series of measures focused on improving the public service dimension of telecommunications provision; a proposed new set of regulatory requirements on NRAs and communications services providers to improve security; and four measures of what were described as a modernisation and updating kind, the most substantive of which was the repeal of the 2000 Regulation on local loop unbundling (European Parliament and Council 2000) such was the degree of competition now deemed in existence in Member States' local loops (European Commission 2006a; European Commission 2006b). Very importantly, at this juncture any proposal to create EECMA was highly conspicuous by its absence.

However, a year later, in November 2007, after the consultation phase had concluded, the Commission released a report to Member States in which its proposed changes were re-presented under three broad categories, the proposal of EECMA assuming centre stage in one of these. Under the heading of so-called 'better regulation' came a radical and what has turned out to be unpopular proposal to reduce, from 18 to 7, the number of telecommunications markets subject to ex-ante regulation, as well as ones to simplify the market review procedure and radio spectrum regulation. A second category, 'connecting with citizens' grouped the initial proposals for universal service and security. Thirdly,

‘completing the single market in electronic communications’ now contained the proposal to create EECMA based on the persistence of ‘regulatory inconsistency and distortions of competition’ (European Commission 2007a: 4). EECMA would also be accompanied by a strengthening of the independence and regulatory enforcement powers of NRAs. The formerly most controversial element of the initial proposals, the proposed right of veto on remedies for the Commission, was now described as an oversight role to be undertaken in cooperation with the new authority, which had by now eclipsed it as the most controversial element of the proposed alterations to the ECRF. The revised proposals were accompanied by two new draft directives and a draft regulation related to the establishment of EECMA.

In its summary review document, the justification for EECMA was couched in terms of strong signals sent to the Commission as a result of the second phase of the consultation on the ECRF review. Here, the Commission reported criticism of the ERG’s performance which it was argued delivered ‘only loose coordination among regulators’ and a “‘lowest common denominator” approach’. Despite this, it was acknowledged explicitly that ‘Member States had reservations about “ceding powers” to the Commission’ (European Commission 2007a: 9). The industry support which the Commission so often in the past drew on to justify its action was also present now, though far from overwhelming in nature. The Commission claimed that new telecommunications players along with ‘some’ (ibid) incumbents were in favour of either institutional reform of the ERG or a stronger role for the Commission, though neither of these preferences suggest automatically the creation of an entirely new organisation like EECMA. The following section examines the politics behind the proposal of EECMA focusing on the relationship between the Commission and the ERG in the period preceding its emergence. It also analyses the proposed institutional features of EECMA explaining in the process how in its current guise the proposal marks a radical departure from the kind of evolutionary path assumed by EU telecommunications policy to date.

THE EUROPEAN COMMISSION, THE ERG AND THE POLITICS OF EECMA

The proposal by the European Commission of EECMA was not included in either phases of the consultation on the review of the ECRF. However, in June 2006, Viviane Reding, the information society and media commissioner, announced the Commission’s intention to create a European level regulatory authority for telecommunications in order to deliver a more effectively functioning EU telecommunications market (Financial Times, 28.6.06; European Voice 16.11.06). It appears that the Commission’s ongoing conflict with the German government over proposed legislation to afford a regulatory holiday to the German incumbent Deutsche Telekom to allow it to invest in broadband infrastructure free from competition, was a significant factor in strengthening the Commission’s resolve to propose EECMA (European Voice, 16.11.06). However, the debate on the best way to ensure that so-called Next Generation Networks are deployed as quickly as possible is very much an open one and unlikely to be resolved by the creation of EECMA or a variant thereof. The Commission’s final report on the review was claimed to have been delayed by several months due to its desire to smooth the proposal to introduce EECMA (European Voice, 30.8.07).

The creation of the new authority along the lines proposed by the Commission would involve, effectively, an institutional ‘supranationalisation’ of the ERG. The

