

Building the Eurocracy: The Politics of EU Agencies and Networks

Andy Tarrant, University College London

R. Daniel Kelemen, Rutgers University

**Paper Prepared for the Biennial European Union Studies Association
Convention,**

Montréal, Canada, 16-19 May 2007

Abstract

This paper explores both the politics behind and the policy impacts of the design of EU regulatory institutions. The EU has established an extensive 'Eurocracy' outside of the Commission hierarchy, including over two dozen European agencies and a number of networks of national regulatory authorities (NRAs). Building on research on the politics of EU level agencies and regulatory networks, the paper will first attempt to explain the politics of institutional choice: why do EU policy-makers create agencies in some policy-areas, while opting for looser regulatory networks in others. Second, the paper will assess the impact of these institutional choices: can EU regulatory networks deliver the cooperation and harmonization of regulatory practices that their advocates promise?

Introduction

The Eurocracy is growing. It is growing, however, not in the ways its opponents had feared nor in the ways its champions had hoped. Euroskeptics who depict the European Commission as a burgeoning bureaucracy are misguided, as the Commission remains a remarkably small executive with approximately 25,000 employees. Widespread political opposition to the creation of anything approximating a large, unified executive bureaucracy in Brussels has long-since ended hopes, for the few who harboured them, of creating a European superstate. Nevertheless, the Eurocracy has grown and continues to grow in novel ways. European policy-makers have constructed regulatory structures necessary to govern the European market, but, to paraphrase Marx, they have not done so in circumstances of their own choosing, but under existing circumstances transmitted from the past.

In constructing the Eurocracy, policy-makers have had to contend with and integrate existing national regulatory bodies. Also, policy-makers have had to address political conflicts between member state governments and EU institutions (such as the Commission and Parliament) concerning the design of EU regulatory structures. Some conflicts have focused on fundamental questions of the balance of power between national governments, the Commission, and Parliament, while others have focused on distributional conflicts concerning the economic implications of various regulatory arrangements.

Ultimately, this 'politics of eurocracy' (Kelemen 2005) has led to the establishment of a diverse set of regulatory structures at the EU level, including over thirty EU agencies and a number of regulatory networks¹. Collectively, the number of officials, both European and national, engaged in policy making in these agencies and networks far surpasses the number of employees of the European Commission. The emergence of the Eurocracy has not gone unnoticed by academic analysts. A number of scholars have examined the establishment of EU agencies (Kreher 1997; Kelemen 1997, 2002, 2005; Majone 1997; Shapiro 1997, Gehring and Krapohl 2004, Krapohl 2007; Groenleer 2006, Feick 2006) while others have focused on the emergence of pan-European regulatory networks (Eberlein and Grande 2005; Eberlein and Kerwer 2004, Joerges and Neyer ; Tarrant). Meanwhile other scholars have examined the politics of delegation in the EU more generally, examining conditions under which member states delegate to the Commission or national administrations (Pollack 2004, Franchino 2006). For all their theoretical and empirical strengths, these studies tend to focus on particular aspects of the Eurocracy (such as agencies, networks or comitology), and thus do not provide a comprehensive view that considers the full

¹ Estimating the number of regulatory networks is difficult, as estimates would vary considerably depending on what was included in the category. There are regulatory networks which have officially been constituted as networks which advise the Commission (for example, the European Regulators Group in telecoms), there are other regulatory networks which have not been officially recognised but which the Commission has helped initiate, for example an informal network of rail regulators engaged in access regulation, and there are regulatory networks which act independently of the Commission. More than one type of network may exist in the same sector. For example in both energy and telecoms, there is an independent grouping of regulators which exists alongside the body constituted by the Commission. The difference in practice between the recognised and the independent body is that when the regulators wish to discuss an issue without the Commission present that they nominate themselves the independent grouping; otherwise, the same individuals are involved. Further research is being undertaken to try and identify the number of regulatory networks.

range of choices available to decision makers and explains the reasons for and impact of their design choices.²

This paper seeks to contribute to such a comprehensive explanation the politics of Eurocracy. First, we explore the politics behind the institutional choices in the design of EU regulatory bodies. Above all, we seek to explain why in some policy areas, policy-makers have opted to create EU level agencies, while in other areas policy-makers have established much looser regulatory networks. Second, we explore the consequences of institutional choice. Designers of EU regulatory bodies and scholarly observers have promised many things, including regulatory independence, exchanges of best practices, consensus building through networks and promoting harmonization through soft-law without resort to inflexible centralized regulation. But have the new agencies and networks delivered? Have some institutional arrangements delivered better than others? Is regulation based on a network model feasible? Or will the limitations of networks potentially lead to the formation of more supranational authorities? What relationships are emerging between national regulators and supranationals?

The remainder of the paper is structured as follows. In section I, we briefly review existing literature on EU regulatory bodies and present our central arguments concerning the politics behind EU regulatory institutions. We offer an explanation of why policy-makers opt for centralized authorities in some cases and looser regulatory networks in others, and present our hypotheses concerning the likely impact of these institutional choices. In section II, we explore the politics of EU regulatory networks. In section III, we examine the politics of EU agencies. Finally, in section IV we conclude.

I. Argument

When a decision is made to regulate a sector at EU-level, decision-makers face a large range of options in terms of the bodies that can be tasked to deliver the regulation. The following possibilities, all of which policy-makers have discussed as options for appropriate regulatory bodies in the EU Telecommunications Framework, illustrate the wide range of options policy makers face in designing regulatory institutions: 1) whether the Commission, an alternative sui generis European-level agency, or sector specific NRAs should be vested with the power to regulate, 2) whether supervisory powers over the national regulators should be given to the Commission, Ministries or alternatively to a collective body of the NRAs, 3) the degree to which the actions of either the Commission or the NRAs should be independent of review from the devolving national legislative/executive actors.³ In other words, EU policy makers can delegate to the Commission, to EU agencies or to networks of NRAs. Moreover, they can delegate to these bodies with varying systems of control and degrees of discretion. How then do EU decision makers decide which form of Eurocracy to rely on?

It is not possible to understand the nature of European agencies or networks of regulators without understanding the wider domestic and European institutional

² For an exception see Coen and Doyle 2000.

³ [See the Section on the politics of networks below](#)

system within which they are designed and embedded. Each sectoral institutional ecology is shaped by the preferences of the relevant political actors, mediated by the rules of decision-making in the relevant sectors.

The relevant decision-makers in any particular policy field will vary depending on whether the regulatory institution is created as a result of treaty amendment, in which case only the European Council has formal power, or whether the regulatory institutions are created under powers already contained in the Treaty. In either event, representatives of the Member States, if they are in agreement on the regulatory structure, are likely to be the dominant negotiating partner. In the field of internal market legislation where much of the EU's regulatory activities are concentrated, the decision-making bodies are generally the Council and the Parliament, with the Commission enjoying a quasi-legislative power due to its power of initiative.⁴ Legally, if the Council wants to set up a body which makes regulatory decisions outside of the Commission, then in accordance with the current jurisprudence of the ECJ, it must make a Treaty amendment to create a *sui generis* body⁵. This was done, for instance, in order to create the European Central Bank and Europol. On the other hand, an agency which advises the Commission need not have a basis in the Treaties, but can simply be created by an act of secondary legislation. However, in that event, the agency only has collective power to the extent that its advice is accepted by the Commission, although it may be politically difficult for the Commission to ignore the collective advice of the agency executive (particularly if the Commission's decision, is itself subject to ministerial comitology, as it is in pharmaceuticals). Finally, networks of national regulators, independent of an agency arrangement need not be created through EU legislative or constitutional processes at all. Rather, they can be created by the NRAs themselves and possibly formalised later by Commission decisions appointing them collectively as advisor to the Commission when exercising its powers.

4 (It should be noted that if these bodies did not legislate that the default regulator could become DG Competition; the Commission could therefore potentially attempt to make unilateral decisions to regulate a sector. The latter, sometimes backed by the ECJ, set out to pursue this as an objective for the utility sectors in the mid-1990s. Indeed, this was one of the incentives for the Council to agree re-regulation which returned control of these sectors to NRAs (Nihoul and Rodford: 37; Tarrant (2004): 14-17).

5 Agencies can be set up by secondary legislation but *sui generis* independent regulators like the ECB require a Treaty amendment. This is because independent European regulatory agencies are viewed under the Meroni doctrine as in principle being unconstitutional since they disturb the "institutional balance" of the Treaty by potentially moving European-level executive powers away from the Commission which should otherwise be the European executive body. In Meroni (1957) the Court held that Community law did not allow delegations of discretionary powers to bodies that were not created by the Treaty. It allowed that executive powers could be delegated as long as they were circumscribed and the delegating body remained the decision-maker. The Commission's formal view on regulators is set out in its European Governance White Paper of 2001 which states that "Agencies cannot be granted decision-making power in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assignments." (European Commission, 2001: p.24) However, a body that actually acted as an independent regulator at European level would have to engage in precisely these tasks. Legally, this could then only be admissible by making such a regulator another *sui generis* European institution through a Treaty amendment.

In designing EU regulatory institutions, Member States are typically confronted with a tension between their desire to make credible regulatory commitments and their desire to manipulate the distributional consequences of regulatory decisions. The former concern would tend to encourage member states to opt for more centralized (i.e. EU level) and independent regulatory bodies, while the latter concern calls on member states to maintain as much national control as possible. Certainly, concern with the need to make credible commitments has overridden distributional concerns in some instances, as for instance in the 1990s, when Member States enshrined the operational independence of the ECB and central banks so as to commit to stable, neutral policy (Ziloli and Selmayr: 627).⁶ However, in the design of most 'Eurocratic' institutions, outcomes are significantly influenced by Member State concerns over the distributional effects of regulation.

Unsurprisingly, where Member States believe that a particular institutional outcome is likely to have unfavourable distributional consequences from their perspective, they are likely to veto it.⁷ Member State governments have often chosen to exercise their negotiating power in order to ensure that they remain the principals of NRAs. Indeed, a substantial attraction for Member States of the oft-hyped model of EU Framework regulatory directives policed purely by national regulators is that this institutional arrangement allows Member States to preserve their autonomy as to the actual content of regulation applied within their jurisdiction and thus the distributional outcomes.⁸ *More generally, we argue that the greater the distributional conflict in a policy area, the less likely member states are to delegate regulatory authority to autonomous European level regulatory bodies, and the more likely they are to opt delegate to bodies (such as networks of NRAs) more subject to control by national governments.*⁹

The Parliament's preferences with regard to 'eurocratic' structures have been driven by two primary concerns. First, the Parliament has sought to protect its institutional self-interests. Along with the growth of its legislative power, the European Parliament has sought to assert itself as a watchdog of the EU executive bodies (such as EU agencies or networks) that implement EU directives. To this end the Parliament has demanded greater transparency and judicial oversight of regulatory processes.¹⁰

⁶ It should be noted that when the Commission or the European Parliament suggested importing that wording for sector-specific regulators, they were rebuffed.

⁷ This behaviour is not just a feature of protectionist Member States. To give an example, the UK in 1995-98 was hostile to the concept of the Euroregulator for telecoms. This was a Member State which had liberalised early and whose incumbent was aggressively acquiring overseas assets and was expected to benefit from pro-competitive regulation elsewhere. The UK's concern was primarily based on the fear that any centralized institution would be controlled by a majority of Member States that were perceived as not being genuinely interested in pursuing pro-competitive policies. Policies that were set centrally could then fetter the ability of the UK NRA to pursue pro-competitive policies.

⁸ In this context, it is worth noting that the NRA's that participate in pan-European networks in many sectors are far from being 'independent' agencies. Most NRA in broadcasting, electricity, gas, posts, rail, telecoms are not independent of the government. Most are resourced directly by the government, staffed by national civil servants, the heads are usually appointed by the Minister and they are potentially subject to legislative override. In some countries the Ministry has "sleeping" overlapping powers. Sometimes the NRA is actually situated within the ministry; for instance, 12 of the 27 Rail NRAs are simply departments within their state's transport ministry.

⁹ This hypothesis parallels Franchino's (2005, 2006) arguments about member state decisions to delegate to the Commission or to member state administrations.

