

A Case Study of Networked Integration



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A Case Study of Networked Integration

Negotiating the institutional architecture of the EU Regulatory Framework in Electronic Communications (2007-2009)

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Summary

This paper presents an in-depth empirical case study of the institutional negotiations (2007-2009) that led to the genesis of the Body of European Regulators for Electronic Communications (BEREC), and its role in the coordination of national regulatory remedies in the EU's market for Electronic Communications. BEREC's character is unusual in the EU context, in that it constitutes an institutional hybrid between a soft-law, networked form of integration and a more legalised, more centralised institutional structure. The purpose of the paper is to explain the origins of this unusual constellation and its institutional resilience. We are also interested in what these negotiations might reveal about the dynamics of institutional integration and change in the EU, taking special account of sectors where, like this one, a networked mechanism of transnational governance is in operation. The paper reveals an interpretation of how networked governance evolves and proliferates, where the role of formal political actors (the EU institutions) remain central but transnational networks of national policy actors (like regulatory agencies) themselves can play a role of considerable significance in modelling their own institutionalisation.

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Introduction

The *Body of European Regulators for Electronic Communications* (BEREC) was formally set up in 2009. It operates within an institutional architecture that is unprecedented in the EU. BEREC itself remains an independent network of national regulatory authorities (NRAs) that builds, like its predecessor the European Regulators Group (ERG), extensively on NRAs’ market expertise and leaves much regulatory decision-making to them, but whose advisory functions vis-à-vis the EU Institutions are now firmly recognised in the EU framework legislation. Further, in the BEREC Office, BEREC has alongside it since 2009 an established EU agency on whose operational and administrative support it may also draw in exercising its functions.

The objective of this research paper is to offer a detailed account of the process leading up to the birth of this unusual and evolving institutional architecture, so as to extrapolate what formal and informal actors had most traction in this process and how they interacted. Our focus is on the empirical context of the legislative negotiations that resulted in the establishment of BEREC and the BEREC Office. We track the contributions of those with formal vetoes in the negotiations, including the Commission, the European Parliament and the Council, as well as those of the NRAs and their existing transnational networks whose

influence stemmed largely from their informal (soft) power. We do so from the consultation period and initial Commission proposal in 2007, right through to the establishment of BEREC and the BEREC Office, and the introduction of new procedures to coordinate national regulatory remedies, in which BEREC takes a central role (the 'Articles 7 and 7a' procedures), in 2009.

By conducting a detailed empirical study of the negotiations that produced the institutional origins of this unusual constellation, we can explain its continuing resilience (against further centralisation) as well as the commitment by both regulators and various political actors to its mode of operation in the European electronic communications sector. We are also interested in highlighting what the negotiations from 2007-9 might reveal about the dynamics of institutional integration and change in the EU more generally, taking special account of sectors where, like this one, transnational regulatory networks or more generally, a 'networked' mechanism of transnational governance, are in operation.

Much has been written on a growing trend towards networked forms of governance in the EU, that rely on transnational networks of national policy actors, to coordinate and discipline Member States more softly than the hard law and centralised institutions of the EU's traditional way of doing things (the so-called Community Method). There are rich normative debates about the legitimacy of these softer governance arrangements, and equally rich conceptual debates about quite how they differ from, relate to and interact with the Community Method.¹ Our particular interest here lies in interrogating some of the 'common sense' assumptions about the institutional dynamics that characterise the emergence and evolution of this trend, and its proliferation; especially where they tend to focus on formal institutional actors, namely, the formal EU institutions and the political governments of Member States. A common starting point, following a formal integration account, is that of an intergovernmental political struggle, whereby Member States are reluctant to compromise their sovereignty, but under functional pressures to coordinate stemming from complexity and interdependence. Networked governance arises, and proliferates, where Member States settle on compromises that allow for inter-state coordination without necessitating full-blown integration. At the European level, the EU Parliament and EU Commission might prefer instruments of control premised on the centralized exercise of hierarchical power. But they are content, given national sensitivities, to 'upload' a policy field to a transnational network that disciplines only softly, sometimes in the hope that the Member States will eventually acquiesce to more supranational solutions.

One message of this paper is that these accounts, which focus on the institutional interplay between formal institutional actors (the European institutions), have an important role to play in explaining the evolution of networked governance in the EU. But, as our case study below reveals, a further-reaching interplay between formal and informal actors may be taking place in the interstices of these formal political dynamics, with effect on institutional outcomes that manifest networked governance. This may be the case where a transnational network of national policy actors (like regulatory authorities) already

¹ Sabel, C. and J. Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford: Oxford University Press, 2010; Dawson, M., *New Governance and the Transformation of European Law*, Cambridge: Cambridge University Press, 2011; Walker, N. and G. De Búrca, 'Reconceiving Law and New Governance', *Columbia Journal of European Law* (2007) 13, 649.

exists - and be it as an informal configuration; and this existing network too might be using its, informal and soft, power (such as transnational channels of communication and co-ordination, growing transnational knowledge and expertise, reputation and so on) to influence the formalisation of its own governance. Where this happens, formal accounts of integration are certainly necessary in telling the story of Europe's networked integration, but they are not necessarily sufficient to account for the resulting institutional constellations because transnational networks themselves can play a role of considerable significance in modelling their own institutionalisation.

In limiting our study to one specific historical episode of institutional change – the formalisation of BEREC and the BEREC Office – within one policy sector only, we certainly cannot make a generalised claim as regards the dynamics of integration in the EU and of networked governance. But by drilling deep into the historical process that saw the genesis of these institutions, we can reveal the relevant interactions between formal and informal actors – between the political actors, NRAs and their existing (less formal) transnational networks – influencing this particular institutional change. The advantage of doing so is that we can present factors and motivations that might have driven these actors and demonstrate how this might have in turn influenced the outcome, in some detail.

We focus on two specific issues in the legislative process (2007-9): firstly, the negotiations over the composition of the EU regulator - essentially a choice between reforming an existing transnational network, the European Regulators Group (ERG), or establishing a new EU agency; and secondly, the negotiations over the extent of the Commission's powers over regulatory remedies designed by NRAs to counter competition problems on their telecoms markets - essentially whether the Commission should be able to veto and/or harmonise national remedies. Both institutional choices at the heart of those negotiations fell either side of the fault line between networked and centralised integration. Expressed in binary turns, they pitched 'integration by law' against 'integration by coordination'; harmonisation against national discretion; and hard law against soft disciplining.

We know that once the negotiations concluded in 2009, the resulting revisions to the regulatory framework for electronic communications (the 'Regulatory Framework') neither established a fully-blown EU agency nor extended the Commission's veto to the design of national remedies. The Commission must instead exercise its powers taking 'utmost account' of BEREC, a new advisory body, with a formal role in the Regulatory Framework but based on the existing transnational network; and the Commission can only recommend that an NRA amend or withdraw a remedy, not veto it.

In our study, we track the negotiations to establish a fine-grained picture of their dynamics including the influence of the NRAs and their existing transnational network. We draw on the public record as well as 44 confidential, semi-structured face-to-face interviews with individuals who, at the time of the negotiations, held key positions in the Commission, the European Parliament, national ministries, NRAs and as industry stakeholders, and who were involved in or who closely followed the negotiations. A table of interviewees is included as Appendix. As one aspect of our study focuses particularly on the role of NRAs and their transnational network in these negotiations, we included many interviews with NRA officials in our primary research, but then confirmed whether their views were corroborated by other

interviewees. Having granted anonymity to our interviewees, we do not reveal their identity even when quoting directly from the transcript.