Commission's declaration of intent signalled the onset of a period of negotiation between itself and the ERG right up to the point of the publication of the final proposals to Member States in November 2007. Analysis of this gives a clear indication of the fractious politics of the initiative, where the Commission and the ERG's Head 'often did not agree with each other' (Reding 2007c: 10) on the former's admission. The idea for EECMA seems also to have been bound up in the bid by the Commission, articulated at the outset of the consultation, to secure extension of its veto to the regulatory remedies proposed by NRAs. In November 2006, in an apparent softening of her initial stance, Viviane Reding, Information and Media Commissioner, wrote to the ERG, appearing to use the proposal to create, what was at that time described as "the enhanced ERG", instead of pursuing extra Commission powers regarding remedies. She here claimed willingness to 'give serious consideration to the option of relying in future on the ERG and national regulatory authorities for more consistency in the internal market'. However, tellingly, she also noted that 'concrete proposals are needed for new institutional arrangements that would transform the ERG into a more efficient and more accountable permanent body with independent powers for ensuing consistency in the application of the regulatory framework (Reding 2006a: 2). The intention was that the ERG 'would be transformed, by means of a legal instrument to be adopted by the European Parliament and the Council of Ministers into a new permanent and independent body responsible for electronic communications networks and markets' (Reding 2006a: 4, emphasis in original).

This bargaining position was re-emphasised by Fabio Colasanti, deputy to Reding, in a follow-up communication to the ERG which took place after a meeting between both parties in January 2007. The political carrot for the ERG presented here was the possibility of taking over regulatory control for the enforcement of the 'article 7' procedure or, more specifically, a proposed modified form to include remedies. This would also clearly have dissolved the brewing discontent over the Commission's desire to extend involvement here. The less politically involved alternative was also presented, namely that the ERG undertake such work in an advisory capacity only (Colasanti 2007) leaving the consequent regulatory enforcement duties to the Commission, something more akin to the current role of the ERG. Somewhat boldly, the Commission, in this communication, also raised the possibility of the new regulatory body assuming some responsibility for communications content regulation, this justified on the basis of the move in this direction made by some NRAs (ibid), giving a strong flavour of the ambitious mood the Commission appeared to be in.

In late February 2007, the ERG provided a detailed position on the Commission's proposals expressing outright opposition to the use of a 'veto as a formal oversight mechanism' (Viola 2007: annex 2, p1) contained in both of the institutional options presented to it by the Commission. Instead, it put forward a much more limited development of the so-called current Article 7 provisions (relating to the Commission's veto over SMP matters) into a 'more streamlined and targeted approach' (Viola 2007: annex 2, p2). Here, after 2010, NRAs would provide market reviews to the ERG which it would scrutinise, though only at the request of an NRA or the Commission, or its own self-initiative. In fact, consideration of Article 7 issues, it argued, would become the exception rather than the rule. This was justified on the rather dubious assumption that by then "consistency" will become less and less of an issue' (ibid). The ERG was more

amenable to extending its powers in respect of ‘a regulatory “coordination” function, rather than on article 7’ (Viola 2007: annex 2, p3).

Taking this forward, the ERG posited three possible scenarios for extending its powers. First, some formalisation of its advisory role in the specific production by the Commission of legislative proposals in telecommunications could occur. This role could range from providing advice before the Commission writes a proposal, to mandating the ERG to create a legislative proposal itself for automatic consideration by the Communications Committee. Interestingly, the ERG urged the Commission to increase the latter’s involvement in the legislation formation process in any event. Second, the ERG could be granted a formal role in the legislative process possibly in addition to the first option. Here, it was proposed to give it the remit of forming a comitology committee to deal with issues arising from Commission Decisions which were themselves the responsibility of NRAs to implement. With regard to Directives and Regulations, the ERG suggested that it might be given ‘one or two readings of draft legislation prior to readings by the European Parliament’ (Viola 2007: annex 2, p5.). Third, the ERG argued that the responsibility for decision-taking could be given to the ERG where it ‘would have the power to define and implement a European strategy in those areas where coordinated action was warranted. NRAs would remain central constituent parts of the “federal” system’ (ibid). The legal measures thus created by the ERG would be binding on all NRAs and Member States. Clearly, each of these options suggested strongly that the ERG was not averse to the strengthening of its powers. However, it did not want its institutional status changed in the process from fundamentally ‘intergovernmental’ to ‘supranational’.