¹⁰ Where the primary regulatory actor is the NRA, as it is in the context of the networks, the Parliament has successfully insisted on appeal being available to a national court on the merits of regulatory decisions not just on procedural aspects. This overturned existing practice in a minority of Member

Second, the Parliament has sought to maximize its popularity with voters, by favouring regulatory institutions that promise to yield favourable outcomes for consumers. These preferences have not led the Parliament to favour the same bureaucratic structures in all policy areas. Rather, in sectors already subject to significant privatization and liberalization, such as electricity, gas and telecoms, the Parliament has been in favour of supranational decision-making (more strongly in telecoms) and in favour of national regulators being made more clearly independent of national ministries.¹¹ In more sheltered sectors such as posts and rail, it has been silent on this: but equally, there has not been a strong push by new entrants for an EU access regime in these sectors and post and rail privatisation is often not a popular political position. The perceptions of the consequences of rail privatisation in the UK have also severely damaged MEPs confidence in the benefits of competition in that sector.¹²

The European Commission has demonstrated a clear, enduring hierarchy of preferences concerning the structure of regulatory bodies. Unsurprisingly, the Commission has generally preferred supranational over intergovernmental solutions. Generally, the Commission's first preference would be to expand its own regulatory capacity and authority, through increased financing, staffing and grants of regulatory powers. However, since the late 1980s, it has become clear that Member State governments are unwilling to countenance any significant expansion of the European Commission. It was when the Commission was faced with increasing regulatory burdens in the run up to the 1992 target for completion of the Single Market and was unable to win political support for expanding its own capacities that the Commission turned to promoting the establishment of EU level, 'independent' agencies and transnational regulatory networks. European level authorities with considerable autonomy from national regulatory authorities are the Commission's clear second choice, while the Commission has ended up promoting networks only where more centralized solutions have not received support.

Generally, the Commission and Parliament share an abiding preference for more supranational (as opposed to nationally controlled) regulatory institutions. Therefore, the greater the influence of the Commission and Parliament in the politics of bureaucratic design in a particular sector, the more likely that a supranational regulator (either the Commission itself or an EU agency) will be tasked with delivering regulation.

States where either appeal was restricted to traditional judicial review (ie principally fairness of procedures) or appeal was restricted to an administrative unit within the sponsoring Ministry. In both energy and telecoms, the Parliament has required periodic legislative reviews which give it the opportunity to reassess the application of existing legislation and for the interim periods incorporated a requirement in the legislation for the Commission to report on progress.

¹¹ European Parliament (2000: 9). The rapporteur's comment on the amendments at first reading on the draft ONP Framework Directive: "...in your rapporteur's opinion, only a genuine European regulatory authority is in a position to make completely sure that a genuine European market develops which functions, after the fashion of the planned networks, seamlessly in the interests of all citizens. For that reason, your rapporteur believes it is necessary that the value which Parliament attaches to the establishment, ultimately at least, of such an authority be restated." European Parliament (1996).

¹² Interview [add full reference].

The Commission's evolving position on a European regulatory architecture for telecoms well illustrates its hierarchy of preferences. In telecoms, the Commission has successively pushed for regulatory content to be set by: 1) the Commission's own DG Competition, 2) a Euroregulator, 3) individual NRAs subject to a Commission administrative veto, and now what it is calling "European Regulators Group +" or "ERG+"¹³. In the first instance the Commission offered to surrender all its powers to the ERG if it would take up a majority decision making basis for regulatory obligations. Subsequent to its refusal to do so, the Commission is now referring to a model where it makes the formal decision subject to the collective advice of the ERG (interviews). In this variation, ERG+ would look to have similar characteristics to a European Agency (whether or not it is formally described as such). The Commission is proposing the same model for gas and electricity¹⁴.

Bureaucratic agencies, once created, can become powerful, self-serving actors in their own right (Moe 1989). In the EU context, it is particularly important to consider the impact of networks of NRAs. Once created, NRAs may become relevant actors in the debates over the allocation of powers, and they generally seek to maximize their own authority, either by resisting delegation to supranational bodies or by seeking to repatriate authority that had already been delegated to supranational authorities. The extent to which they engage in substantive supranational activity appears to be a reflection of the extent to which the Commission has been attributed powers of implementation and thus indirectly (and probably directly in many cases) of Member State preferences. In the areas of utility access regulation where the Commission has no sector-specific powers at all there is either very little discussion of access issues in a network of regulators (e.g. rail) or none at all (eg posts).¹⁵

Conversely, where the Commission's powers have increased over time, the networks of regulators have become more active.¹⁶ The threat of an increase in powers also seems to have some effect; it is noticeable that in response to the threat of the Commission requesting the ability to veto NRA regulatory obligations in telecoms that the ERG/IRG has acted to give the impression of more cohesive activity.¹⁷ In gas and electricity, once the Commission was granted the ability to set compensation payments for cross-border electricity flows and to set binding guidelines on access charging in 2003, the national regulators began to construct the mechanisms that would allow them to discuss the content of access regulation (including the detail of payments and charging mechanisms).¹⁸ In 2007, there will be new draft regulatory legislation in electricity, gas, posts and telecoms. The combined electricity and gas

¹³ The "plus" would mean that the ERG took up formal decision-making competences and exercised them.

¹⁴ Commission communication "Prospects for the internal gas and electricity markets" COM(2006) 841 of 10.1.2007, p.12-13.

¹⁵ Interviews (add full cites).

¹⁶ This might suggest that the Commission should be extremely careful about seeking a "neutralisation" of the Meroni doctrine which some legal experts have recommended (Geradin and Petit: 31-36). Networks of regulators may only function in the "shadow" of a potential Commission veto.

¹⁷ "Conscious that it had not necessarily been fulfilling its potential as a mechanism for regulatory approximation and the promotion of the internal market, the ERG has invested a considerable amount of its resources during the past year to improve its own effectiveness as an organisation". ERG Letter of 27 February 2007 to Commissioner Reding, p.5. In fact, what the ERG has agreed internally in terms of rule change at plenaries in 2007 and which are described in the letter as a response to the Commission's proposals ie common positions formed by consensus but subject to two thirds majority decision-making where no consensus, was in fact a restatement of the existing position.

¹⁸ ERGEG, press releases on gas and electricity regional initiatives, PR O6-06 and 06-05.

regulatory network (ERGEG) has responded quite differently to that of the telecoms regulatory network, ERG, in the sense of asking for the ability to set detailed regulatory conditions at supranational level¹⁹, whereas the ERG refused the latter²⁰. However, their responses are similar in that they have both asked to take over competences that have already been granted at European level to the Commission. (ERG was content to request taking over only the current Commission veto on the triggering conditions for the application of regulation)²¹.

Finally, our expectations regarding the effects of the choice of eurocratic structures follow closely from our foregoing discussion of the preferences of key actors. As mentioned above, the effect of a choice for a network of NRAs as opposed to some centralized Euroregulator (the Commission/ a sui generis European entity/ an agency) is that reliance on NRAs leaves each Member State free to pursue different economic outcomes. The consequences are sometimes argued to be theoretically beneficial in allowing learning effects. However, where the freedom is used for protectionist purposes, networks are also likely to prevent businesses achieving pan-European economies of scale and scope. They may also potentially create unfair trading conditions whereby laxly regulated entities in one Member State can acquire more heavily regulated actual or potential competitors in other Member States.

II. Politics of European networks

A stand alone network of regulators is unlikely to be very successful in promoting effective regulation when it is underlying disagreement over the content of regulation which leads to its adoption as the primary mechanism for joint policy-making. The first section below examines theoretical claims made for networks of regulators in the utility field as a mechanism for effective coordinated regulation. The second part of this section will examine the role, powers and effect of the European Regulators' Group ("ERG") in telecommunications. It provides evidence that the ERG has had little effect to date on regulatory practice and consequent market outcomes. It cannot do so because its members are not in fact genuinely independent of ministries. To the extent to which the body provides substantive collective advice to the Commission, there is not a great deal that the Commission can do with it, as its powers under the regulatory framework are also highly circumscribed.

The choice between a European agency and a regulatory network is typically, in its pure form, a choice between, on the one hand, an institution which combines majority decisions subject to a Commission veto and, on the other hand, an institution which features neither of these mechanisms.

When we compare differing institutional outcomes in energy, pharmaceuticals, posts, rail and telecoms, variation in the number of Member States owning regulated entities seems to be a plausible explanation for different institutional outcomes between the sectors. The starting point at the moment of liberalization of each of the utility

¹⁹ ERGEG's response to the European Commission's Communication "An Energy Policy for Europe". Ref. CO6-BM-09-05, 6 February, 2007, pp11-16.

²⁰ Ibid, p.6.

²¹ Ibid, p.4.

sectors was identical. In each, a vertically integrated state owned operator owned a monopoly delivery infrastructure and was in general the monopoly provider of services provided over that infrastructure. Creating competition in each of these sectors required not just that new entrants were allowed to enter the market but they had non-discriminatory access to the monopoly delivery infrastructure (Pelkmans: 439-440, Cave and Valletti, 332). This requirement for non-discriminatory access created the need for a regulator. While most Member States were in favour of new private investment, they were also concerned at the economic and political risks of exposing incumbents to competition. An effective regulator could increase risk. The economic value of the state shareholdings was a significant state asset and realisable if full or partial privatisation was envisaged. Annual profits were also a sizeable contribution to state income. The incumbents tended also to be the largest corporate employers in any Member State, and their workforces were highly unionized and often civil servants.

With respect to electricity, gas, posts, rail and telecoms, where there has been an increase in powers of the Commission, it has been broadly parallel to a reduction in the degree of state ownership in each of the relevant sectors. Posts and rail remain almost completely dominated by integrated nationalised companies in the EU; the relevant EU Directives for posts does not deal with access issues²² and that for rail accords all responsibilities to NRAs²³. In telecoms, the Commission obtained no powers of implementation in 1998 at a time when there was greater than 25% state ownership in 13 out of 15 Member States (OECD 1998). In 2002, the Commission was given limited centralized powers at a point when ownership greater than 25% had been reduced to 8 Member States (OECD 2002). State ownership is of course a crude proxy for concern over distributional issues. A Member State might privatise and nonetheless have a preference for preserving a national champion. Equally, Member States with a state owned company may alter policy. For example, since the election of a centre-right coalition in Sweden, the new government has begun considering a reform of the regulatory regime to remedy a situation where the NRA's attempt to implement the telecommunications regime was crippled by the appeals system.²⁴

²² European Parliament and Council (2002c)

²³ European Parliament and Council (2001)

²⁴ The White Paper is available at
The english summary is on pages 27-41
<http://www.regeringen.se/content/1/c6/07/12/95/f8427277.pdf>

Network Governance Theory

An alternative view is that regulatory networks will give rise to informal cooperation between national regulators to meet the functional need for effective European-level regulation which would otherwise be frustrated by the resistance of Member States to devolve regulatory powers to a supranational institution. Effectiveness here is defined as “the capacity to produce (including to make other actors produce) collectively binding decisions on the supranational level, decisions that fill the regulatory gap.”(Eberlein and Grande 2005:156)

This theory is consistent with and derives from other theories which seek to explain the “New” Governance of the EU. The latter defined as methods of policy-making that depart from the “Community” method of legislating through the use of regulations and directives and instead relying on participation at European level of national actors in a collective learning process (Eberlein and Kerwer (2004:123)²⁵. In particular, Eberlein and Grande’s work draws on application of the theory of “deliberative supranationalism”. This is in essence a constructivist approach which had been applied to the work of committees in the European Union. In committees, it is argued that a culture develops of “...interadministrative partnership which relies on persuasion, argument and discursive processes rather than on command, control and strategic interaction” (Joerges and Neyer: 620). The outcomes of the decisions made in the committees, it is argued, are neither intergovernmental nor supranational. They are not intergovernmental, because the participants are socialized into pursuing collective decision-making within the parameters of the formal objectives devolved to the Committee under the legislation, pursuit of which gives a primacy to objective scientific evidence. Nor are they supranational, because the Commission is obliged to recognize that it cannot pursue objectives which will not meet with at least a qualified majority of supporters (Ibid: 618). The solution to this apparent dichotomy is that the participants to the committees pursue the scientific-rational logic of the committee, overcoming the interests of the institutions which they represent. The suggested principal mechanisms of this divorce are: (i) participation means that delegates have an informational advantage over their domestic administrations which allows them to shape national preferences (Ibid: 620); and (ii) participation means the development of common converging definitions of problems and philosophies for their solution (Ibid:620)²⁶.

The unwillingness of Member States to grant regulatory powers to supranational authorities where there are distributional issues at stake means that regulatory powers are granted to national regulators instead. However, this gives rise to a decentralization problem as national regulators could defect from the spirit of EU

The classic example of “new governance” is the Open Method of Coordination. For a general discussion of OMC see Zeitlin and Pochet (2005) For a critical appraisal see Idema and Kelemen (2006)

²⁶ Or as Joerges and Neyer put it in another article, delegates “...slowly move from representatives of the national interest to representatives of a Europeanised interadministrative discourse in which mutual learning and understanding of each others difficulties surrounding the implementation of standards becomes of central importance.” (Joerges and Neyer 1997: 291).

legislation. There is therefore a functional need for cooperation in order to ensure a level-playing field (Eberlein and Grande: 99). Regulators therefore come together to achieve harmonizing decisions. Defection is prevented by “professionalisation”:
“...Professionalisation creates a strong, shared frame of reference that facilitates convergence and homogenization. National officials are driven by a “reputation game” with their national counterparts. They will seek to comply with “best-practice” regulatory standards to maintain their good standing in the professional community.” (Eberlein and Kerwer: 162) If this is not sufficient constraint, then the transparency of regulatory regimes reinforces it. A further pressure for conformity is that regulators that are unable to observe the commitment required by professionalisation will be unable to make credible commitments to its partners and will not therefore be able to become effectively involved in transnational networks (Eberlein and Grande: 103).