Background: the evolving EU Framework in Electronic Communications

The strategic economic importance of the telecoms sector and the deep institutional roots that tie it into national structures only temporarily delayed convergence right across Europe on a liberalized model that combines private ownership, competition and the establishment of NRAs. This was in response to considerable international pressures, including technological and economic developments, overseas reforms with cross-border effects and EU regulation that combined to undermined institutional stability at the national level.² Many Member States liberalised their telecoms sectors in the 1990s, to some extent responding to a series of directives that the Commission enacted between 1988 and 1998 under its direct competition law powers,³ but, more significantly, in response to an emerging consensus that liberalisation was essential for a sector that was rapidly globalising.⁴

Pressure for change had built up since the 1960s, as state-owned telecoms services struggled to keep pace with the growing demands placed upon them and also became increasingly disconnected from the postal services that they traditionally partnered.⁵ The digitalization of switching and transmission, optical fibre, satellite communications and convergence with computing and audiovisual sectors transformed the sector still further, making it increasingly economically strategic, lucrative and tempting for governments to cash-in their state monopolies. Simultaneously economic globalization and, more specifically, the liberalization of telecoms sectors elsewhere, which gave those foreign operators first-mover-advantages when it came to competing on domestic and international markets, created their own pressure and only increased the EU's determination to prise open domestic telecoms markets to more competition. And pressing ahead, the EU enabled Member States in turn to shift blame and justify change by arguing it was making liberalization inevitable.

The UK privatised *British Telecom* in 1984 and sold its remaining shares in 1991-1993. It also created the NRA, Oftel, to reassure investors that political interference would not compromise the company's profitability and to balance the different interests of consumers and operators in a monopolistic market, while also working towards opening up that market to new entrants.⁶ In contrast to the UK's liberal model, France held onto its dirigiste model throughout the 1980s, only to turn DGT, renamed *France Télécom*, into a type of public corporation in 1990 and then selling off the majority of its stake between 1997 and 2004. In 1997, it established an NRA, *Autorité de régulation des télécommunications*. Germany also resisted the liberalisation of its state monopoly in the 1980s but, practically in sync with France, created

² M. Thatcher, 'Varieties of Capitalisms in an Internationalized World: Domestic institutional change in European telecommunications' (2004) 37 *Comparative Political Studies* 751.

³ S. Schmidt, 'Commission Activism: Subsuming telecommunications and electricity under European competition law' (1998) 5(1) *JEPP* 169.

⁴ M. Thatcher, 'The Commission and National Governments as Partners: EC regulatory expansion in telecommunications 1979-2000' (2001) 8(4) *JEPP* 558.

⁵ J. Foreman-Peck and J. Müller (eds), *European Telecommunication Organisation* (Nomos, 1988)

⁶ M. Thatcher, *The Politics of Telecommunications: National institutions, convergence and change in Britain and France* (Oxford University Press, 1999), at 147.

Telekom (later *Deutsche Telekom*) in 1989-1990, sold off a majority of its shares between 1996 and 2002, and, in 1998, established an NRA, *Regulierungsbehörde für Telekommunikation und Post*. *France Télécom* and *Deutsche Telekom* did not resist the end of their monopolies because they were above all concerned to prepare for liberalisation in the EU, which was opening them up to increasing competition on their domestic markets and internationally. Unencumbered by the state ownership, they felt they would be better equipped to compete, expand abroad and to reduce their costs. Differences in domestic settings and past reform paths did not prevent institutional convergence at very similar times.

The EU responded to these changes by developing a regulatory framework to foster and manage competition within and across these newly liberalised markets to ensure better rights for consumers and to provide a more supportive, consistent regulatory environment.⁷ While the Commission had begun to harmonise telecoms regulation in the mid-80s – making significant play of the idea of the ‘information society’⁸ – it only started to think seriously about how to bring about a truly single market in the 1990s.⁹ This resulted in the EU’s first regulatory package in 1998, which comprised a series of directives on competition, licensing, interconnection and standards. Following a major revision in 2002 and further review in 2009, the current Regulatory Framework is set out across five directives that include a general Framework Directive¹⁰ and additional, more specific Directives specifying framework rules for authorizations, access and interconnection, universal service and privacy in the processing of personal data.

Their broad agreement on the general direction of travel, extending from traditionally enthusiastic liberalisers right through to Member States that have traditionally favoured public ownership, meant the EU’s involvement (in negotiations in Council Working Parties, COREPER, or ultimately amongst ministers) was, from the outset, more about getting the details right and solving mutual problems than dealing with ideological conflict or overt assertions of national interests (although some Member States continue, to this date, to be more guarded than others about opening up their markets, and more protective of their national incumbents). This broadly suited an EU regulatory framework that would rely heavily on co-ordination by means of a soft law and transnational network, where different regulatory solutions could be tested in different national “regulatory laboratories” and the network used to ensure results were shared and lessons learned.

The emergence of a transnational regulatory networks and their soft disciplining

As States divested themselves of the day-to-day running of telecoms services, they also began to delegate regulatory oversight to independent, national regulatory authorities (the NRAs). Though EU regulation did not (initially at least) require the Member States to establish NRAs, it incentivised their creation by offering new entrants instruments with which to attack unfair competition and institutional structures, leading to clashes with incumbents that were more complex and more intense and something national governments

⁷ M. Michalis, *Governing European Communications: From unification to coordination* (Rowman and Littlefield, 2007)

⁸ *Ibid.*

⁹ Goodman, *Telecommunications Policy-Making in the European Union* (Edward Elgar, 2006).

¹⁰ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended in 2009.

were quite happy to delegate. Later, the EU began proactively to rely on these NRAs to deliver its liberalization-plus-re-regulation programme, making them its agents of integration by requiring Member States to designate NRAs as the bodies responsible for enforcing market-opening rules, but submit their efforts to the scrutiny of their peers through a dedicated transnational network. The Commission has continued to push for the agencification of this network (and has been continually thwarted).

The Regulatory Framework specifies the parameters within which the Member States, chiefly via their NRAs, are to regulate licensing, anti-competitive practices, universal service obligations etc. on their telecoms markets,¹¹ but also leaves them considerable leeway to devise remedies to suit the specific features of their own markets. That discretion has always been subject, however, to some form of review mechanism at the EU level, aimed at tracking divergence and best regulatory practice. While the Commission has long sought to harden up that oversight, particularly through the creation of some form of centralized institution and its appeal for stronger and more extensive veto powers over national implementation, the Member States have consistently resisted such moves. Instead, the NRAs have come or been brought together in transnational networks that exert only soft forms of disciplining and persuasion over their NRA members. These networks and their soft disciplining have become an integral part of the evolving Framework.