The ERG was careful to point out, however, that pursuit of any of these three options would ‘require the development of clear subsidiarity-based criteria to define more precisely the class of areas where coordinated and/or centralised action was warranted’ (ibid). The ERG also took significant pains to emphasise how it was developing its regulatory competence through self-initiative. Here mentioned were studies on how to promote regulatory best practice; the undertaking of remedies case studies and the establishment of regulatory knowledge centres among NRAs (Viola 2007: annex 1, p3). Two weeks prior to the Commission’s mid-November 2007 publication of its proposals for the modification of the ECRF, the ERG put forward a final position statement with a view to influencing the outcome of the Commission’s deliberations. Essentially reiterating its previous position, the document again tried at length to demonstrate how the ERG had made significant achievements already, going beyond what might reasonably be expected from a consultation body. It made detailed reference to the series of reform measures (enunciated in the Madeira Declaration) enacted at the end of 2006, amounting to what it described as ‘a major step-change’. Notable among these is an agreement with the institutionally overlapping International Regulators Group to ensure that the ERG’s Secretariat would be in the future better resourced financially to undertake its business. The ERG also introduced majority voting. This can be seen as a move to align further the ERG away from the EU and the Commission - it certainly appeared to be interpreted as such by the latter.

The ERG made specific policy proposals falling short of the degree of Europeanisation the Commission had in mind. A formalisation of the cooperation between the Commission’s Article 7 Task Force and the ERG’s Article 7 Expert Groups

was advocated. Second, it was argued that the Commission should engage in a formal consultation procedure with the ERG whose subsequent opinions would ‘enhance regulatory certainty for stakeholders’ (Voila 2007b: 3). Third, it was argued that the Commission could invite the ERG to work with it on the drafting of implementation measures related to the ECRF, such as Recommendations and Guidelines. Finally, the ERG offered to involve the Commission at an earlier stage in the drafting of its work programme. The ERG Chair argued that ‘amendment to the ERG Decision could reflect the proposals outlined...with minimum delay, and at minimum cost and bureaucratic impact, and in particular without the need for a complex and lengthy legislative process’ (Viola 2007: 4).

EECMA: INSTITUTIONAL FEATURES AND POLICY IMPLICATIONS

The Commission issued its proposals for reform on November 13 2007, which essentially reflected its position held in the negotiations with the ERG throughout 2007. The draft regulation that would establish EECMA gives a clear indication of the extent to which, if agreed to by Member States, it would create supranational institutional authority in EU telecommunications governance. EECMA would be an independent body established at the EU institutional level, accountable to the European Parliament. Very importantly, it would only play an advisory role for the Commission on core regulatory matters. EECMA would be established according to the general principles created in 2005 by the Commission, and recently further elaborated (European Commission 2008) for the functioning of European regulatory agencies. It would be governed directly by a Board comprising the heads of the EU’s telecommunications NRAs (European Commission 2007b).

The Commission was unequivocal, in proposing EECMA, in its criticism of the current pattern of regulation in the ECRF. Appearing not to take account of the aforementioned changes in ERG voting, it was particularly critical of the modus operandi of the ERG where it argued that consensus-based decision-making meant that ‘common approaches [were] difficult and slow to achieve’ or even ‘impossible’ where substantial differences existed between regulators. It cited a number of regulatory deficiencies in the ERG’s performance, such as divergent remedies at the national level, variations in rights of use conditions, the existence of different numbers nationally for the same transnational service and ineffectual handling of cross-border disputes (European Commission 2007: 16). The Commission was also overtly critical of the IRG, hinting at an unsatisfactory relationship between it and the ERG where the former ‘influences Community regulatory approaches [yet] has neither any obligation to implement Community Law nor any duty to report to the Commission’ (European Commission 2007: 5). In a subsequent explanatory communication from Viviane Reding to the ERG, in December 2007, the legal establishment of the IRG as a private law body was criticised as ‘add[ing] some complexity and yet another player to the regulatory process in addition to the ERG’ (Reding 2007c: 5). The ERG reacted by indicating its view that the proposal ‘appear[ed], at a *prima-facie* analysis, not to be in line with the evolution of the cooperation amongst regulators toward a federal and non-bureaucratic model, as advocated by the ERG’ (ERG 2007: 1).

In dismissing the possibility of creating a strengthened ERG with more incisive decision-making powers (instead of EECMA) through instigation of majority voting, the

Commission argued that, procedurally, such a change would still not allow the ERG to issue binding decisions on its members, since legally only the Commission is able to do this (European Commission 2007: 6). The Commission also argued that, structurally and procedurally, the ERG needed a major overhaul requiring an injection of resources that could only come from the EU, since 'the Commission must be sure that its opinions and advice are transparent, accountable and independent' (ibid). The only solution, argued the Commission, was for the ERG to be transformed into 'a Community body subject to the same rules of administration and budget that apply to all community bodies' (ibid), thus serving to internalise the kind of detailed work essential to the smooth functioning of the 'regulatory' state at the European and national levels in telecommunications.