There are, however, some clear weaknesses to this theory in relation to the regulated utility sectors, which are characterised by the existence of monopoly access operators often with state ownership. Eberlein and Grande do recognize that if there are redistributive conflicts between Member States that this may adversely affect the effectiveness of informal harmonization (Ibid:104). However, since this is arguably the reason for the creation of national regulators rather than upwards delegation in the first place, adverse effects are likely to be built into the system of cooperation from the beginning. In other words, the description of a “functional need” in the theory is rather one-sided. The functional need from a supranational or a new entrant perspective may well be a “level playing field”; it could be quite another from a national government’s perspective, where the first best option could be compliance by everyone else but not by one’s own regulator²⁷ or indifference to any cross border trading and a political priority to preserve the numbers employed by the domestic incumbent. Furthermore, while professionalisation could have the effects described, further analysis of the concept needs to be developed in order to describe what form of professionalisation would have the constraining effect described. Most regulatory staff are in fact civil servants and their careers depend upon promotion within the national civil service structures. The heads of regulatory institutions are political appointees and may even be politicians. There is no real market for international utility regulators. The number of meetings they attend with their international colleagues may also be rather limited. These factors suggest that the primary loyalty of regulatory staff must be to their national regimes.

Participants in regulatory networks will not necessarily have an informational advantage over domestic colleagues. This is because they are not the only source of information about either supranational policy development or the potential effects of such policy development on domestic circumstances. Ministries still collectively occupy the voting positions on European regulatory comitology bodies. The regulated entities usually also collectively employ a full time and well-resourced permanent secretariat in Brussels. Many of them also maintain their own individual permanent offices in Brussels. They are also the possessors of the greatest amount of information

²⁷ Eberlein provides the following example of beneficial defection: “Take the example of an incumbent operator in the electricity business. A lenient domestic regime helps to protect the home market from new competitors. Almost unassailable at home, the operator can more easily expand into foreign markets that are more open to new entrants. The current expansion of French electricity giant EDF from a rather secure home base into other European markets illustrates this point quite clearly.”(Eberlein 2003:153)

about the impact of regulation on domestic circumstances, since such regulation is targeted on them. Consequently, a Ministry at an informational disadvantage to a participating regulator has alternative sources of information when required.

Participation in the various European regulatory networks is also by right, it is not as a result of making credible commitments. There is no contractual arrangement between the different national regulators. To date, the networks at most issue best practice statements of principle, not binding decisions. There is no synchronization of national regulatory decisions applying the principles adopted in the network, which might otherwise be necessary in theory to facilitate retaliation for non-compliance, although energy may be moving away from this. Furthermore, there is no effective mechanism whereby retaliation could even occur. Offended regulators could not discriminate solely against a company in their area of regulatory jurisdiction on the basis that it was owned by the incumbent in the country of the offending regulator. The company could easily demonstrate that it was being discriminated against on the basis of nationality and this would be a clear breach of EC law for which a court would grant interim relief. And in any event, any generalized and surreptitious return to protectionism would have the potentially effect of returning all regulators to the desired position of the protectionist countries.

A pre-condition for a “reputation” game is clearly that regimes are sufficiently transparent for regulators or third parties to judge whether or not they are implementing the principles. Eberlein and Grande argue that “They are very well informed about the activities and performance of their regulatory counterparts in other jurisdictions. Since they do not wish to be perceived as failing to meet, in their domestic arena, the standards of their profession, peer pressure can go some way to increase compliance.” (Eberlein and Grande 2005:162) The regulatory regimes tend not to be transparent. There is no institution that collects rigorous and comprehensive data on the quality of regulation in the utility sectors. For example, OFGEM cannot find the data to establish why energy has not flowed over interconnectors connecting UK grids to Europe despite enormous price differentials.²⁸ Complete failures to implement can be observed, however weak implementation or skewed implementation is extremely difficult to track. Another example is that the single most significant form of transparency in a vertically integrated industry is accounting separation. In energy, posts rail and telecommunications, none of the relevant information is published to third parties, except in two of Member States.²⁹

²⁸ In the November 2005 cold snap in UK wholesale gas prices increased 400% but the gas interconnector only flowed at 50% of capacity. In February 2006, the interconnector flowed at 90% of its capacity despite prices being much lower and only slightly above EU levels. OFGEM said it was unable to work out the causes since there was inadequate transparency on continental markets. (OFGEM 2006:2).

²⁹ For telecoms, see ECTA Scorecard (2006). In gas and electricity, neither the Commission nor new entrants have undertaken any study to investigate the extent to which the accounting separation rules allow non-discrimination to be demonstrated. Centrica say that it is not the case (Interview). A Commission official said that accounting separation in the energy field had “never really worked” (Interview). It should also be noted that in the telecoms directives, peculiarly, that the remedy of accounting separation, unlike any of the other remedies, is subject to any conflicting national laws. Article 11(2) of the Access and Interconnection Directive states “...National regulatory authorities may publish such information as would contribute to an open and competitive market, while respecting national and Community rules on commercial confidentiality.” ECORYS found in a report for DG Tren in 2006 that 55% of railway undertakings were compliant with the rules on accounting separation in the rail directives. However, these rules are extremely general. The report also stressed that “...it should be

Finally, it may also be the case that the regulators that are part of the regulatory networks are not even the bodies in some countries that actually conduct national implementation of the best practice papers agreed in the networks. Regulators may actually be parts of Ministries or advisors to Ministries which exercise decision-making powers³⁰. And even if NRAs are the decision-making bodies, controls may be in place that ensure that where they have those powers that they take account of interests other than those of interaction with their international peers. The collective of national energy regulators, ERGEG, itself recognises that one of “critical point delaying or hampering the development of more efficient and integrated electricity and gas markets in Europe..[is the]...insufficient independence and/or capacity of regulatory authorities.” ERGEG (2004:p.5).

It is also useful to clarify the type of decisions which the networks make. They do not make “effective” decisions as defined by Eberlein³¹. Decisions of IRG/ERG for example are guidelines and the less agreement there is among the regulators, the vaguer are the guidelines. Furthermore, as discussed below, the participants do not appear to consider that decisions of the networks are binding upon them.

The European Regulators Group in Telecoms: a network case study

Background

The ERG is an institution which brings the European Commission and the NRAs together. It is not a creation of the Directives regulating the sector, the Council collectively having struck out a draft article creating such a body from the Framework Directive on the basis that as an actor it would be a potential competitor for the comitology body on which ministries sit³². Rather, it is a body created by a Commission Decision permitting a range of national regulatory authorities to “advise and assist” the Commission with respect to the latter’s duties under the Directives³³. The Commission effectively building on the existing Independent Regulators’ Group, which is the same body absent the Commission and which continues to exist in parallel to the ERG³⁴.

noted that most of the annual accounts do not provide sufficient information to make any pronouncement regarding cross subsidies.” (ECORYS: p.30)

³⁰ A rather clumsy example occurred in Spain in 2006. Until 2006 it transpired, the Spanish Energy Regulator only had the ability to advise the Ministry, which took all the concrete decisions. When EON (the German energy company) proposed to purchase Endesa (a Spanish energy incumbent), the government passed an emergency law to give the Spanish regulator the power to block mergers in the sector which threaten a “strategic interest” (EU Business Energy a national issue, not European: Spanish Minister). This was a little too blatant and the decision was in practice overturned by the Commission taking jurisdiction under the merger rules.

³¹ See page [] above.

³² Presidency (2001)

³³ Article 3 (Commission 2002)

³⁴ IRG was set up in 1997.

The ERG has no powers to make decisions which are binding on its members³⁵. Assuming it could make substantive collective positions, it might be considered to potentially have the power to do so indirectly via “advice” which it provided to the Commission and upon which the Commission then acted. (There is no formal mechanism through which the Commission is required to respond to a collective view of the ERG). However, such an indirect power would be subject to the limitations set in the Directives to the Commission’s own powers. In actual practice, the Commission’s discretion to set regulatory policy in pursuit of harmonisation is severely circumscribed³⁶. Alternatively, as the NRAs are the bodies which are those required formally to make the regulatory policy decisions at national level under the EU Framework, it has been argued that it could act as a venue for harmonisation through coordination and mutual education (Eberlein and Grande). It is the case that the national regulators participate in 7 working groups organised under the auspices of IRG/ERG and they produce best practice papers. However, given the consensual decision-making practices, these are typically drafted in a very general way and members do not regard them as morally binding.

Choices of European-level institutions

Member States have had three main occasions so far on which to adopt varieties of supranational institutions to set telecommunications regulatory policy and a fourth is about to occur. On each occasion, they have attempted to ensure that the maximum room for discretion is retained at national level. Some authors have suggested that the disputes over institutions were derived from general constitutional power struggles and have been divorced from the content of the regulatory policy itself (Thatcher 2001:559, Franchino: 222, Levi-Faur: 189). They have either based this assessment on an understanding that the content of regulatory policy was agreed and contained in the Directives. However, the regulatory objectives and principles contained in the Directives are general and ambiguous. In so far as the European framework is concerned, implementation of these principles and objective has been reserved to the discretion of the NRAs and the nature of the institutions selected and the rules which surround them has limited the extent of the Commission’s involvement. This has been a function of pursuing a European policy for harmonisation which requires support from Member States which wish to promote competition and others which are more concerned to support their national incumbent operator. As a consequence, pro-competitive Member States do not wish to risk override from Member States which are anti-competition. Protectionist Member States are concerned to avoid the opposite. Opaqueness of the regulatory regimes means that Member States are unlikely to be sure where the preferences of many of their peers fall with respect to such a cleavage. One Member State identifies the Member State preferences as broadly: pro-competitive: 5; anti-competition: 9; unknown: 13 (interview). The lack of knowledge of Ministries would appear to be shared by NRAs. An NRA that is active in the ERG

³⁵ Article 4.1 ERG (2003), although Article 4.2. states that on an exceptional basis decisions can be made on a two-thirds basis. Article 4.4. states that the positions or opinions of the Group shall not be binding on its members, but that members shall take the utmost account of such positions or opinions. At Madeira in 2006, the ERG removed the description of majority voting as exceptional but the non-binding nature of decisions was preserved (interview).

³⁶ The Commission has the ability to make comments under Article 7 (3) of the Framework Directive (Commission 2002). It has the ability to propose a harmonisation measure to a regulatory committee comprised of representatives of national Ministries (Article 19), but only with respect to numbering; not the most significant of issues. No harmonisation measures have been adopted.

was willing in 2006 to characterise 14 of its peers as generally in favour of competition (although noted that some appeared to be subject to ministerial pressures) but was unable to identify the general stance of 11 and identified 2 as probably hostile to competition (interview). Rather than being distinct from policy concerns, constitutional struggles have been a surrogate for how those principles and objectives would be deployed; operationalisation would depend on who actually directed regulatory policy.

The first attempt to regulate the key access and interconnection issues which determine whether liberalisation would be a de facto reality as opposed to a de jure exercise, was mounted by DG Competition in 1996 through a Commission own-initiative Directive³⁷. Member States could have permitted DG Competition to become the regulator of access. Instead, they chose to adopt a Council (and by necessity Parliament) Directive which would in practice subsume DG Competition's efforts (Nihoul and Rodford: 37, interviews)³⁸. The second occasion, therefore comprises the set of directives adopted in 1997/8, and in particular the Framework and Access and Interconnection Directives³⁹.

The outcome of the second occasion was: a rejection of a Euroregulator⁴⁰, no substantive Commission implementation powers in the field of access whatsoever⁴¹, discretion vested in national regulators, but national regulators which are defined in such a way as to ensure that they were not independent of ministries (and indeed,

³⁷ See Articles 4(a)-(d) (Commission 1996)

³⁸ According to current and former senior DG Competition officials, the Council (as opposed to individual Member States) collectively threatened recourse to the ECJ against the Full Competition Directive if the Commission did not initiate sector-specific legislation which would create a Framework where NRAs would be the principal regulatory actors

³⁹ Commission (1997) (1998)

⁴⁰ Although never formally proposed due to the unanimous objection of the Member States, it was something which Commissioner Bangemann favoured (Bartle, Financial Times 20/10/1997). A study to assess support was undertaken on behalf of the Commission by NERA in 1995. The hostility of Member States can be seen in the reaction of the Council to a proposed Parliamentary amendment to the Interconnection Directive on the subject. This amendment merely called for the Commission to review the need for a Euroregulator when the Directives came for review. The Council Working Group refused to accept this by unanimity. See Common position 34/96 of 18 June 1996 OJ C 220/13 at 33 and Common Position 7/97 of 9 December 1996 OJ C 41/48 of 1997 at 63. The press release announcing the results of the conciliation committee on Directive 97/33 (PRES/97/84 (20 March 1997)) indicates that the Council abandoned this objection, presumably because it was of symbolic rather than substantive value: the Commission could in any event include any elements in its review.