The 1998 regulatory package established a Licensing Committee that brought together NRAs to advise and issue formal regulatory opinions on proposals relating to the harmonization of licensing conditions and spectrum management,¹² but interaction between NRAs (or between officials in relevant ministries who later came to staff NRAs once they were created) began long before this. Already in 1983, the EU established a Senior Officials Group for Telecommunications, which was to set up a programme and provided the initial impetus for an Open Network Provision framework;¹³ a task that was then handed to a Commission-chaired committee of national representatives in 1990.¹⁴ The Member States could turn to that ONP Committee for guidance and clarification when implementing directives (on leased lines, voice telephony, interconnection etc.) and the Commission could consult it when drawing up annual implementation reports, or before launching infringement proceedings, but the committee was also supposed to measure the Member States' progress and jockey along the more recalcitrant. Then, in 1991, the EU created the ONP Co-ordination and Consultation Platform to provide a single point of contact for consultation with telecoms operators, which, in 1998, was merged with the European Interconnect Forum to form the European Telecommunications Platform.

¹¹ The package also covered issues like the award and conditions for use of the radio spectrum and Voice-Over-Internet-Protocol, the extent of access obligations, mobile termination rates, interconnection charges, unbundled local loop pricing and data roaming.

¹² Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services. See also <http://circa.europa.eu/Public/irc/info/licensing/home>

¹³ European Commission, Progress Report on the thinking and work done in the field and initial proposals for an Action Programme, 1984, Communication from the Commission to the Council on Telecommunications. COM (84) 277 final.

¹⁴ Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision.

Since the mid-1990s, the Commission has sought to harden up and centralize this institutional set up at every opportunity. In 1996, the Industry and Information Technology Commissioner, Martin Bangemann, suggested the creation of a dedicated EU agency,¹⁵ which gained some support from within the European Parliament, but crucially not the Council. The Member States were keen to protect the powers of their (often recently established) NRAs and to avoid too much harmonization of their diverse telecoms strategies, especially on matters such as tariffs, competing infrastructures and third generation mobile licensing.¹⁶ In 1999, the Commission suggested creating a High Level Communications Group that would bring the NRAs together to advise it, to conduct peer reviews and to resolve disputes.¹⁷ The new Regulatory Framework had increased NRA powers and the Commission was dissatisfied with existing modes of coordination. Traditionally, NRAs had come together through the intergovernmental (and highly consensual) European Conference of Postal and Telecommunications Administrations (CEPT) and its European Committee for Telecommunications Regulatory Affairs (since 2001, the Electronic Communications Committee) supported by the European Communications Office.¹⁸ Besides, the International Telecommunications Union (ITU) sets telecoms standards internationally and was once the 'global sovereign' in the field, though it now competes with multiple other organisations.¹⁹ Foremost amongst them, the NRAs had established their own Independent Regulators Group (IRG) just two years previously, in 1997, which served as an unofficial forum for sharing information and best practice. The IRG issued so-called Principles of Implementation and Best Practice.

Despite the existence of the IRG, the Commission continued to push for the creation of a formalised network of NRAs.²⁰ NRAs in turn protested that this formalisation was unnecessary and that handing them conflict-resolution responsibilities was incompatible with their advisory status.²¹ Already then, they were using their transnational networks to assert independent influence over proposed institutionalisations that would affect them, though of course they worked through their government leads in the Council as

¹⁵ *Agence Europe*, 24 May 1996 and 25 February 1997; *Financial Times*, 3 July 1996 and 19 December 1997.

¹⁶ S. Simpson, 'Supranationalization through institutionalization and its limits in European telecommunications' (2009) 12(8) *Information, Communication and Society* 1224; J. Goodman, *Telecommunications Policy-Making in the European Union* (Edward Elgar, 2006), at 132-56; *Agence Europe*, 25 February 1997; *European Voice*, 17 April 1997; *Financial Times*, 19 December 1997 and 8 June 2001.

¹⁷ European Commission, 'Towards a New Framework for Electronic Communications Infrastructure and Associated Services: The 1999 Communications Review' COM(1999)539, 2 December 1999.

¹⁸ Commission Communication, *Towards a new framework for Electronic Communications infrastructure and associated services: The 1999 Communications Review*, COM(1999) 539; see, generally, M. Michalis, 'Institutional Arrangements of Regional Regulatory Regimes: Telecommunications regulation in Europe and limits to policy convergence', in E. Bohlin, S. Levin, N. Sung and C-H. Yoon (eds), *Global Economy and Digital Society* (Elsevier, 2004), 285.

¹⁹ J. Braithwaite and P. Drahos, *Global Business Regulation*, (CUP, 2000), 23. Alongside the Electronic Communications Committee of CEPT and the IRG, it offers the NRAs yet another forum for meeting up outside the auspices of BEREC, so that they, as well as national governments and the Commission through CoCom, have alternative venues for coordination: D. Coen and M. Thatcher, 'Network governance and multi-level delegation: European Networks of Regulatory Agencies' (2008) 28(1) *Journal of Public Policy* 49, 66.

²⁰ Commission Communication, *Proposal for a Directive on a Common Regulatory Framework*, COM (2000) 393 final; Commission position on the Council common position, 18 September 2001.

²¹ This view is set out in the Commission Communication, *The Results of the Public Consultation on the 1999 Communications Review*, COM (2000) 239 final.

well.²² The Commission responded by dropping the conflict-resolution powers from its formal proposal,²³ but the Council rejected the idea, citing legal grounds. This left the Commission to examine the possibility of setting up a network at its own initiative,²⁴ which it eventually achieved in 2002, creating the European Regulators Group (ERG) as a forum for NRAs to come together to debate, reflect and advise upon one another's work and to encourage their cooperation, coordination, mutual learning and benchmarking as well as the exchange of best practice.²⁵ There was some resistance from the NRAs initially because, being so heterogeneous at the time, they feared each meeting would necessitate a reshuffle of the national representatives present, depending on the agenda item under discussion. This problem was resolved in 2004, however, with a tweak that explicitly excluded ministries from the ERG and narrowing its remit to fields in which the majority of Member States had already delegated powers to independent NRAs.²⁶

The 2002 Regulatory Framework also guaranteed NRAs commercial independence²⁷ and handed them the responsibility of identifying and regulating dominant market positions, which represented a significant increase in their discretionary power. It balanced this against a new set of consultation and cooperation requirements that were supposed to lock them into a partnership with one another and the Commission.²⁸ Both the Commission and the NRAs delegated formal coordinating functions to the ERG,²⁹ which acted as an interface between them, aimed at achieving consistent implementation of the Regulatory Framework despite the ERG's soft enforcement powers. The ERG, which the Commission attended in a non-voting capacity, prepared Common Positions and Opinions on a consensual basis, frequently accommodating a wide range of views, but it had no power to impose anything on its NRA members.

Even after the creation of the ERG, NRAs continued to meet regularly as the IRG, which they established as a legal entity (ASBL) under Belgian law in May 2008. While the Commission was an observer in the ERG only the NRAs could vote, whereas the IRG excludes the Commission entirely. Its meetings were usually held back-to-back with those of ERG because the NRAs appreciate the opportunity to discuss responses to public consultations or direct requests for advice from the Commission in its absence. The Commission would then be invited back into the room and the NRAs adopted the ERG moniker to respond officially. This practice continues today, now that ERG has been disbanded and replaced by BEREC. The IRG still exists and operates alongside BEREC, much in the same way as it did when the ERG was still in operation.

²² A. Saz-Carranza and F. Longo, 'The Evolution of the Governance of Regulatory Networks: The case of the European telecommunications regulatory network' (2012) *Jerusalem Papers in Regulation and Governance*, Working Paper No. 41, at 29.