The clear supranational nature of EECMA is evident in the Commission's claim that it would reinforce the powers of NRAs 'by taking over the functions of the ERG and giving them a robust and transparent foundation in Community law' (ibid). EECMA was also necessary to deal with a growing number of regulatory issues of a transnational nature which were not within the remit, by definition, of NRAs. Here, mobile and IP based services were specifically mentioned. Initial plans in the review for the creation of a separate agency for the regulation of radio spectrum were dropped by the Commission (European Voice, 30.8.07), further enlarging the potential remit of EECMA in an important and expanding regulatory sub-field of communication. In creating EECMA, it is clear that the Commission anticipates a comprehensive attitudinal transformation among NRA members that would make it up, itself a classic element of supranationalisation. EECMA's proposed Board of Regulators would 'comprise the heads of NRAs and will work in the Community interest' (European Commission 2007: 9) which is something rather different from the operational philosophy of the ERG. It has also been reported that the Commission intends EECMA to be much less consultative than the ERG has been (European Voice, 30.8.07).

The specific details of the draft EECMA regulation gives a strong indication of its functional breadth where article 3 specifies as many as nine different general activities broadly around issuing opinions and providing assistance at the request of the Commission, dissemination of information to market players, as well as taking specific 'European level' decisions on rights of use matters related to numbers from the European Telephone Numbering Space (European Commission 2007: 31). Article 4 of the directive indicates the kind of very close operational relationship which is likely to develop between the European Commission and EECMA, where the former could request an opinion 'on all matters regarding electronic communications' (European Commission 2007: 24). Clearly, this could create a very large workload and, given the complexity of the array of issues which the Commission has to deal with, the intention would appear to be to draw heavily on its expertise in the many specifically mentioned areas. Just some of these are: market definition, SMP and remedies; identification of transnational markets; specific national market analysis; provision of necessary information to end-users; quality of service; transparency measures in relation to local loop unbundling; key issues in relation to access and authorisations. In other words, such work cuts across the whole complex gamut of regulatory issues which are integral to the attempt to create and police competition in the telecommunications sector across the EU.

Articles 5 to 23 of the draft regulation specify in more detail the precise tasks which EECMA would be assigned. For example, in terms of market reviews, under article 6

EECMA would be required to put forward specific measures such as designating companies which it considers to hold SMP, for example, in situations where it finds ineffectively functioning competition (European Commission 2007: 26). The same situation broadly pertains regarding the definition and analysis of transnational markets (article 7). The Commission proposes that EECMA will take on the burdensome task of the annual review of the telecommunications sector hitherto assigned to it.

Structurally, as well as a Director and a Chief Network Security Officer, EECMA would be made up of a Board of Directors, an Administrative Board, a Permanent Stakeholders Group and a Board of Appeal. The key body, the Board of Regulators, would contain the Heads of the NRAs of each EU Member State, EECMA's Director and a non-voting member of the European Commission. Very importantly, the draft regulation to establish EECMA stipulates that the Board shall take action on the basis of a simple majority vote (European Commission 2007: 37). It would be responsible for undertaking the main bulk of EECMA's work, referred to in articles 4-23 of the draft regulation, including approval of its programme of work for a forthcoming year. The Administrative Board of EECMA would be responsible for the formal appointment of the Board of Regulators and the Board of Appeal. It would adopt annually the EECMA workplan (after consultation with the Commission) and annual report on EECMA's activities, both of which it would be required to send to the European Parliament, the Council of Ministers and the Commission itself (European Commission 2007: 36).

Reaction to the proposal of EECMA beyond the confines of the ERG, which would be most directly affected by it, has been, on the whole, equally negative. It has been claimed that the EU is not in a 'political mood...to set up more supra-national bodies' (Financial Times, 29.6.06). Rather, the EECMA initiative had 'irked almost everyone. Member states, big industry operators, fellow commissioners and even the watchdogs themselves have problems with it' (Financial Times 16.11.07; see also O'Brien 2007). The UK regulator, Ofcom, maintained that the current regulatory power balance between the Commission and NRAs was appropriate and argued that the 'proposal for a central regulator received little support during the creation of the existing rules [1999-2002] and we see no reason why it might be appropriate now' (Laitner, 2006: 1). It praised the political independence of the ERG as a particularly attractive quality, arguing that EECMA would be subject to political interference by both the Commission and Member States (Financial Times, 30.10.07). In the initial consideration of the proposal in the Council of Ministers, the EU has reported significant opposition from Member States (European Council of Ministers 2007: 10). Given this level of negativity, it has even been suggested that the proposal of EECMA is a political tactic of the European Commission, where Viviane Reding 'outlines outlandish ideas, then waits for the air to clear before returning to the table to get the deal she really wants', in this case, possibly, some form of greater power for the EU over telecommunications regulation (Laitner 2007: 1).