⁴¹ The only implementation powers it was given in the Interconnection Directive were to make modifications to annexes IV, V and VII relating to accounting systems and interconnection charges (Commission 1997). The drafting of these Annexes excludes the Directives from any binding effect on the NRAs; the original Commission drafting made the content of these annexes mandatory. Annex IV which deals with cost accounting systems contains a list which "indicates, by way of example, some elements which may be included in such accounting systems", Annex V is a "list of examples of elements for interconnection charges", Annex VII contains the Framework for the negotiation of interconnection agreements, Part 1 sets out "Areas where the national regulatory authority may set ex ante conditions" and Part 2 contains "other issues the coverage of which is to be encouraged". Even though non binding, amending these lists was subject to comitology and a regulatory committee as the form of committee (the Commission originally proposed an advisory committee only.) In most areas of legislation, where the Commission is given implementing powers, its not subjected to committee oversight and in almost half the remaining cases it is subject to an advisory committee only (Tseblis and Garrett: 309).

could be part of ministries)⁴², very general principles⁴³ and a confusion of objectives rendering infringement procedures difficult⁴⁴.

The outcome of the third occasion for review of law in the sector was a transfer of some competencies to the Commission. In exchange for increased discretion for NRAs with respect to the imposition of regulation, by the removal of automacity for the application of regulation, the Commission was given the power to examine the NRA's market analysis justifying regulation or its removal⁴⁵. This was a compromise forced on the Council by the European Parliament⁴⁶. The European Parliament has so far consistently supported more supranational regulation in each review. However, the Council was adamant in refusing to give the Commission the ability to review the content of regulation decided on by the NRAs. The Council also refused to countenance draft articles for the new Directives which would increase the independence of NRAs from Ministries⁴⁷ and vetoed the proposition that a committee of national regulators advise the Commission on review of NRA decisions⁴⁸.

Institutional arrangements in telecommunications are about to be subjected to a fourth examination in the context of the 2006 review⁴⁹. It is notable in that context that the

⁴² There is no actual definition of an NRA, rather some requirements which partly defined their characteristics. Article 1.5 of 97/51 on independence of NRAs stated: "national regulatory authorities shall be legally distinct from and functionally independent of all organisations providing telecommunications networks, equipment or services; Member States that retain ownership or a significant degree of control of organisations providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control." (European Parliament and Council (1997b)).

⁴³ Some authors consider that the principles in the EU Telecommunications Directive are prescriptive (Levi-Faur:189, Schmidt: 245). Levi-Faur, for example, states that the Interconnection Directive "determines the principles of the sensitive issue of fixing charges and costs of establishing a uniform system for cost calculation." In fact, the Member States ensured in the Council Working Group that the Directives did not contain any constraining principles. While the Directive contains elements that NRAs should take into account when dealing with costs, Member States would not agree the relevant cost-base, which made the requirement for cost-based wholesale prices meaningless. Leading economists in this area, Cave and Crandall, note with respect to the costing principles "Cost orientation turned out, however, to be an excessively vague phrase, permitting excessive interconnection charges...the interconnection directive took a rather catholic view of cost standards, citing "fully distributed costs, long run incremental costs (LRIC), marginal costs, stand-alone costs, embedded direct costs. Each of these can [also] be measured ...on the basis of a historic or forward-looking basis..." (Cave and Crandall: 50).

⁴⁴ Article 1.1(a) of Directive 97/51: "Open network provision conditions shall aim at: - ensuring the availability of a minimum set of services, encouraging the provision of harmonised telecommunications services to the benefit of users, in particular by identifying and promoting by voluntary means harmonised. (Commission)

⁴⁵ Article 7 of the Framework Directive

⁴⁶ The parliamentary delegation's preparatory notes for an informal trialogue that occurred during conciliation recorded "The Council did not take into account the internal market dimension of the regulatory framework and their common position did not provide for a mechanism impeding a NRA to take a decision which would endanger the proper functioning of the market." Notes for informal trialogue, Presidency (2001).

⁴⁷ The Commission proposed additional text on independence which read "Member States shall ensure that national regulatory authorities are able to act freely, without further authorization or control from any other agency or body." Presidency (2001)

⁴⁸ Ibid

⁴⁹ Article 25 of The Framework adopted in 2002 required such a review. Documentation relating to the review can be found at:

Commission has privately offered to the ERG to hand over its responsibilities for reviewing market definitions and findings of market power to a reconfigured ERG if the ERG will support an approach where it reviews the actual content of regulation and is reconfigured as a body taking binding majority decisions⁵⁰. The ERG collectively rejected this approach; agreeing only that they were willing to take over the Commission's powers to review market analysis and significant market power findings (ie the triggers for when regulation applies, rather than the content of regulation)⁵¹. This may indicate the constraints provided by their true principals, the Ministries, since such proposals by genuinely creating an alternative principal might potentially increase NRA decision-making freedom.

The telecommunications regulators have responded quite differently from the combined electricity and gas regulatory network (ERGEG). The latter have asked for the ability to set detailed regulatory conditions at supranational level for cross-border services⁵². However, their responses are in fact similar in that they have restricted their objectives to take over competences that had already been granted in legislation by the Council of Ministers European level to the Commission.

The reasoning for Member States general approach is illustrated by comments from two senior national regulators with respect to the opposition of their respective Member States to the original Euroregulator concept:

“At the point in time when the issue of the Euroregulator came up, we were careening down the path of substantially reducing interconnection rates. OFTEL was way ahead of the game. We were deeply hostile to anything that might have allowed European recalcitrants like France and Germany to jointly determine our policy and undermine our good works. In fact, we were not convinced that the latter two were really serious about competition in telecommunications” (Interview with Donald Cruickshank, former Director-General, OFTEL.)

“Portugal would have been opposed unless it was a simple matter of coordination or a specific task with which we agreed. We were opposed to any federal regulatory body particularly as at the time we were seeking a derogation from opening to competition.”

http://ec.europa.eu/information_society/policy/ecomm/info_centre/documentation/public_consult/index_en.htm

Initial Commission proposals are likely to be published in autumn 2007.

⁵⁰ Letter from Commission Reding to ERG of November 2006 entitled “The European Communications Network Authority (ECNA) – first outline of the European “FCC”. Under this model, the NRAs would continue to make decisions but they would be subject to review by the ECNA. The ECNA would be run by a Council of 12, 9 representing NRAs and 3 members comprising the managing board of the ECNA. The members of the managing board could not be employees of NRAs. Decisions would be by simple majority. The directives would include new minimum requirements regarding the personal, financial and instrumental independence of NRAs.

⁵¹ Letter from ERG to Commissioner Reding of 27 February 2007. According to one off-the-record source, a minority of members were in favour of the Commission proposals but agreed to endorse the collective position. This minority appears to have been a sub-set of the pro-competition group of NRAs identified above.

⁵² ERGEG's reponse to the European Commission's Communication “An Energy Policy for Europe). Ref. CO6-BM-09-05, 6 February, 2007, pp11-16.

(Interview with Luis Garcia Pereira, former Head of the International Section, Anacom).

Nonetheless, these two regulators institutions were strong supporters of the creation of the IRG. Their motivations were partly in order to promote discussion amongst peers. However, the motivation of the UK at least, was partly in order to stave off pressure for a Euroregulator (interviews). Consistent with this approach, more recently Kip Meek, as Director of Policy at OFCOM and then lead official on the 2006 Review, has recently argued that ERG need to be seen to promote best practice in order to stave off demands for supranational controls over national regulators.⁵³ The role OFCOM envisaged for ERG was an open market coordination-type role, the publication of best practice and possibly naming and shaming.

Unsurprisingly, the preferences of new entrants and incumbents have also tended to be consistent. New entrants have in general favoured supranational regulation; incumbents have favoured national regulation. Previous assessments have sometimes found that the “industry” position is confused⁵⁴. However, this is because the concept of “industry” does not map business interests accurately when the issue is the design of regulatory institutions which are by their nature intended to benefit some business interests and fetter others. Even when business interests are clearly separated into those for and against access regulation, industry views will be ambiguous unless the institutions are clearly specified⁵⁵. For example, most incumbents were against a Commission veto in the 2002 Review, France Telecom’s initial position was in favour⁵⁶. France Telecom was however in favour, presumably because it calculated that such a veto would be subject to ministerial comitology and subject to a regulatory procedure (ie ¾ majority votes). The French Ministry’s initial position did not entirely make it clear whether or not it accepted a Commission veto, however it was clear that any Commission powers needed to be subject to ministerial comitology⁵⁷. In the context of the 2006 review, ETNO (the collective incumbents’ association in Brussels) believes that there are three possible outcomes to the institutional debate: an extended Commission power over remedies, an enhanced ERG/EU regulatory agency and the status quo. Its working group on regulatory policy has recommended that ETNO promote the status quo as it fears that the other institutional solutions would lead to what they consider inappropriate pro-regulatory pressure (interview). ECTA, the new entrants association, on the other hand, is arguing for either a Commission veto or an ERG+ agency and, in their view, the most likely feasible advance, if there is one, formal advice from the ERG combined with a Commission decision. However, they would not support any arrangement which subjected Commission decisions to ministerial comitology. In their view, the structures they favour would lead to pressures for the adoption of what they consider best practice regulation (interview).

Lack of independence of NRAs

⁵³ Meeting between ECTA and Kip Meek of 5th May 2006. My notes.

⁵⁴ See for example, the NERA report on the Euroregulator.

⁵⁵ The NERA report did note “...other respondents stated that they found it difficult to assess the possible added value of a European regulator for different regulatory activities without first having details of the institutional framework and structure that would support a new ERA.” (NERA)

⁵⁶ <http://europa.eu.int/ISPO/infosoc/telecompolicy/review99/nrfwd/Frtelec19e.htm>

⁵⁷ “En tout état de cause, les Etats membres doivent être associés à tout acte produisant des effets significatifs, notamment au travers d’une procédure de comitologie appropriée”. See <http://europa.eu.int/ISPO/infosoc/telecompolicy/review99/comments/fradmin28b.htm>

Proving the lack of independence of national regulators is not straightforward. All Member States claim that they have created an independent regulator. For example, in interviews conducted by Coen et al, a representative of the German Economics Ministry stated that “RegTP [the regulator] was fully independent and claim[ed] that there is no political influence on the decision-making of RegTP (Coen, Heritier, and Boelhoff 2002:8).

Institutional Design Accounts

Attempts have been made to assess the independence of regulatory authorities by assessing the degree of statutory protection from ministerial instruction or influence with which these institutions have been endowed. There is an extensive literature on the design of independent institutions, although it largely relates to the design of central banks. The OECD study of 2000 on “Telecommunications regulations: institutional structures and responsibilities”, for example, follows in this tradition and states:

“Whilst the degree of independence is also influenced by factors such as political traditions and the personality of the head of the regulatory body, the single most significant factor is the institutional structure of the regulator. In fact, the degree of independence varies from country to country according to the institutional arrangements put in place by law and regulation.” OECD(2000:14)

However, the OECD report provides no evidence to support this conclusion. It engages in no comparative analysis and simply provides a list of the different institutional arrangements in different countries and suggests why these arrangements would enhance independence. Many of these particular institutional arrangements were then adopted by Gilardi and 21 grouped in 5 categories (agency head status, management board members’ status, the formal relationship with government and parliament, financial and organisational autonomy, and , extent to which regulatory competences are shared) and scored in order to provide an index against which agency independence could be measured (Gilardi 2002). However, the risk of this approach, as Forder has pointed out with respect to such lists relating to the statutory independence of central banks, is that if we concentrate only on the rules contained in statutes which are ostensibly there to safeguard regulatory independence, then we end up with a measure of the number of controls designed to structure independence/dependence but not of actual independence itself (Forder 1996 and 1997). Forder argues that in the context of central banks that statutory independence may not tell us about informal rules and who actually sets policy. He points out that detecting these informal rules will be problematic if governments have incentives for third parties to believe that there is independence. Furthermore, even if the institution is the decision-taker, it may be under the implicit or explicit threat of legislation or other sanctions if it does not comply with the government’s wishes.

An attempt has been made to assess the independence of telecommunications regulators using the statutory independence approach (Edwards and Waverman 2005). Edwards and Waverman score NRAs against 12 institutional elements including

whether the NRA is appointed by the legislative or the executive and whether the regulator has a fixed term or not. As a consequence of finding the UK amongst the least independent on this basis, they admit there is a methodological problem⁵⁸, but otherwise ignore this difficulty. They also find that the German regulator is the most independent, a finding which would have equally surprised most industry observers⁵⁹.