²³ Commission proposal for a Directive on a Common Regulatory Framework, 12 July 2000.

²⁴ Commission position on the Council common position, 18 September 2001.

²⁵ Commission Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services, as amended by Commission Decision 2004/641/EC of 14 September 2004.

²⁶ Commission Decision 2004/641/EC of 14 September 2004, amending Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services.

²⁷ The 2009 review affirmed their independence from their political principals in national governments.

²⁸ D. Geradin and P. Pettit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, Jean Monnet Working Paper 01/04 (NYU School of Law, 2004), at 16.

²⁹ D. Coen and M. Thatcher, 'Network governance and multi-level delegation: European Networks of Regulatory Agencies' (2008) 28(1) *Journal of Public Policy* 49.

Launch of the Framework Review (2005-2007): Commission attempt to centralise

Despite their longstanding collaboration through various networks, building consensus around best regulatory practice in the context of significant divergence had proven difficult for NRAs.³⁰ The ERG had, for instance, adopted a common position on how to analyse wholesale roaming markets³¹ – an obligation that the Regulatory Framework imposes on the NRAs but that they had delayed acting on – but struggled to reconcile differences between the NRAs as to whether regulation was necessary at all or whether it would have to be accompanied by retail price controls. The NRAs' differing goals, scopes and administrative traditions, alongside the complexity of conducting market reviews across an increasingly differentiated telecoms sector, meant there was always an underlying tendency for their regulatory remedies to diverge, justifiably or otherwise, even without instances of lax implementation or blatant attempts to steal an advantage for incumbents. Moreover, several NRAs were making surprisingly creative uses of their implementation powers under the Regulatory Framework,³² and some NRAs were skeptical about the independence of their counterparts in other Member States, particularly where the state retained significant financial interests in the incumbent. However, their criticism was muted, possibly because relations within the ERG/IRG were too cosy, making them cautious about stepping on one another's toes, or (optimistically) out of respect for the doctrine of subsidiarity. The ERG published annual reports and a draft work plan, upon which it invited comments from select trade associations and operators, which sometimes found their way into the final version, but its meetings were closed (purportedly to allow discussion of individual cases, but conveniently also concealing disagreement). Though operators with an ear to the ground could keep track of what was going on through leaks, for instance by cross-checking with sympathetic sources on the inside, this was not particularly satisfactory.³³

Whenever the Commission reviewed EU telecoms policy in the 1990s (1992 and 1999), it had therefore made the case for more centralisation, yet had been unable to persuade the Member States to accept a centralised EU telecoms regulator. Undaunted by these previous failures, or perhaps sensing that the proposal remained a useful bargaining chip with which to extract concessions on other issues, it revived the idea once again when it launched a further review of the Regulatory Framework in 2005, leading eventually to its 2009 revision.

Viviane Reding, then Commissioner for Information Society, appeared initially to advocate only incremental institutional reform, but the Commission's proposals for the third regulatory package ended up being more ambitious.³⁴ Alongside substantive proposals on roaming, spectrum management and the structural separation of incumbents (the former monopoly operators), Reding proposed a European Electronic Communications Markets Authority (EECMA) which was more akin to an EU agency.³⁵ Although

³⁰ W. Sandholtz, *High-tech Europe: The politics of international cooperation* (University of California Press: 1992)

³¹ ERG (2005) European Regulators Group common position. ERG (05) 20Rev1. Brussels: European Regulators Group.

³² Italy, Poland and Sweden had, for instance, tried to achieve functional separation, never envisaged under the Regulatory Framework as it then stood.

³³ E. Sutherland, 'A Single European Regulatory Authority', paper presented to the 17th Biennial Conference of the International Telecommunications Society, Montreal, 24-27 June 2008.

³⁴ V. Reding letter to the ERG, 6 December 2007.

³⁵ Commission Communication, *Proposal for a Regulation establishing the European Electronic Communications Market Authority*, COM (2007) 699 final, 13 November 2007.

its Board of Regulators was to comprise the heads of the NRAs and it was to take decisions on a simple majority basis, its Administrative Board was to oversee the Board of Regulators and consisted of twelve members, half appointed by the Commission and half by the Council. Reding envisaged it working alongside the NRAs in a system akin to the European System of Central Banks.³⁶ The NRAs would continue to act as the contact point for operators and analyze the specifics of their telecoms markets, but the EECMA would coordinate their work more closely than had the ERG, thereby ensuring they applied the Regulatory Framework (and, if necessary, Commission instructions) more consistently.

Reding also proposed an enforcement system with more supranational teeth, including an extension of the Commission's veto, which then covered NRA definitions of a market and their designations of operators with significant market power (the triggers for regulatory intervention). But the Commission wanted to extend it to their design of the regulatory remedies themselves.³⁷ Reding regarded this veto extension and the proposed agencification as 'two sides of the same internal market coin'.³⁸ Though the EECMA's relationship with the Commission would formally have only been advisory, combined with a veto over the design of regulatory remedies, it would have had significant *de facto* power over the Member States in key areas of telecoms regulation.

These proposals no doubt reflected the Commission's growing frustration at both the failure of NRAs to apply adequate regulatory remedies to deal with competition shortfalls on their telecoms markets, and the ineffectiveness of the ERG's soft law disciplining at forcing them to do so. The Commission particularly criticised the favourable treatment some NRAs continued to afford their national incumbents.³⁹ It was in dispute at the time with the German NRA due to its proposal to shield the planned fibre-optic network of *Deutsche Telekom* from intervention on price regulation by granting it a regulatory holiday (a period of grace during which specific remedies would not apply).⁴⁰

The Commission also described the ERG's coordination as 'loose' and only capable of achieving 'lowest common denominator' solutions, complaining that differing national agendas and differing interpretations of the Regulatory Framework meant telecoms remained a patchwork of fragmented markets separated by a system of roaming charges and that operators enjoyed no genuinely level playing field, discouraging cross-border competition.⁴¹ Reding emphasized that the 'institutional set-up of the ERG

³⁶ V. Reding, 'The Review 2006 of EU Telecom rules: Strengthening Competition and Completing the Internal Market', a speech at the annual meeting of BITKOM, Brussels, Bibliothèque Solvay, 27 June 2006. A closer parallel is in fact the *European Medicines Agency*, which is not a creature of the treaties but of a Regulation, and it works together with its national counterparts to foster scientific excellence in the evaluation and supervision of medicines. See also the *Financial Times*, 16 November 2006. In fact, the Commissioner later dropped the comparison of EECMA with the European Central and instead referred to the European Medicines Agency, of much lower profile.

³⁷ Commission Communication, *Proposal for a Directive amending Directives 2002/21/EC and 2002/19/EC*, COM(2007) 697 final 13 November 2007

³⁸ V. Reding Speech to the European Parliament, Plenary session, 2 September 2008.

³⁹ S. Simpson, 'New Governance as Political Compromise in European Telecommunications: The amended European Union Electronic Communications Regulatory Framework', paper presented to the 18th Biennial International Telecommunications Society Conference, Tokyo, 27-30 June 2010.

⁴⁰ Press Release IP/07/237 of 26 February 2007.