CONCLUSION

The proposal of EECMA by the European Commission is another important juncture in the Europeanisation of telecommunications governance begun more than 20 years ago. The idea of creating a European level regulatory authority for telecommunications, though not new, remains controversial. EECMA represents a radical departure from the kind of institution-building which has occurred thus far in the development of the neo-

liberal telecommunications order across the EU. Though impossible to determine at the time of writing, most evidence suggests that Member States are unlikely to agree to the Commission's proposal in its current form. In practical terms, much of what EECMA would be, and would do, is far from radical. It could well be viewed even as the next logical stage of an ongoing process. Dealing at the EU level with the persistent regulatory problems in telecommunications markets highlighted by the Commission seems sensible. However, commitment made to any European project – and in telecommunications this has been significant - requires the development of a European outlook and a set of practices commensurate with this. The essential problem for EU Member States stems from the deep historical national-centricity of the sector and its governance which yielded the 'neo-liberal dilemma': to gain the opportunity to benefit from international competition, domestic markets must be opened and made as competitive as those of potential competitors. Though a detailed and complex system of regulation has been developed through the EU, the result is predominantly 'intergovernmental' in nature, including those elements constituted at the EU level. The legislative framework, and the institutional apparatus for producing and refining it, is European but the operational control of the telecommunications markets of EU states is overwhelmingly still in the hands of national level interests. Any effort to broaden the regulatory apparatus beyond the legislative at EU level within the EU institutional framework has been viewed suspiciously.

The exception in this picture is the European Commission whose outlook is European in nature and thus much more attuned to the 'supranational'. Despite its role as champion, on the one hand, and 'honest broker', on the other, of neo-liberal competition in telecommunications, its 'policy entrepreneurial' activities aimed at enhancing the EU institutional remit in telecommunications has never been far from the surface of the policy debate. EECMA is simply the latest incarnation of this. On the one hand, Commissioner Reding has argued that 'Centralism has no place in Europe. Instead, decentralisation is a guiding principle of European law' (Reding 2007: 4), yet on the other she has claimed that EECMA 'needs to bring out the best of the national regulators, but it needs – and this is crucial – it needs to be more than just the sum of all its national parts. It needs... to have a European approach, a European vision' (Reding 2007: 4, 28 Nov speech).

A core issue for Member States is likely to be oversight and accountability of EECMA. Its political principal would be the European Parliament, relatively inexperienced in telecommunications, though, in practice, the European Commission, with over two decades of detailed involvement in telecommunications and a closer 'on the ground' interaction with EECMA, would play a much more influential role. Creating EECMA would bring the current ERG, very much an 'intergovernmental' organisation in outlook, into the European institutional fold. This would require an attitudinal journey, from national to European, to be undertaken by the NRAs whose members would comprise its Board. A core issue in the new proposed system is undoubtedly the power to be afforded to the Commission. EECMA would be an advisory body only on all issues bar those of a transnational nature, over which it would have decision-making authority. In other words, this would tie it in, to a much greater extent than was the case with the ERG, to the Commission. In essence, EECMA can be viewed as a way for the Commission to get its desired veto on remedies by the back door. However, because of

the nature of EECMA, beyond this, it could also provide a step towards further supranationalisation of telecommunications regulation in Europe. Clearly, this would mark a major change in the nature of EU telecommunications policy as it has developed to date. Such a move is unlikely to secure the agreement of Member States. Instead, it has been suggested that some form of compromise position might be the most likely outcome, where a much more intergovernmental-like committee, along the lines of the Lamfalussy committees that deal with securities markets, banking and insurance, might be the outcome of the current debate on EECMA (Financial Times, 16.11.07). In any event, the creation of EECMA, a watered down variant of it, or even the agreement of a right of veto for the Commission to be extended to remedies, would not suggest that ex-ante regulation of telecommunications is likely to disappear, despite claims that eventually competition authorities will be able to take over the supervision of all telecommunications markets (European Voice, 29.3.07). The regulatory state in telecommunications will be around for some considerable time to come.

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