Another model has been suggested by Thatcher for testing independence by observing the relationship between politicians and regulators (Thatcher 2004:5). The five indicators that he used for testing the use of control by elected politicians over regulators were:-

- party politicization of appointments: the greater the politicization of regulators, the lower the likely independence of regulators and the greater the control by elected politicians;
- departures (dismissals and resignations) of IRA members before the end of their term (since it is difficult to distinguish “forced” resignations from voluntary ones, they are treated together in the figures); the lower the level of early departures, the more likely IRA independence;
- the tenure of IRA members: the longer their tenure, the greater their likely independence from elected politicians;
- the financial and staffing resources of IRAs;
- the use of powers to overturn the decisions of IRAs by elected politicians

This seems a superior approach to the simple “statutory” approach, since it has the merit of examining some important relationships between elected politicians and regulators, which may be dependent on “rules” other than those which are incorporated in statute. Thatcher’s conclusion is that on the whole these powers, with the exception of limiting IRA’s resources, were not used to control the regulatory authorities (including telecommunications authorities) (Ibid:14). However, whether this is true of most of the regulators examined in his study which covers all of the “independent” national authorities in a range of sectors, not all of these tests have been met in the period 1998-2006 with respect to the specific telecommunications regulatory authorities. If we take France and Germany for example, we should note that in France, until 2004, the Ministry shared regulatory duties with the regulator and that in Germany the President of the BNetzA is an active politician⁶⁰. Thatcher, however, does note that his findings do not necessarily mean that IRAs are independent from elected politicians, rather that if they do control regulators, they do so through more informal means which are much more difficult to observe (Ibid:14). If we cannot observe the true relationship between the regulator and the elected politicians, then we may also need to supplement them with other potential indicators.

⁵⁸ “Independence is, however, much more than a set of formal institutional rules...It therefore must be stressed that the EUR-I index, while capturing independence de jure, does not necessarily capture independence de facto. For example, the UK scores only moderately on the EURI-I index, yet most industry experts regard the UK as the benchmark in independent telecommunications regulation in the EU.” (Ibid:23-24)

⁵⁹ The ECTA studies on regulatory effectiveness have consistently found the German regulator to among the least effective in the EU.

⁶⁰ Mathias Kurth began his political career in 1978 as a deputy in the SPD Fraktion of the Hesse Land Parliament and in the legislative period 1994-1999 was parliamentary state secretary to the Hessen Minister of Economics.

Indeed, if elected politicians care about inward investment or sanctions from the Commission, presumably those aspects we can test will likely to indicate that they either cannot control the regulator or do not exercise the controls that they do have. We may therefore have to examine the effectiveness of national regulatory regimes in actually delivering effective regulation and competitive markets. Where NRAs fail to do so, and fail to do so over time, it may be reasonable to assume a lack of independence.

Qualitative assessment of the independence of BNetzA

This section briefly looks at further evidence with respect to the actual independence of an individual NRA and suggests that there is evidence of only nominal independence. BNetzA is an independent authority under the responsibility of the German Federal Ministry of Economics and Labour (the “BMwi”). Its President and two Vice-Presidents are appointed by the Ministry and are usually shared with two of the main parties that are not in government. Regulatory decisions, however, are not made by the President but by three member court-like “ruling chambers” which are staffed by senior civil servants who report to the President. The position of President is non-renewable (Gehring).

In theory as a result of the “court-like” structure of the ruling chambers, German regulatory decisions should be independent (Gehring). However, as Doehler notes “...these chambers are widely regarded as being free from ministerial instructions. But this is only inferred from their court-like image and nowhere guaranteed in the law” (Doehler 2003:110). What the law requires is that general instructions have to be published in the federal register⁶¹ and this is meant to ensure the Ministry only makes transparent general policy directions rather than interfering in individual pricing decisions. However, Doehler notes that “In practice, the overseeing department has issued several general and special instructions...if agency delegation was meant to offer credible commitment, it went only half way.” (Ibid:110) Doehler does not explain a “special instruction”. According to an interview with the Regulatory Affairs Director of a German company, the Ministry had interpreted the requirement for publication of general instructions to mean that if it issued instructions that were specific to an individual set of circumstances then they could be characterised as “special” and would not therefore fall under the publication requirement (interview). Coen et al noted after an interview with a representative of RegTP that “The RegTP complains of constant and subtle ministerial attempts to guide regulatory decision-making (interview RegTP, February 2000). In sum, while BMwi only rarely formally interferes with RegTP decision-making, there seems to be steady informal interference. This leaves the Ministry as one of the central players in the regime” (Coen, Heritier and Boelhoff: 8).⁶² The OECD’s review of regulatory reform in

⁶¹ Article 65(5) Telekommunikationsgesetz 1996

⁶² A senior German official said to this author “Structurally the ruling chambers are independent. However, President and Vice-Presidents are appointed by the Ministry and they are from the parties. Their terms are renewable and there is an expectation about how they will behave – partisan [i.e. pursue party interests]...The Ministry could go via the President. He [the President] could then summon the Chairman of the relevant ruling chamber. It would be a very subtle process. The President has the formal right to give a written order. However, this would never happen as it would show up. Instead, the Chairman could be asked to reconsider a particular draft decision. This would be very difficult for a civil servant. He could ignore this view, but would want to be very sure of his ground. There would be real risks. He could then be moved to another area and this seems to have happened

Germany noted "...there have been concerns expressed about the independence of the regulator. The government still owns 42.3%⁶³ of DTAG giving rise to concerns about a conflict of its interests as a shareholder and regulatory policy maker."(OECD 2004:16)

In the next section, we look at two aspects of implementation necessary for the effective application of telecommunications regulation. BNetzA scores poorly with respect to accounting separation and is one of the regulators that does not require the publication of comparative supply information either solely to the regulator or to third parties in general.

The effect of the existence of the IRG and ERG

Establishing the effect of networks is difficult. We can see that they exist and that they produce documents of best practice. However, this is not sufficient to tell us the extent to which they have an impact. The same difficulties exist as when trying to judge implementation of Directives: we need to examine application and outcomes to see whether actual implementation as opposed to paper implementation has really occurred (Mastenbroek: 1116, Verluis: 13)⁶⁴.

This paper selects two aspects of regulation which are supporting remedies to the key principle of non-discrimination: accounting separation and transparency requirements. They in effect permit control of price and non-price discrimination. They were mandatory principles of the 1996 Commission Directive and the 1998 Access and Interconnection Directive and became discretionary under the 2002 Directives. An NRA that imposes a non-discrimination requirement on an incumbent will not be able to verify whether or not non-discrimination is being observed if accounting separation and transparency obligations have not also been imposed.

The ERG Common Position of 2003 on Regulatory Remedies describes accounting separation and transparency respectively as follows:

twice. The President can also withdraw the case from the ruling chamber to the President's Chamber or to another Chamber. This has never happened, but the threat alone would act as a discipline"
(Interview)

⁶³ Another 22% was owned by a state owned bank. The combined ownership is now a total of 38%.

⁶⁴ This approach was also adopted by IBM in their analysis of the liberalisation of EU rail markets. IBM constructed two indexes: the LEX index and the ACCESS index. Their overall index of liberalisation comprised of a joint index with a weighting of 30:70 of these two elements. Their justification for this approach was as follows "The LEX Index reflects how adequately the countries examined in the study have implemented the regulatory structure, without attempting to comment on the actual administrative implementation and the actual effectiveness of the respective legal regulations. It is just this which is described in theoretical legal discussions as *law in the books*. The factors examined in the LEX Index, while they are relevant for the market opening, are not of decisive character. With reference to the market opening processes of the European rail markets, the formulation of national law in a way that is adequate for the market opening is a necessary but not a sufficient condition. Decisive for the actual market opening are the factors of the second level, that is the ACCESS index." IBM Business Consulting in conjunction with Professor Dr. Dr. Christian Kirchner Rail Liberalisation Index 2004, p.8. IBM also noted that "while the level of the legislative market access barriers (LEX Index: *law in the books*) is gradually converging, the level of practical market access obstacles (ACCESS Index: *law in action*) continues to show significant differences." Ibid, p.2.

“ [accounting separation] is specifically put in place to support the obligation of transparency and non-discrimination...Accounting separation should ensure that a vertically integrated company makes transparent its wholesale prices and its internal transfer prices...”(ERG 2003: 49)

“...Transparency is a very important obligation as it is a significant counterweight to possible significant market power undertakings’ strategies in relation to regulatory obligations. Economic literature observes that where access is given at particular prices, access requirements can be rendered significantly less effective through the use of selected standards, quality degradation, late delivery etc.”(Ibid:48)

Nonetheless, as with any ERG document, these are described in optional terms. The evidence in 2006 suggests that these obligations have hardly been imposed. The precise nature of cost accounting systems is not clear in many countries; the outcomes of the ECTA Scorecard for 2006 are shown in Table 2. Of the seventeen Member States identified, thirteen were attributed scores of 10 or less out of a maximum of 20. The current position appears to be that still only Ireland and the UK have implemented in full the Commission’s Recommendations. The view of an accounting consultant asked to review the accounting separation regimes of all the Member States in 2001 for DG Information Society is that only one or two would then actually have been of any use in assessing cases of non-discrimination⁶⁵.

The table below indicates that while a headline requirement for Accounting Separation has been made in many cases it has not been made operational. A negotiator from a major Member State, in the margins of a 1997 Council Working Group negotiating the Interconnection Directive when asked by DTI and OFTEL representatives why his Member State would support the principle for accounting separation but not agree to give the Commission the power to issue binding guidelines told them: “We are not ready for anglo-saxon competition. We will agree to the requirement for non-discrimination. We will not agree to accounting separation except in principle. Consequently, one will not know whether there is non discrimination or not...”⁶⁶

⁶⁵ Interview with Jean-Luc Gustin. It was also his view that if Member States really wished to introduce systems to track non-discrimination, it would take approximately six months and a cost of about £5 million to take each of the systems put in place in 1998-9 and make them fit for that purpose; a hardly insurmountable hurdle.

⁶⁶ Tarrant (2003 :.273).

Table 2

ECTA Scorecard on Accounting Separation⁶⁷

Accounting Separation (Art 11 AD)

Section	Sub-section	Question	Question	Weight	AT	BE	CZ	DK	FI	FR	DE	EL	HU	IE	IT	NL	PL	PT	ES	SE	UK
B	2	34	Does cost accounting separation accompany non-discrimination	5	5	5	5	5	5	5	0	5	5	5	5	2.5	5	5	5	5	5
-	-	35	Is cost accounting separation methodology clearly specified	5	0	0	5	5	0	5	0	0	2.5	5	2.5	5	0	5	5	0	5
-	-	36	Are accounting separation accounts published	5	0	0	0	0	0	0	0	0	0	5	0	2.5	0	0	0	0	5
-	-	37	Do separated accounts show transfer charging	5	0	0	0	0	0	0	0	0	0	5	5	2.5	0	0	0	0	5
-	-	-	TOTAL	20	5	5	10	10	5	10	0	5	7.5	20	12.5	12.5	5	10	10	5	20
-	-	-	TOTAL 2005		5	0	7.5	0	n/a	2.5	0	5	5	17.5	7.5	0	2.5	5	5	5	20

Source: ECTA

Deleted: ¶
 =====Section Break (Next Page)=====

⁶⁷ ECTA (2006) <http://www.ectportal.com/en/basic651.html>

BT research⁶⁸ into the regulatory requirement to publish comparative supply data with respect to some key access products for business services in December 2006 in 13 Member States: Belgium, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Italy, Netherlands, Poland, Spain, Sweden and the UK, reveals the following:

Product	Publication of key comparative supply data	Publication of key comparative supply data to NRA only
Traditional PPC	3 Member States	1 Member State
Ethernet PPC	4 Member States	1 Member State
ATM Bitstream	3 Member States	1 Member State (a different Member State from the one above)

Views of NRAs themselves

A questionnaire sent to NRAs in 2005 contained inter alia the following possibilities:

- (i) drafting ERG/IRG pibs and opinions is a consensual practice and it is usually possible to find text which covers the positions of all national regulators even where they have divergent policy goals;
- (ii) implementing ERG/IRG pibs and opinions is perceived by your institution as an obligation;

Six of the twenty five NRAs responded. Four agreed with the first statement, one disagreed. One agreed in general but said that if a minority position was held by a single NRA only that it might be overruled. All six disagreed with the second proposition. Two added the following points:

“If a recommendation/ opinion/common position runs up against a domestic political imperative then its useless. It might help where a mere official at the ministry is querying the policy of a national regulator and he or she can say that it’s in line with the collective view of national regulators.

There is no sanction, social or otherwise, for failure to comply with a recommendation/opinion. Everyone recognises that they could find themselves in position where they do not wish to apply a pib⁶⁹ etc for domestic reasons.

Erg has been mandated to look at the extent to which nras do apply opinions et al. However, expect it to be half-hearted. Can’t imagine that the large number of countries that do not apply significant parts will agree a methodology that will point this out⁷⁰.”