⁴¹ Commission Communication, *Report on the Outcome of the Review of the EU Regulatory Framework for Electronic Communications and Summary of the 2007 Reform Proposals*, COM(2007) 696 final, at p. 9.

does not allow it to achieve, even with the best intentions, a consistent application of remedies or a common regulatory approach to cross-border issues.⁴² She welcomed the ERG's recently strengthened commitments as an 'improvement', but nevertheless maintained that 'the present status of the ERG as mere advisory body to the Commission – working mainly on the basis of consensus, without powers of enforcing its decisions and without guaranteed transparency and accountability, in particular towards the European Parliament – could become a constraint on its evolution in the longer term.'⁴³ Reding acknowledged the NRAs' 'joint regulatory culture', but argued that 'Europe does not yet have a satisfactory level of consistency and harmonisation of practices', leaving 'serious distortions of competition' because 'similar remedies are not applied in similar situations' and 'room for improvement in getting regulators to think beyond their national boundaries'.⁴⁴

The Commission further argued that the wide divergence in fixed and mobile termination rates across the EU could not be explained by differences in underlying costs, networks, or other national specificities. Operators were being prevented from offering pan-European services by obstacles to market entry (e.g. the need to repackage services to meet different regulatory requirements on different national markets) which, in turn, was diminishing infrastructure competition and the take up of new technologies. It criticized NRAs for producing divergent regulatory remedies in the face of similar regulatory problems (access obligations, mobile termination rates, interconnection charges, unbundled local loop pricing etc.) and questioned their level of resourcing and the approach to appeals against their decisions, which often took too long and involved a 'practically automatic' suspension.⁴⁵

But these proposals also reflected Reding's personal beliefs as to the need for a new supranational institutional architecture. As one MEP put it, she had 'big ideas of building a new power base.'⁴⁶ When the Commission eventually published these proposals in November 2007,⁴⁷ following a two-year consultation,⁴⁸ many regarded them as provocative. In a tactical as well as political move, Reding sought to provoke NRAs by suggesting a centralised structure, with a view to 'getting regulators to think beyond their national boundaries'⁴⁹ and to focus their minds on promoting the development of a genuine single market in telecoms. It may have also been a tactical bargaining move, where the Commissioner was setting the 'bar high' (Commission official) when entering the Framework negotiations, knowing that these negotiations were likely to be a two-year process: 'asking for 150 per cent to eventually achieve 100

⁴² Commission to ERG, 26 November 2006

⁴³ Commission to ERG, 30 January 2007.

⁴⁴ Speech to the ERG, 8 February 2006, at

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/69&format=HTML&aged=0&language=EN&guiLanguage=en>

⁴⁵ Commission, *Impact Assessment accompanying COM(2007)697, COM(2007)698, COM(2007)699 and SEC(2007)1473, SEC(2007) 1472*, at p. 71.

⁴⁶ Malcolm Harbour MEP, *EurActiv.com*, 14 November 2007.

⁴⁷ Commission Communication COM (2007) 697 final and COM (2007) 699 final

⁴⁸ Commission Communication, *On the Review of the EU Regulatory Framework*, COM (2006) 334 final, together with *Proposed Changes* (SEC (2006) 816) and *Impact Assessment* (SEC (2006) 817).

⁴⁹ V. Reding speech to the ERG, 8 February 2006

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/69&format=HTML&aged=0&language=EN&guiLanguage=en>

per cent, rather than asking for 100 per cent and achieving merely 50 per cent' (Commission official). Another Commission official suggested that Reding's preference for a European regulator, which she publicised widely, was moved by her own political ambitions, implying that internally the Commission was rather more realistic in its assessment that it might end up settling for less than the centralised institutional architecture it initially proposed.

The Commission (and not only Mrs Reding personally) had an institutional interest in setting-up EECMA. One expert in the European Parliament described how EECMA was conceived of by some 'as a sort of fake nose for the Commission to do things which the Member States would not let it do, but maybe the agency could do'. An NRA official recounted that there was speculation at the time that the Commission would be using EECMA as a 'human resource management tool', as it intended to transfer personnel from the Commission to the new authority, which would also be taking in the functions of the existing European Network and Information Security Agency (ENISA) whose administrative overheads as an independent EU agency are, as one ministry official commented, 'absorbing so much money'.

But other comments suggest there was more nuance to the Commission's position and its motives in these negotiations. Even if Reding's political agenda in favour of radical centralization was thwarted eventually, the resulting institutional compromise, formalising NRAs' cooperation and peer review procedures and tightening their collaboration with the Commission, still broadly suited the Commission's supranational instincts and the objective to put in place a mechanism to attain greater regulatory consistency in the sector across Europe, to drive the network of regulators towards greater awareness of the European dimension when regulating, and to support 'cross-border regulatory approaches' (Commission official).

By provoking NRAs with a tactical proposal, the Commission at least successfully managed to 're-engage the regulators' (Commission official) in stepping up the ERG's efforts to attain greater consistency in regulation, and to eventually formalise them into setting up BEREC. Ultimately, it remains untested to what extent the Commission's tactical intentions genuinely existed at the time it published the draft legislation, or if these intentions were rather added as a convenient 'gloss' on events as negotiations progressed, not least to downplay the Commission's political defeat, or partial defeat, on these institutional issues. But on both accounts, the proposals' *effect* was to put pressure on NRAs to 'step up their game' so as to further the Internal Market.

The outcome: BEREC and the BEREC Office as an institutional compromise

The progress of the initial Commission proposal to the final vote on what would be BEREC and the BEREC Office, through the co-decision procedure, was difficult. When eventually, the revised Regulatory Framework was enacted in November 2009, after a protracted and at times turbulent legislative process, the agreed institutional compromise fell significantly short of what the Commission had initially sought. Once again, it was denied a fully-fledged EU regulatory agency. Instead, it settled for a modification of the existing ERG network in the form of an 'institutionally highly convoluted arrangement',⁵⁰ renamed *Body of European Regulators for Electronic Communications* (BEREC).

⁵⁰ M. Thatcher, 'The Creation of European Regulatory Agencies and its Limits: A Comparative Analysis of European Delegation', (2011) 18(6) *Journal of European Public Policy* 790, at p. 803.

BEREC is a hybrid that Levi Faur calls an ‘agencified network’.⁵¹ It is established by hard EU law (a Regulation)⁵² and has formal decision-making rules (majority voting). Its Board of Regulators is made up of the heads of NRAs (the Commission also attends, though without any voting power) and ‘take[s] all decisions relating to the performance of its functions’,⁵³ which require a two thirds majority.⁵⁴ BEREC has greater administrative capacity than the ERG, with a Management Committee responsible for day to day operations (made up of NRAs but the Commission also attends),⁵⁵ as well as a permanent Administrative Manager and staff⁵⁶ in a separate BEREC Office formally set up as ‘Community body with legal personality’.⁵⁷ The BEREC Office is based in Riga in Latvia, a choice dominated by the Council during the negotiations. On the question of where the Office should be located, the European Parliament was in favour of Brussels but the Council, for political reasons, decided it should be Riga in Latvia although it brought practical complications including further travel to meetings for NRAs.

BEREC itself remains independent (not an EU body), drawing much on a soft law, transnationally-networked decision-making rules. Its role is to develop and disseminate best regulatory practice on the implementation of the Regulatory Framework and provide assistance to individual NRAs when they request it;⁵⁸ to deliver opinions on Commission draft decisions, recommendations and guidelines;⁵⁹ to advise the EU institutions at their request or at its own initiative;⁶⁰ and to assist them and the NRAs in interacting with third parties, particularly by disseminating regulatory best practice.⁶¹ But BEREC has more coercive power than the ERG, principally because it takes decisions by majority vote, and the Commission and NRAs must take ‘utmost account’ of its opinions and recommendations.⁶²

The regulation creating BEREC left it to the NRAs to define its decision-making rules in detail (e.g. the procedure for voting) which resulted in some tough negotiations amongst the NRAs. Given its increased responsibilities/bite, these rules are more important than they had been in the ERG, where NRAs had decided on a simple majority basis. BEREC generally decides on the basis of a two thirds majority (except for Article 7a remedy proceedings (see below) when a simple majority suffices) and that majority is to be made up of total members; a change championed by one group of NRAs that believed the ERG’s treatment of abstentions benefitted the stronger NRAs (abstentions were common amongst weaker NRAs that were also more likely to succumb to pressure given the open voting in the ERG).

⁵¹ D. Levi-Faur, ‘Regulatory Networks & Regulatory Agencification: Towards a Single European Regulatory Space?’ (2010) *Jerusalem Papers in Regulation and Governance*, Working Paper No. 30, at p.5 and 17-19.

⁵² Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, 25 November 2007 (‘BEREC Regulation’).

⁵³ Article 5(1), BEREC Regulation

⁵⁴ Article 9(1), Rules of Procedures of the Board of Regulators as revised in May 2011, BoR (11) 23.

⁵⁵ Article 7, BEREC Regulation

⁵⁶ Articles 8-10, BEREC Regulation

⁵⁷ Article 6(1) BEREC Regulation

⁵⁸ Article 2(1) and 2(2), BEREC Regulation

⁵⁹ Article 2(3), BEREC Regulation

⁶⁰ Article 2(4), BEREC Regulation

⁶¹ Article 2(5), BEREC Regulation

⁶² Article 3(3), BEREC Regulation

BEREC's Board of Regulators meets four times a year and is made up of the Heads of the NRAs from EU Member States, with observers from the Commission, the accession states (Turkey, Croatia and the Former Yugoslav Republic of Macedonia) and the EEA states (Switzerland, Norway, Iceland and Liechtenstein). BEREC's annual work programmes, drafted by the incoming chair, with opportunities for formal and informal consultation every autumn, are delivered by expert working groups.

The 'Contact Network', which pre-existed BEREC and continues to play a role within BEREC, is attended by all NRAs, usually by lower level officials. The Contact Network meets before the Board to prepare its decisions. It is a specific type of expert working group, composed of senior representatives of all NRAs and chaired by a representative of the Chair of the Board of Regulators. The administrative manager of the BEREC Office also attends Contact Networks meetings. The Network's role is to coordinate proposals to be considered by the Board of Regulators and, with the support of the BEREC Office, to prepare the Board's meeting. The Board may also decide to delegate some of its duties to the Contact Network. The Contact Network also acts as a 'filter and facilitator' between BEREC's expert working groups, and it also operates as an 'informal network whose members are the key contact points between NRAs for seeking and exchanging information on regulatory issues.'⁶³

Coordination of national regulatory remedies (Article 7 and 7a procedure)

In addition to its proposal for an EU agency, the Commission, when launching the Framework review, also sought to establish that it would have the power to veto the design of draft NRA regulatory remedies under the EU Regulatory Framework in future. Again, its proposal did not exactly succeed in making it into the final text of the legislation, but was instead significantly watered down as it travelled through the legislative process. Instead of a Commission veto, the procedure for applying a remedy is governed by a new, and again rather convoluted, consultation and notification procedure, set out in Article 7 and 7a of the revised Framework Directive. The provision imposes on NRAs an obligation to notify draft remedies to their counterparts in other Member States, to the Commission and to BEREC for comment.⁶⁴ If the Commission considers a draft remedy may create a barrier to the single market or expresses serious doubts about its compatibility with EU law, it can recommend its amendment or withdrawal, but only after taking 'utmost account' of BEREC's opinion. BEREC may share or reject the Commission's doubts and can propose its own amendments or withdrawal.⁶⁵ The NRA in question may still adopt the measure but must take utmost account of the Commission's recommendation and BEREC's opinion and provide a reasoned justification for not following the Commission's recommendation.⁶⁶ The Commission retains its veto powers over NRAs' definitions of relevant markets and their designation of operators having Significant Market Power, but must again take utmost account of BEREC's opinion when doing so.⁶⁷

These tasks assigned to BEREC under the new notification and consultation procedures in Articles 7 and 7a of the Framework Directive are crucial to understanding the role of BEREC and the BEREC Office in promoting consistent regulatory practice across the EU. The Regulatory Framework obliges NRAs to carry

⁶³ BEREC rules of procedure, Article 12.

⁶⁴ Article 7(3) and 7a(1), Framework Directive

⁶⁵ Article 7a(3), (5), Framework Directive.

⁶⁶ Article 7a(7), Framework Directive.

⁶⁷ Article 7(5), Framework Directive.

out analyses of a range of telecoms markets that potentially require *ex ante* regulation. If an NRA considers that a market lacks effective competition, it is required to impose regulatory obligations. The starting point for an NRA's market analysis is the Commission's recommendation on relevant markets and the guidelines on market analysis and assessment of significant market power (SMP). If an NRA concludes from its market analysis that a given market is not effectively competitive it must impose appropriate regulatory obligations on the dominant undertakings in accordance with the universal service and market access provisions.

Alongside other measures to guarantee effective competition for the benefit of consumers, NRAs must consult on their definition and analysis of relevant markets as well as on any proposed impositions or removals of regulatory remedies on any providers of telecoms networks or services. These EU consultations, the so-called Article 7 procedures, are supposed to contribute to the development of a single market in telecoms (a consistent and transparent application of the Framework Directive throughout the EU) by ensuring cooperation among NRAs, and between NRAs and the Commission. The Commission can comment on the proposed regulatory remedy and may require that an NRA withdraw its market definition and/or the finding of SMP if it considers they are incompatible with the Framework Directive.

The 2009 Framework Directive and the BEREC Regulation introduce new elements to the Article 7 consultation procedure, inserting the new Article 7a procedure in relation to draft regulatory remedies. NRAs are now required to notify their definition of the boundaries of the relevant market and/or their assessment of an operator's SMP, and any draft regulatory remedy, to their NRA counterparts in other Member States, to the Commission and to BEREC.⁶⁸ Whenever the Commission expresses 'serious doubts' about the regulatory decisions of an NRA (whether that is its market definitions, SMP designations, or its imposition of regulatory remedies) BEREC provides an advisory opinion, of which the Commission and NRAs are to take 'utmost account'. Under Phase I of the procedure, the other NRAs, BEREC and the Commission have one month to comment on the draft measure.⁶⁹ Where applicable, Phase II of the procedure applies. It follows two different routes.