⁶⁸ BT(2007)

⁶⁹ An ERG term for a best practice paper.

⁷⁰ In fact, this particular exercise was quietly abandoned (interview).

“IRG pibs are a result of compromise between organisations of very different size, mindset and legal background, therefore they are usually very vaguely worded, carefully avoiding the critical issues. However, even in cases where the final document becomes a truly useful tool for the regulator (ie the ERG Remedies Paper), it is not a legally binding document, therefore it is only implemented in light of the local market situation.”

A good example of the network of regulators not providing a mechanism for overriding domestic constraints can be seen in the regulation of bitstream access in Germany. The ERG produced a paper on the appropriate regulation of bitstream in 2003⁷¹. One of the leading drafters of the paper was an employee of BNetzA, the German regulator⁷². BNetzA was also one of the leading drafters of the ERG’s remedies paper adopted in 2004⁷³. Germany was the last country in Europe to begin regulating the incumbent’s bitstream product (Cullen), commencing the required review in 2006, six years after Deutsche Telekom launched its retail product and three years after analysis of the product was required by the European directives of 2003⁷⁴. Companies that attempted to lodge the IRG/ERG documents during the BNetzA national consultation process on bitstream access in 2006 were told that they were inadmissible⁷⁵. BNetzA resisted making this market analysis for as long as possible and when obliged to do so and propose remedies by the Commission, proposed remedies that would result in no operational effect. In doing so, it ignored the Commission’s comments on what would constitute an effective remedy⁷⁶. This possibility is built into the institutional arrangements which the Council of Ministers agreed when they adopted the 2002 Framework; the original proposals of the Commission and the European Parliament would not have permitted this possibility.

Quantitative data on outcomes

The points made above could be subject to the criticism that the regulatory framework is intended to be flexible to local circumstances and that the full panoply of regulation may not be required in every Member State.

The quantitative data is limited. However, that which exists tends to suggest that state owned incumbents are allowed to charge higher access prices and that where

⁷¹ ERG Bitstream Access. Bitstream access is a wholesale product consisting of the DSL part (access level) and backhaul service of the data backhaul network (ATM network and IP network) and is used to support data services such as broadband access.

⁷² Interviews with participating members of IRG.

⁷³ Interviews with participating members ERG.

⁷⁴ ERG concurs with the obligation – see ERG 2003b:11.

⁷⁵ Interview with Felix Mueller, Head of Law and Regulation, BT Germany.

⁷⁶ Case

2007/576 <http://forum.europa.eu.int/Public/irc/info/ecctf/library?l=/germany/registeredsnotifications/d20070576>. Section III of the Comments letter says: "Need for ex-ante price control: The Commission invites BNetzA to ensure an efficient ex ante price control. Ex ante price control is of particular importance as otherwise excessive pricing may undermine the imposed access. Given the considerable time that has passed so far without ATM bitstream access in place, any further delay of the access regulation, for instance, due to the necessity to launch dispute settlement if prices cannot be agreed between the parties, should be avoided." BNetzA's decision omits to require ex ante price controls.

regulatory conditions are less stringent that investment in telecommunications is lower. The latter would tend to suggest that the access conditions needed to permit competition are not in place.

Evidence presented by Bauer of the difference in regulated interconnection prices between Member States in 2000 shows that they vary, depending on the ownership status of the incumbent (Bauer 2003:40).

	Public	Mixed [partly privatized]	Private
PTOs [incumbents] in category	Austria, Luxemburg	Belgium, Finland, France, Germany, Greece, Netherlands, Sweden	Denmark, Ireland, Italy, Portugal, Spain, UK
Interconnection (Eurocents) ⁷⁷			
Double Transit	2.53 (1.63 – 2.58)	2.11 (1.70-2.63)	1.92 (1.54-2.28)
Single Transit	1.63 (1.63-1.69)	1.62 (1.24-1.89)	1.22 (0.90-1.53)
Local Termination	1.05 (1.02-1.69)	0.86 (0.63-1.43)	0.76 (0.62-0.99)

Variations in price do not arise because of major differences in network costs as similar technology (provided by a group of four global telecoms suppliers) is used by all operators (Edwards and Waverman 2005: 10).

We can also see that the level of investment in telecoms varies and this is likely at least in part to be a reaction to the effectiveness of regulation in containing the incumbent. For example, investment per capita in telecoms in 2001 was \$86 per head in Germany and \$236 in the UK, a ratio that has been more or less constant since liberalisation.⁷⁸ In 2004, ECTA conducted a study which assessed regulatory effectiveness, defined as a combination of resources available to the regulator (for example, sufficient funding), powers to require compliance with its decisions (for example, the power to fine), and, outcomes in terms of the availability of a range of

⁷⁷ These may look like small differences, but these sums are paid per minute of network usage. Cave (1997) has noted “ a change of a few percent in interconnection charges can make the difference between profit and loss for an entrant, half of whose revenues may at the outset go to the incumbent operator.”

⁷⁸ OECD (2003). These figures are not broken down to show incumbent and new entrant investment. They only give a total. It may seem counter-intuitive but incumbent investment is probably higher where new entrant investment is higher. In the US, the Phoenix Center found that incumbents invest more heavily in states where they are more heavily regulated (Phoenix Center (2003)). The explanation is that this is regulation designed to promote competitors, and in so far as it is successful, it seems plausible that it would force greater incumbent investment for the purposes of creating competition. There are certainly individual examples from Europe. BT, for example, in the UK launched a new voice over internet product in 2004 but initially only in the areas where the cable companies had invested in local access networks.

interconnection products and the comparative price of these products. The ECTA study found that there was a wide variation in the regulatory effectiveness of ten NRAs, with Germany obtaining the lowest score and the UK the highest. The ECTA study found that, after allowing for inflation, there was a 90% correlation between the score for regulatory effectiveness and investment levels in Member States (ECTA 2004:40).

Market Outcomes

There is no readily accessible evidence which describes the relative market power of incumbent operators across all markets. However, this could be established by examining all the market reviews received by the Commission. There are nonetheless indicative graphs published in the Commission's implementation report. These indicate quite a degree of variation in outcomes: for example in fixed voice telephony, the Commission's Twelfth Implementation Report has found market shares for incumbents which vary between 44% in one Member State to 99% at the extreme in another. (Commission 2007: 21)

IV. Politics of European agencies

European agencies are EU level public authorities with a legal personality and a certain degree of organizational and financial autonomy that are created by acts of secondary legislation (Commission 2002:3, 1996). This definition distinguishes European agencies from regulatory networks that lack a clear institutional core and from other independent bodies established in the Treaties, such as the European Central Bank, the European Monetary Institute or Europol.

The agencies differ significantly in their structures, functions and resources. Broadly, they can be divided into two categories, 1) executive agencies that perform managerial tasks on behalf of the Commission and 2) regulatory agencies that provide information and advice, make regulatory decisions and coordinate regulatory networks. Twenty-five of these agencies have been or are being established under the EU's first pillar (the EC Treaty).⁷⁹ Additionally three agencies have been established under the second pillar (concerning Common Foreign and Security Policy) and three agencies have been established under the third pillar of the EU (concerning Justice and Home Affairs). Table 3 summarizes existing European agencies and those in final stages of the legislative process.

⁷⁹ Three of these twenty-five agencies are categorized by the Commission as 'Executive agencies' as opposed to Community agencies. The 'executive agencies' have a more limited remit than the Community agencies, as they are established only to implement particular programmes for a fixed time period.

EUROPEAN UNION AGENCIES

NAME	LOCATION	YEAR	PRIMARY FUNCTION
Cedefop - European Centre for the Development of Vocational Training	Thessaloniki	1975	Dialogue/information
Eurofound - European Foundation for the Improvement of Living and Working Conditions	Dublin	1975	Dialogue/information
EEA - European Environment Agency	Copenhagen	1990	Information
ETF - European Training Foundation	Torino	1990	Executive
EMCDDA - The European Monitoring Centre for Drugs and Drug Addiction	Lisbon	1993	Information
EMA - The European Agency for the Evaluation of Medicinal Products	London	1993	Regulation
OHIM - Office for Harmonization in the Internal Market	Alicante	1993	Regulation
EU OSHA - European Agency for Safety and Health at Work	Bilbao	1994	Dialogue/information
CPVO - Community Plant Variety Office	Angers	1994	Regulation
CdT - Translation Centre for the Bodies of the European Union	Luxembourg	1994	Executive
EUMC - European Monitoring Centre on Racism and Xenophobia ⁸⁰	Vienna	1997	Information
EAR – European Agency for Reconstruction	Thessaloniki	2000	Executive
European Police College	Hook (UK)	2000	Training
European Union Institute for Security Studies	Paris	2001	Pillar II / Information
European Union Satellite Centre	Torrejón de Ardoz	2001	Pillar II / Information
EFSA - European Food Safety Authority	Parma	2002	Risk assessment/ regulation
Eurojust - European Body for the Enhancement of Judicial Cooperation	The Hague	2002	Pillar III / Coordination
EMSA - European Maritime Safety Agency	Lisbon, Portugal	2002	Regulation
EASA - European Aviation Safety Agency	Cologne, Germany	2002	Regulation
ENISA: European Network and Information Security Agency	Heraklion, Greece	2004	Information/ risk assessment
ERA: European Railway Agency	Lille/Valenciennes	2004	Regulation
European Centre for Disease Prevention and Control	Stockholm	2004	Information
European Defense Agency	Brussels	2004	Pillar II : Procurement
Intelligent Energy Executive Agency	Brussels	2004	Executive
Community Fisheries Control Agency	Vigo	2005	Regulation
Executive Agency for the Public Health Program	Luxembourg	2005	Executive
European Chemicals Agency	Helsinki	2007	Regulation
European Agency for the Management of Operational Cooperation at the External Borders	Warsaw	2004	Border Control

⁸⁰ The Council has agreed to extend the mandate of the Centre to become a European Fundamental Rights Agency.

The Politics of Eurocracy

European agencies were created first as a political response to a set of functional pressures associated with the 1992 single market programme. Regulatory burdens (in terms of data gathering, monitoring, rule-making, licensing) associated with the completion of the single market programme demanded an increase in the EU's administrative capacity. An obvious means by which to meet these regulatory demands, and indeed the means favoured initially by the European Commission, would have been to expand the Commission's staff and budget. However, there was strong political opposition across the member states to expansion of the Commission bureaucracy. In this context, the Commission sought novel avenues through which to expand the EU's regulatory capacity and turned to the idea of 'independent' European agencies. The 'independent' agency model provided an attractive means to strengthen European governance structures while circumventing member state opposition to the growth of the European Commission. The notion of delegating tasks to depoliticised, 'independent regulatory agencies' was increasingly popular in domestic politics across EU member states in the late 1980s and was therefore likely to appeal to many national governments.

Moreover, from the Commission's standpoint though delegating tasks to agencies outside the Commission hierarchy did entail some sacrifice of bureaucratic 'turf', the prospect of being able to delegate routine regulatory tasks to agencies and concentrating Commission resources on policy making and enforcement was attractive in some respects. And finally, in many cases, the resources and responsibilities granted to European agencies were not taken away from the Commission as such, but from obscure comitology committees that had long advised and overseen the Commission as it implemented EU policies (Dehousse 1997:258).

After the success of Commission President's 1989 proposal for the establishment of a European Environment Agency, a wave of agency creation ensued. Proposals for a variety of agencies emerged from the Commission bureaucracy, and the Commission Secretariat General then stepped in to coordinate the process of agency design. (Kelemen 2002:102) As a series of proposals for the creation of European agencies emerged in the early 1990s, the Commission and the Council reached a political compromise over how the agencies should be structured and governed. While the precise outcome varied across agencies, all agencies established in the early 1990s were subject to the control of management boards composed overwhelmingly of member state representatives. Though the Commission would have preferred more 'supranational' governance structures, member states in the Council demanded that any new agencies be subject to firm 'intergovernmental' control. In this sense, these supposedly independent agencies were anything but independent. Rather, they were subject to oversight by member state appointees and, at least in cases where powers were transferred from the more thoroughly independent European Commission to new EU agencies, this arguably reduced the independence of EU regulation. As for the scope of their powers, some agencies were restricted to information gathering roles while others were granted limited regulatory powers.

Finally, the design of the new agencies, based on a hub and spoke network model, (Dehousse 1997) served to address member state concerns regarding threats that new EU bodies might pose to existing national regulatory authorities: in the hub and spoke structure, a European agency would coordinate and rely on existing national authorities, in some cases even delegating tasks to national administrations on a rotating basis. The European agencies could use their position at the hub of these

networks to pressure national administrations to conform to common European norms and practices, without threatening them with extinction.