Assessing market definitions and SMP findings (Article 7): If the Commission considers that an NRA's definition of the relevant market or its SMP designation may create a barrier to the single market, or has serious doubts about its compatibility with EU law, it may open up a Phase II investigation that extends the process by two months,⁷⁰ during which BEREC (acting on a simple majority basis) issues an opinion on whether it shares the Commission's doubts. The Commission, taking 'utmost account' of that opinion, though not bound by it, then decides whether to require the NRA to amend or withdraw the proposed measure, or whether to withdraw its serious doubts.⁷¹ If required to do so, the NRA must amend or

⁶⁸ Article 7(3) Framework Directive

⁶⁹ Article 7(3) and Article 7a(1) Framework Directive

⁷⁰ Article 7(4) Framework Directive

⁷¹ Article 7(5) Framework Directive

withdraw its measure within six months, taking ‘utmost account’ of the comments from other NRAs, BEREC and the Commission.⁷²

Prior to the establishment of BEREC and the most recent amendments to Article 7/7a, the ERG already provided advice on an informal basis to the Commission on Article 7. Initially, an ad hoc expert working group would be triggered whenever a notifying NRA requested a peer review. Because this resource was ‘under-used’, in 2006 the ERG chose to automatically set up expert working groups every time the Commission launched a ‘Phase II’ case under Article 7 but the resulting ERG opinions had no formal legal status (i.e. there was no obligation on the Commission and the notifying NRA to take utmost account of the resulting opinions, as there is now in relation to BEREC opinions).

Assessing regulatory remedies (Article 7a): From 25 May 2011, the Commission has been able to also extend its investigation to the appropriateness of an NRA’s proposed regulatory remedy and issue a recommendation that requires that NRA to amend or withdraw the measure. If the Commission considers that the proposed remedy creates a barrier to the single market, or has serious doubts about its compatibility with EU law, it may open up a Phase II investigation that extends the process by three months,⁷³ during which the Commission, BEREC and the notifying NRA are expected to ‘cooperate closely’, take into account ‘the views of market participants’ and agree on what they consider to be the most appropriate and effective measure.⁷⁴ Within six weeks of the initiation of Phase II, BEREC (acting on a simple majority basis) publicly issues a reasoned opinion on whether it considers the NRA should amend or withdraw its draft measure.⁷⁵ If BEREC shares the Commission’s serious doubts, it is expected to ‘cooperate closely’ with the NRA concerned to identify the most appropriate and effective measure.⁷⁶ Where BEREC does not agree with the Commission’s position or does not issue an opinion, or where the NRA amends or decide to maintain its draft measure, the Commission, having taken ‘utmost account’ of BEREC, may, within one month of the initial three months period, issue a ‘recommendation requiring’ the NRA to amend or withdraw its measure and suggesting amendments.⁷⁷ The NRA then has one month to communicate its adopted final measure to the Commission and BEREC.⁷⁸ If the NRA decides not to follow the Commission’s recommendation, it must provide a reasoned justification for failing to do so.⁷⁹

In summary, the existing procedure for the coordination of regulatory remedies, which was introduced in the 2009 revision of the Regulatory Framework, falls some way short of the veto that the Commission had originally sought, back in 2007 when launching the Framework review proposals. Instead of a centralised and hierarchical legal structure, with the Commission as ultimate authority, the current mechanism relies instead on a transnationally-networked form of coordination: Articles 7 and 7a require cooperation

⁷² Article 7(6), (7) Framework Directive

⁷³ Article 7a(1) Framework Directive

⁷⁴ Article 7a(2) Framework Directive

⁷⁵ Article 7a(3) Framework Directive

⁷⁶ Article 7a(4) Framework Directive

⁷⁷ Article 7a(5) Framework Directive

⁷⁸ Article 7a(6) Framework Directive

⁷⁹ Article 7a(7) Framework Directive

between the NRAs, the Commission and BEREC. They also involve NRAs in a peer review exercise, supported by the BEREC Office, which has compiled a list of experts from every NRA who can be called on to assess notified analyses and regulatory remedies. As soon as a BEREC Opinion is requested under the Article 7 or 7a procedure, the BEREC Office works on forming an expert working group of 5 to 7 experts from the list. They then have 15 working days (under Article 7) or 25 working days (under Article 7a) to assess the documents and draft an opinion for the approval of BEREC's Board of Regulators.⁸⁰ The NRA whose draft decision is under investigation is not involved, but discussions are of 'the most sensitive kind' given that peers are making potentially negative public judgments about the decisions of their colleagues.⁸¹

The negotiations: initial reactions

The Commission launched the Framework Review in November 2005, with a call for contributions and a follow up workshop in January 2006 (responses to the consultation were published in March 2006). Immediately, and long before the formal negotiations were underway, the key players sought to shape the agenda. After the first round of consultations, the Commission set out its proposed changes to the Regulatory Framework in June 2006 alongside an Impact Assessment providing further detail.⁸² It then launched a second consultation phase,⁸³ leading to revised proposals that were eventually published in November 2007.

Following their publication, the legislative negotiations over these reform proposals quickly became controversial and fractious. There was opposition to the proposed EU telecoms authority even from within the Commission: The Competition Commissioner thought it might blur responsibilities with their own D-G and, along with both the Commissioners for Industry and for Trade, questioned the need for a fully-fledged EU agency and its extra staff.⁸⁴ Meanwhile, the Commission Legal Service flagged legal concerns relating to the authority's competences.⁸⁵

With the exception of some established operators, most notably *British Telecoms*, industry reacted sceptically to the proposed EU telecoms agency and extension of the Commission's veto powers.⁸⁶ With

⁸⁰ Article 13 BEREC Rules of Procedure, BoR (11) 23

⁸¹ C. Fonteijn, Communications and Competition law Conference of the International Bar Association, 16 May 2011 (Vienna)

⁸² Commission Communication, *On the Review of the EU Regulatory Framework*, COM (2006) 334 final, together with *Proposed Changes* (SEC (2006) 816) and *Impact Assessment* (SEC (2006) 817)

⁸³ http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/review_2/index_en.htm

⁸⁴ Günter Verheugen, Industry Commissioner, reported in the *Financial Times*, 24 September 2007. Inter-service consultation note from D-G Enterprise and Industry to DG INFSO: given the transient nature of the regulatory framework, questions 'the desirability to employ 110 persons for regulatory tasks that should largely become superfluous by 2018'. D-G Comp, Inter-service consultation note from D-G Competition to D-G INFSO, ref 831935: beyond causing 'confusion and uncertainty' on the delineation between its own competences and those of EECMA, the proposal also introduces unnecessary bureaucracy and complexity (see also *Financial Times*, 14 January and 30 October 2007). DG Trade, Inter-service consultation note from D-G Trade to DG INFSO, B1-MS/lc (2007) D8772, 19 September 2007: the proposal falls short of the better regulation principle, increasing cost and duplicating resources where the Commission is well-equipped to act in co-operation with the ERG.