The European Agency for the Evaluation of Medicinal Products (EMA), which was among the most significant agencies established in the early 1990s, typified this structure. The EMA was designed to accelerate the slow, fragmented and costly process of assessment and authorization of pharmaceutical products and thus to facilitate the completion of the internal market in pharmaceuticals. The Commission overcame the concerns of national drug testing authorities by proposing a network structure that preserved an integral role for these national authorities. Essentially, the EMA would coordinate a regulatory network in which national authorities would take turns assessing and authorizing pharmaceuticals for the European market.

Internal variations in the design of the EMA also reflect member state concerns with distributional issues (Feick). The significance of distributional issues for Member States is suggested by the variation in the decision-making processes adopted with respect to authorisations for pharmaceutical products within the EMA. In the pharmaceutical sector, as a result of pressure to deal with a nominally liberalised regime but where individual national licensing schemes were being used to block import entry, a reformed EU sector-specific regime was adopted in 1993. A mutual recognition procedure (“MRP”) was adopted vis-à-vis existing products. In theory, this required national regulators to recognise a product authorised in any other Member State, unless they mounted an objection; arbitration could then be conducted within the Medicines Agency. A centralised regime was adopted with respect to “innovative” products whereby the NRAs had to adopt a formal opinion as to whether to authorise, which the Commission would adopt (subject to comitology). “Innovative” products were essentially bio-tech products which barely existed in 1995 so the distributional consequences were very limited. Feick finds that there are very few products blocked under the centralised procedure, whereas under the MRP companies do not attempt to obtain authorisation for 50% of products in half of the Member States in order to avoid objections (Feick: 38-47). In other words, the EMA contained two regulatory mechanisms, and the one that had the most distributional consequences was designed to be the least centralized and ultimately proved the least effective.

In recent years European agencies have evolved from a set of seemingly ad hoc institutional experiments to become central elements in the EU’s model of governance. The 2001 White Paper on European Governance (Commission 2001) acknowledged the development of European agencies and suggested that the creation and greater empowerment of more such agencies could improve EU regulation. The White Paper also called for the establishment of a formal framework for the creation, operation and supervision of such agencies. In a 2002 Communication (Commission 2002), the Commission proposed a set of guidelines for such a framework, an amended version of which was adopted in 2005 (COM (2005) 59 final).

The politics of agency design has changed in significant respects in recent years. Conflicts concerning 1) What the agencies should do, and 2) Who should control them, remain central. However, the European Parliament has become an increasingly significant player in agency design and oversight. With the growing involvement of the Parliament and heightened profile of existing agencies, questions concerning the transparency and accountability of European agencies have become more prominent (Kelemen 2005).

The Commission, Parliament and Council continue to disagree over the design of management boards that oversee the agencies, and a 2003 European Parliament Report⁸¹ identified at least ten variants in the structure of boards of existing agencies. The Commission continues to push for structures that would insulate the agencies from traditional intergovernmental politics, proposing a model in which management boards would have 15 members, six appointed by the Commission, six by the council and three non-voting members representing stakeholders. The Parliament in turn has expressed a preference for a model in which the Commission would draw up a list of candidates to be submitted to the Parliament for scrutiny and to the Council for final approval (European Parliament 2003:10).

More generally, the European Parliament has sought to assert itself as a watchdog of the executive, including European agencies, and to enhance the transparency and accountability of EU regulatory processes. From the mid-1990s, the European Parliament has used its budgetary powers in order to impose accountability requirements on European agencies. (Dehousse 1997; Kelemen 2002:105; Flinders 2004:536). Also, the Parliament has demanded that the agencies adopt formal, transparent and judicially enforceable administrative procedures, to enable its interest group allies to challenge agency actions and to engage in the sort of ‘fire-alarm’ oversight favored by Congress in the US context (McCubbins and Schwartz 1984; Kelemen 2005). As European agencies replaced the opaque comitology committees that had long underpinned the Commission’s regulatory processes, the European Parliament demanded that they function with greater transparency and that they be accountable to the Parliament and ECJ.

The transparency and accountability requirements in the founding regulations for the recently established European Aviation Safety Agency (EASA) illustrate the impact of the European Parliament’s heightened influence. EASA has been given the authority to issue airworthiness codes and to issue (or suspend or revoke) individual airworthiness and environmental certifications for aircraft products. The regulation (Reg. 1592/2002) establishing the EASA requires the agency to establish ‘transparent procedures’ for issuing certification specifications and demands that the agency ‘consults widely’ with interested parties according to a fixed timetable and that it ‘make a written response to the consultation process.’ (Art. 43) Similarly, in taking individual decisions on aircraft parts the agency shall ensure that concerned parties be granted a hearing and that the agency decision contain the reasons for the decision. (Art. 44) Such ‘Giving Reasons Requirements’ (Shapiro 2002) provide the legal basis for interested parties to challenge agency decisions on both substantive and procedural grounds. Similar ‘giving reasons requirements’ have been programmed into the founding regulations of other recently established European agencies, such as the European Railways Agency, reflecting a general trend toward concern for heightened judicial oversight of EU agencies as a result of pressure from the European Parliament.

In short, one can summarize the politics of agency design as follows: The European Commission proposed the establishment of European agencies as a means by which to expand the EU’s regulatory capacity, given the Council’s (and to a lesser extent the Parliament’s) opposition to expanding the Commission. Though the establishment of European agencies led to a loss of bureaucratic ‘turf’ for the Commission in some cases, delegating routine technical duties to agencies allowed the Commission to concentrate its resources on its core tasks – policy initiation and

policy enforcement. In its approach to European agencies, the Council of Ministers sought to limit both growth and potential ‘drift’ of supranational regulatory bodies and to defend the prerogatives of national regulatory bodies. Also, the Council recognized that its existing mechanisms for oversight of EU regulatory processes, the notoriously opaque and unaccountable comitology committees, could not withstand the democratic deficit critique in the long term. These preferences led the Council to support the creation of European level regulatory agencies subject to the requirements that 1) they be controlled by management boards dominated by member state representatives, and 2) they be designed along a hub and spoke model that integrated national regulatory authorities into their operations. Finally, after the European Parliament became an active player in the politics of agency design in the mid-1990s, it has demanded the establishment of bureaucratic structures and administrative procedures that enhance the transparency and facilitate ‘fire-alarm’ oversight (Kelemen 2002:97; McCubbins and Schwartz 1984; Pollack 1997).

Turning finally to an assessment of the effectiveness of EU agencies, less systematic evidence is available. In attempting to compare EU agencies with European networks of NRAs, it is important to attempt, so far as possible, to compare like with like. In some potentially highly divisive policy areas, such as environmental protection or occupational safety, member states only agreed to the establishment of European agencies after limiting the remit of these bodies essentially to information gathering and dissemination. Such agencies cannot rightly be treated as ‘regulatory’ bodies in a comparative study. Better candidates for comparison include bodies such as the EMEA and the newly created European Aviation Safety Agency and European Chemicals Agency. Of these true European regulatory agencies, only the EMEA has been studied extensively.

The EMEA, particularly when relying on its centralized procedure has proven effective and has made significant contributions to the creation of a true single market for pharmaceuticals. Analysts have concluded that the EMEA’s ability to resist pressures from parochial interests and its reliance on transparent, legally binding decision making procedures, subject to judicial review have been crucial to its success (Feick 2006; Gehring and Krapohl 2004). To better understand the effectiveness of EU regulatory agencies, further research, similar to that conducted on the EMEA, must be conducted on the operations of other EU agencies.

V. Conclusions

The institutional architecture of the European Union is changing. The European Commission has become increasingly accountable to the European Parliament and, as a result, increasingly politicized. The days when the European Commission could be viewed as akin to an independent agency charged with the completion of the internal market (Majone 2002:330) are gone. Widespread resistance to the growth of the Commission’s regulatory bureaucracy coupled with the fact that the Commission increasingly acts as a politically accountable executive, has forced EU decision makers to create other regulatory bodies to implement EU policies. Surveying the broad range of areas of EU policy-making, one can observe a wide variety of regulatory architectures, from very loose networks of NRAs which lack binding regulatory powers to the quite centralized EU agencies empowered to issue EU wide regulation.

How can we stand the institutional design choices EU leaders make when faced with this wide range of options? Scholars of EU regulation may rightly hope that regulatory institutions will be designed to operate with maximal efficacy and to produce 'good governance'. They should not, however, expect this to be the case. The study of the politics of bureaucratic structure (Moe 1989, 1990) suggests that bureaucracies are often not designed solely with efficiency and effectiveness in mind. Sometimes they are even designed to fail, because actors who have an interest in their failure have a hand in their design. To expect the politics of bureaucratic design to yield more optimal outcomes in the EU's case, would simply be to let hope triumph over experience.

In the EU, concern over the distributional consequences of EU regulation plays a significant role in the politics of bureaucratic design. Where concern over distributional consequences was greatest, EU member states have used their central position in the politics of bureaucratic design to demand the creation of regulatory institutions that allow governments to control the distributional effects of regulation. The reliance on networks of NRAs rather than EU-level agencies in many areas of sectoral regulation (in particular those with significant state ownership) can be understood in this context. Generally, the politics of bureaucratic design has only led to the creation of powerful EU level regulatory authorities in areas where distributional conflict was much lower.

Our analysis suggests that much of the faith placed in the network model of governance is misplaced. Proponents suggest that the EU has come to rely on network based governance because it is innovative, exploring new modes of non-hierarchical governance suited to this 21st Century multi-level polity. Our analysis suggests that the reliance network based governance is based much more on efforts of member state governments to maintain national control over regulation so that they can help shelter incumbents and generally favour national interests.

Selected Bibliography

ECJ cases

Case 9/56, *Meroni v High Authority*; Court of the ECSC: Reports of Cases before the Court 1957, pp. 133-55.

National Case

Case 598/2004 of 4 October 2006 Sentencia Audiencia Nacional (sala de lo Contencioso-Administrativo. Seccion 3

Newspapers

Financial Times, International Regulatory Update, 20 October 1997.

EU Business Energy a national issue, not European: Spanish Minister 26 April 2006

Select Bibliography

Beltratti, A., Bortolotti, B. and Milella, V., (2007) State ownership, political risk, and asset prices (unpublished).

British Telecommunications Plc (2007) The Economic Benefits from providing businesses with competitive electronic communications services (London)

Bartle, I. (1999) A future pan-European regulator for telecommunications?: agenda-setting in a system of multi-level governance unpublished.

Bauer, J. (2003) "The co-existence of regulation, state ownership and competition in infrastructure industries" Working Paper no. 03-03, Quello Center for Telecommunications Management and Law, Michigan State University.

Cave, M. (1997) Telecoms: International Competition and the Role of Regulation in Beesley, M.E. (ed) Regulating Utilities: Broadening the Debate, The Institute of Public Affairs in association with The London Business School (London).

Cave, M. And Crandall, R.W. (2001) Telecommunications Liberalisation on Two Sides of the Atlantic Washington: AEI-Brookings Joint Center for Regulatory Studies.

Cave, M. and Valetti, T. (2000) "Competition and regulation in telecommunications" in Galli, G. and Pelkmans, J. (eds) (2000) Regulatory reform and competitiveness in Europe II Cheltenham: Edward Elgar.

Coen, D., Heritier, A., Boelhoff, D. (2002) Regulating the Utilities: UK and Germany compared, London: Anglo-German Foundation for the Study of Industrial Society.

Coen, D and C. Doyle (2000) "Designing Economic Regulatory Institutions for European Network Industries". *Current Politics and Economics of Europe*. 9:4.83-106.

Commission of the European Communities (1995) Proposal for a European Parliament and Council Directive on Interconnection in Telecommunications

ensuring universal service and interoperability through application of the principles of open network provision (ONP) COM (95) 379 19 July 1995 Brussels.

Commission of the European Communities (1996) Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets OJL 074 22/03/1996 Luxembourg: Office for Official Publications of the European Communities.

Commission of the European Communities (2001c) Staff Working Paper of 3 December 2001 SEC (2001) 1957.

Commission of the European Communities (2001d) European Governance. A White Paper. COM (2001) 428 (Brussels).

Commission of the European Communities (2002b) Commission Decision of 29 July 2002 establishing the European Regulators group for Electronic Communications Networks and Services, OJ L 200 of 30 July 2002, Luxembourg: Office for Official Publications of the European Communities.

Commission of the European Communities (2003a) Guide to the case law of the European Court of Justice in the field of telecommunications, Informal DG Information Society compendium, January 2003, Brussels.

Commission of the European Communities (2003e) Decision of 11 November 2003 establishing the European Regulatory Group for Electricity and Gas OJL 296 14/11/2003 Luxembourg: Office for Official Publications of the European Communities.

Commission of the European Communities (2004) Commission Decision of 14 September 2004 amending Decision 2002/627/EC establishing the European Regulators group for Electronic Communications Networks and Services, OJ L 293 of 16 September 2004, Luxembourg: Office for Official Publications of the European Communities.

Commission of the European Communities (2006), Prospects for the internal gas and electricity markets, COM(2006) 841 of 10.1.2007 (Brussels)

Commission of the European Communities (2007), Twelfth Implementation Report, Volume 2, 403 SEC 2007, 29 March 2007 (Brussels)

Communications Week International (1996) "Pan-European watchdog heads for ministerial agenda" Issue 169 12 August 1996.

Council of the European Communities (1990) Council Directive 90/387/EC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision OJL 192 24/07/1990 Luxembourg: Office for Official Publications of the European Communities.

Doehler, M. (2003) "Institutional choice and bureaucratic autonomy in Germany" in Stone-Sweet, A. and Thatcher, M. (2003) The politics of delegation London: Frank Cass.

Eberlein, B. (2003), Formal and informal governance in Single Market regulation in Tomas, C., and Piattoni, S. (eds) Informal Governance in the EU, Cheltenham, Edward Elgar

Eberlein, B and Grande, E (2005) "Beyond delegation: transnational regulatory regimes and the EU regulatory state" *Journal of European Public Policy* pp.12 (1): 89-112.

Eberlein and Kerwer, D. (2004), New Governance in the EU: A Theoretical Perspective, *Journal of Common Market Studies*, Vol. 44

ECORYS (2005) Development of competition in the European Postal Sector. A study for DG Internal Market, Markt/2004/03/C (Rotterdam).

ECORYS (2006) Analysis of the financial situation of railway undertakings in the European Union, (Rotterdam).

ECTA (2004a) Report on the relative effectiveness of the regulatory frameworks for electronic communications in Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Spain, Sweden, and the United Kingdom, Brussels.

ECTA(2006) Report on the relative effectiveness of the regulatory frameworks in electronic communications in Austria, Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Sweden and the United Kingdom, Brussels.

Edwards, G. and Waverman, L. (2005) The effects of public ownership and regulatory independence on regulatory outcomes. A study of interconnect rates in EU Telecommunications, unpublished.

Eising, R. and Jabko, W. (2000) Moving targets: institutional embeddedness and domestic politics in the liberalisation of EU electricity markets, EU Working Paper, EUI, RSC 2000/6.

Eising, R., and Kohler-Koch, B. (1989) The Transformation of Governance in the EU, London: Routledge.

European Council (1996) Information Note. Proposal for a Directive of the European Parliament and of the Council on Interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (95/0207(COD))-outcome of the Parliament's first reading (part-session from 12 to 16 February 1996) 5160/96 Brussels.

European Parliament and Council Directive (1997a) Directive 97/33/EC of 30 June 1997 on interconnection in telecommunications with regard to insuring universal service and interoperability through provision of the principles of open network provision OJ L 199 26/07/1997 Luxembourg: Office for Official Publications of the European Communities.

European Parliament and Council Directive (1997b) Directive 97/51/EC of 6 October 1997 amending Council Directives 90/387/EEC and 92/44EEC for the purpose of adaptation to a competitive environment in telecommunications OJ L 295 29/10/1997 Luxembourg: Office for Official Publications of the European Communities.

European Parliament, Committee on Industry, External Trade, Research and Energy (2001) Additional set of compromise amendments proposed by the Rapporteur, 27 November 2001. PE 309.058/C11-C14 Brussels

European Parliament and Council Directive (2001) Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJL 75 of 15 March 2001, Luxembourg: Office for Official Publications of the European Communities.

European Parliament and Council (2002a) Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) OJ L 108 24/04/2002 Luxembourg: Office for Official Publications of the European Communities.

European Parliament and Council (2002b) Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) OJL 108 24/04/2002 Luxembourg: Office for Official Publications of the European Communities..

European Parliament and Council (2002c) Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (O J L 015 , 21/01/1998) as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ L 176 of 05/07/2002 Luxembourg: Office for Official Publications of the European Communities..

European Parliament (2003a) Opinion of the Committee on Legal Affairs and the Internal Market for the Committee on Industry, External Trade, Research and Energy on the Eighth Report on the Implementation of the Telecommunications Regulatory Package 13 October 2003 RR\316297EN.doc PE 316.297 Brussels

European Regulators Group(2003a) Rules of Procedure for ERG, Brussels.

European Regulators Group (2003b) Common Position on the approach to appropriate remedies in the new regulatory framework, ERG(03) 30Rev1

European Regulators Group (2003c) Common Position on Bitstream Access, ERG (03) 33Rev1.

European Regulators Group (2007), Letter of 27 February 2007 to Commissioner Reding , February 2007 (Brussels).

European Regulators Group for Electricity and Gas (2006) Electricity Regional Initiative, PR 06-05 (Brussels).

European Regulators Group for Electricity and Gas (2006) Gas Regional Initiative, PR 06-06 (Brussels).

European Regulators Group for Electricity and Gas (2007) Response to the European Commission's Communication "An Energy Policy for Europe", Ref. CO6-BM-09-05, 6 February, 2007 (Brussels)

- Eurostrategies and Cullen International, (1999) Final Report on the possible added value of a European Regulatory Authority for Telecommunications, Brussels.
- Feick, J. (2006) Regulatory Europeanization, National Autonomy and Regulatory Effectiveness: Market Authorization for Pharmaceuticals, MPIfG Discussion Paper 02/06 (Max-Planck-Institut fuer Gesellschaftsforschung).
- Forder, J (1996) "On the assessment and implementation of "institutional" remedies", *Oxford Economic Papers*, pp. 39-50.
- Forder, J. (2001) "Some methodological issues in the statutory characterization of central banks", *West European Politics*,24(1):202-216.
- France Telecom, (2000) Commentaires de France Telecom sur les propositions de directives pour le nouveau cadre reglementaire,Paris.
- Franchino, F. (2000). "Control of the Commission's Executive Functions." *European Union Politics* 1(1):63-92.
- . (2006) *The Powers of the Union*. Cambridge University Press.
- Gehring, T. (2004) "The Consequences of delegation to independent agencies : separation of powers, discursive governance and the regulation of telecommunications in Germany." *European Journal of Political Research* 43 : 677-698.
- Gehring, T. and S. Krapohl. (2004). "Single Market Regulation between technocratic independence and political control the European Agency for the Evaluation of Medicinal Products and the authorization of Pharmaceuticals" Bamberger Centrum für Europäische Studien, BACES Discussion Paper #4, 2004. Otto Friedrich Universität, Bamberg.
- Geradin, D. and Petit, N. (2004) "The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform" . Available at SSRN: <http://ssrn.com/abstract=489722> or DOI: [10.2139/ssrn.489722](https://doi.org/10.2139/ssrn.489722)
- Gilardi, F. (2002) "Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis", *Journal of European Public Policy* 9(5): 873-893.
- Groenleer, M. (2006), 'The European Commission and Agencies', in D. Spence (ed.), *The European Commission*, London: John Harper Publishing, pp. 156-172.
- Idema, T. and Kelemen, D. New Modes of Governance, the Open Method of Coordination and other Fashionable Red Herring
- IBM and Professor Dr Dr Kirchner, C., (2004) Rail Liberalisation Index, Berlin
- Joerges, C. and Dehousse, R. (eds) (2002), Good governance in Europe's integrated market, Oxford: Oxford University Press.
- Joerges, C., and Neyer, J. (1997). Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector. *Journal of European Public Policy* 4(4): 609-625.

Joerges, C and Neyer, J. (1997). From intergovernmental bargaining to deliberative political processes: the constitutionalisation of comitology.” *European Law Journal* 3(3):273-299.

Kelemen, R. D. (1997). ‘The European “Independent” Agencies and Regulation in the EU.’ CEPS Working Document No. 112. (Brussels: Centre for European Policy Studies).

----. (2002). ‘The Politics of ‘Eurocratic’ Structure and the New European Agencies.’ *West European Politics* 25(4): 93-118.

----. (2005) “The Politics of Eurocracy: Building a New European State?” In N. Jabko and C. Parsons, eds, *The State of the European Union: With US or Against US? European Trends in American Perspective*, Volume 7. New York: Oxford University Press.

Krapohl, S. (2004) “Credible Commitment in Non-Independent Regulatory Agencies: A Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs. *European Law Journal* 10, 5: 518-538.

----. (2007). “Thalidomide, BSE and the Single Market: A historical-institutionalist approach to regulatory regimes in the internal market” *European Journal of Political Research*, 46(1):25-46.

Kreher, A. (2000) “Agencies in the European Community - a step towards administrative integration in Europe”. *Journal of European Public Policy* Vol. 4, no.2., 225-245.

Levi-Faur, D. (1999) “The governance of competition : the interplay of technology, economics and politics in European Union electricity and telecommunications regimes”, *Journal of Public Policy*, 19: 175-207.

Majone, G. (1997). The new European agencies: Regulation by information. *Journal of European Public Policy* 4:2, 262-275.

----. (2002). Delegation of Regulatory Powers in a Mixed Polity” *European Law Journal* 8(3):319-339.

Moe, T. (1989), 'The Politics of Bureaucratic Structure', in J. Chubb and P. Peterson (eds.), *Can the Government Govern?* (Washington, DC: The Brookings Institution).

NERA, (1997) Issues associated with the creation of a European Regulatory Authority for telecommunications, London.

Nihoul, P. and Rodford, P. (2004) EU electronic communications law: competition and regulation in the European telecommunications market Oxford: Oxford University Press.

OECD, Working Party on Telecommunication and Information Services Policies (2000a) Telecommunications Regulations: Institutional structures and responsibilities, Paris.

OECD (1997) Communications Outlook (OECD Paris).

OECD (2002) Communications Outlook (OECD Paris).

OECD (2004) Regulatory Reform in Germany, Paris.

OFGEM welcomes European Commission determination to create a competitive energy market 16 February 2006

Pelkmans, J. (2001) "Making EU Network Markets Competitive", *Oxford Review of Economic Policy*, Vol.17, No.3 (Oxford University Press)

Phoenix Center Policy Bulletin No.5.(2003) Competition and Bell Company Investment in Telecommunications Plant: The Effects of UNE-P. Washington. Available at <http://www.phoenix-center.org/pcpb.html>

Presidency of the European Community (2001a) Working Documents on four of the Directives making up the package (Framework, Access, Authorisation and Universal Service Directives), as well as on the Radio Spectrum Decision 13878/1/01 Rev1 Brussels

Presidency of the European Community (2001b) Note for informal triologue 20 November 2001.

Presidency of the European Community (2001c) Note from the Presidency, 6 December 2001 Brussels

République Française (2000) Réponse des autorités françaises à la consultation publique sur l'évolution du cadre réglementaire des infrastructures de communications électroniques et des services associés Paris.

Schmidt, S. (1999) "Sterile debates and dubious generalisations: European integration theory tested in telecommunications and electricity", *Journal of European Public Policy*, 16(3) pp233-271.

Shapiro, M. (1992). "The Giving-Reasons Requirement" The University of Chicago Legal Forum, pp. 180-220.

----. (1997) 'The Problems of Independent Agencies in the United States and the European Union', *Journal of European Public Policy* 4/2.

Stratens Offentligen Utredningar (2006), Effektive LEK.Slutbetaenkande av Utredningen om oerversyn av lagen om elektronisk kommunikation, SOU 2006:88 (Stockholm)

Tarrant, A. (2003) "Accounting Separation: The hole in the heart of the EU telecommunications regime", *European Competition Law Review*, Vol. 24(7): 273-279.

Tarrant, A. (2004) The institutional outcome of the 1999 telecommunications policy review; a case study in the relative power of Member States and supranational institutions. Unpublished MPhil thesis, Oxford University

Thatcher, M., (1999) The Europeanisation of regulation – the case of telecoms, EUI Working Papers, RSC No.99/22.

Thatcher, M. (2000) The regulation of telecommunications in Europe, London: European Policy Institute

- Thatcher, M. (2001) "The Commission and national governments as partners: EC regulatory expansion in telecommunications, 1979-2000", *Journal of European Public Policy*, 2001 8(4): pp558-584.
- Thatcher, M. and Stone Sweet, A. (2002) "Delegation to independent regulatory agencies; pressures, functions and contextual mediation", *West European Politics*, Vol. 25(1): 1-22
- Thatcher, M. (2005) "The Third Force? Independent Regulatory Authorities and elected politicians in Europe" *Governance*, Vol. 18.
- Thomas, S. (2005) The European Gas and Electricity Directives (Brussels: European Federation of Public Service Unions.)
- Tseblis, G. and Garrett, G. (2000) "Legislative Politics in the European Union", *European Union Politics*, Vol 1(1): 9-36.
- Tseblis, G. and Garrett, G. (2001) "The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union", *International Organization*, Vol 55(2): 357-390.
- Voets, A. (2004) Comparative study in the effectiveness of regulators: Germany, Lausanne: Institut des Industries du Reseau.
- Zeitlin, J. and Pochet, P. (eds), The Open Method of Coordination in action: The European Employment and Social Inclusion Strategies
- Ziloli, C and Selmayr, M. (2000) "The European Central Bank: an independent specialised organization of Community Law" *Common Market Law Review*, 37: 591-643.