⁸⁵ Commission Legal Service, inter-service consultation note to D-G INFSO, JUR(2007) 0629, 19 September 2007

⁸⁶ *Financial Times*, 29 June 2006.

the attitude better-the-devil-you-know, most telecoms operators (incumbents and new entrants alike) favoured the institutional *status quo* and were against significant transfers of regulatory power to the EU that might have quickly led to reductions in the significant revenues they could extract from network connection fees. They had their issues with the NRAs, but these were not so bad as to persuade them that they might be better off taking their chances with an EU agency with centralised power, including over national regulatory remedies. They also feared a decline in the quality of regulation because the EU might settle for lowest common denominator remedies. *British Telecom* was unusual in that it supported an extension of EU powers over national remedies, because it already operated on a highly competitive market in the UK and saw its access to other markets blocked by lax implementation of the Regulatory Framework elsewhere.⁸⁷

The Commissioner's choice to play politically provocatively (according to one interviewee from a national ministry: 'it was pushing the Member States') reduced the level of confidence amongst the other political players in the Council and the European Parliament and amongst NRAs and industry, in the Commission, as summarised by this NRA official:

'Reding was a game changer in terms of people's willingness to concede even in principle Commission supervision because she was felt to be ... [too political].'

Council of Ministers' sovereignty reflex

Political positioning

In the Council of Ministers, it quickly emerged that the Member States were generally not persuaded by the Commission's case for an EU agency.⁸⁸ Informal meeting notes that were made available to us summarise the main concerns within Council, dating from as early as March 2008: an EU agency would concentrate powers in the hands of the Commission; would run against the principles of subsidiarity and proportionality; would create additional bureaucracy; and might slow down the gradual reduction of ex-ante sector-specific regulation in the telecoms market. Their resistance, even in a sector with a particularly advanced partnership with the Commission, was rooted in the sovereignty reflex and the desire to maintain control over politically sensitive areas like spectrum management, security, universal service obligations and the protection of national champions.⁸⁹ The Commission provoked these sovereignty reflexes, arguably, by placing institutional reform – the proposals for an EU telecoms authority and an extended veto over remedies – at the heart of the review. By focusing attention on these institutional proposals designed (as one ministry official put it) for 'taking control of the market', the Commission arguably alienated the Member States more than necessary. Had it instead balanced substantive and

⁸⁷ P. Humphreys, 'The Problem of Inconsistent Regulatory Implementation and the Review of European Union Regulatory Policy' (paper presented at 17th biennial conference of the International Telecommunications Society, Montreal, 24-7 June 2008).

⁸⁸ 2835th Council meeting on Transport, Telecommunications and Energy, 29-30 November and 3 December 2007, Press Release 15891/07 (Presse 274); 2877th Council meeting on Transport, Telecommunications and Energy, 12-13 June 2008, Press Release 10410/08 (Presse 165).

⁸⁹ D. Coen and M. Thatcher, 'Network governance and multi-level delegation: European Networks of Regulatory Agencies' (2008) 28(1) *Journal of Public Policy* 49, 55.

institutional aspects of the Framework review more carefully, it might have been able to create a different political dynamic.

Those Member States that might have been more receptive to centralized regulation – the UK, Sweden and Denmark in particular – still had serious reservations about creating a powerful new EU agency and were hesitant to hand over power in politically sensitive areas. They were also potentially discouraged by the fact that the proposed agency might have created an institutional precedent that the Commission would then seek to extend to other fields in which the agency model was even less welcome. According to one NRA official, Council was opposing these proposals ‘much more than [the European] Parliament’, partly driven by their fear that a precedent might be created, with impact way beyond the telecoms sector, affecting the institutional framework in fields such as data protection, energy, healthcare etc. Around the same time as the Framework negotiations, the Commission had proposed an agency for the energy sector,⁹⁰ which had met with stiff opposition from both the Council and the European Parliament.⁹¹ In this context, in March 2008, the Commission pledged to work with the Member States to ‘develop a clear and coherent vision on the place of agencies in European governance’ and not to propose any new agencies until this had happened.⁹²

Member States were more divided on the extension of the Commission’s veto. Most resisted (including Germany and Spain whose governments, NRAs and incumbents were particularly close). Some even argued the existing veto over the designation of relevant markets and the definition of significant market power should be withdrawn. Other Member States (including Denmark, Sweden and the UK) were not opposed to extending the veto in principle, on the basis that it would encourage consistent implementation of the Regulatory Framework.⁹³

Explaining what might have motivated the Member States in their reactions towards the Commission’s institutional reform attempts, interviewees (including ministry personnel, Council attachés, NRA officials, the Commission, the European Parliament and senior figures from industry) invariably bring up not only concerns about their effectiveness, e. g. that regulation required market-specific intervention, for which the NRAs had better expertise than a centralised body (and they could operate with less resources). In addition, the overwhelming majority of responses suggests further reaching political motivations. Member States were reluctant to cede control over their national markets, with power ebbing away from ministries and NRAs and into the hands of the Commission, or a Commission-led centralised agency. A member of the Council administration for example considered that Member States generally wanted to be in control of the national market, motivated by considerations of subsidiarity and opportunism to the extent that their domestic economies would benefit from cross-border markets. A transnational network,

⁹⁰ Commission Communication, *Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators*, COM (2007) 530 final.

⁹¹ ITRE Committee, *Working Document on a Proposal for a Regulation establishing an Agency for the Cooperation of Energy Regulators*, Rapporteur R. Brunetta, PE400.297v01-00.

⁹² Commission, *European agencies: The way forward*, MEMO/08/159, 11 March 2008.

⁹³ UK House of Commons European Scrutiny Committee, 16th Report (2008-9), 22 April 2009, Chapter 1, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xiv/19iv03.htm>.

not a centralised agency, was seen as the best option to maintain such control. A Commission official considers that the Member States' positions followed 'political ideas':

'A market authority would be seen as an extension of power of the power of the Commission, the supranational, and contrary to the interests of the Member States as sovereign states. It was very much the usual, classic dichotomy.'

Other Council attachés consider:

'Not for good economic reasons, but mainly for political reasons or for commercial reasons in terms of the linkage with the incumbents, governments were generally opposed to a veto on remedies.'

'If you have a fully-fledged agency, you give away a lot of power which you would rather have in the national regulators who can take better care of the national circumstances.... Whatever the agency is, it is just more Brussels power, more resources [and] more manpower to the EU, whether it is the Commission behind-the-scenes or they are just mandating. It is just more muscles in Brussels to come after the Member States.'

'Why didn't we end up with the EU agency? It is a power thing. ... I don't think we would have thought an agency particularly inefficient. Rather the contrary. They would have been quite efficient at starting infringement procedures against national markets not behaving.'

The following views from ministry officials also make the point:

'We are trying to maintain control because... everybody tries to subsist for years; governments as well.'

'We expected the likes of Germany and Spain and France to be opposed to [the proposed Commission veto on remedies] because they were concerned ... that if there was a Commission veto then the market dominants of their incumbents... would be subject to doubt.'

'The Commission tried to take control in order to have a way to ensure that the same rules will apply to all countries in every situation. We were against that... because it went against national control, and against our institutional division of powers between the governments and [the NRA]; but also ... because there is an intellectual objection. It makes no sense trying to apply the same rules for different situations.'

The following statements from NRA delegates endorse these observations:

'At the level of the Member States, the subsidiarity arguments, namely that there is no need for any centralisation and we do not want to give up any competences, have been fairly pervasive; not only amongst the larger Member States but also in many smaller ones.'

'It was clear that Council was opposed to centralisation as a tool in order to keep national markets as much under control as possible'

'There was a political concern in most of the ministries... to try to limit the Commission powers, especially in an area like telecommunications which is a shared competence.'

'The Member States looked at the Commission as a body that wanted to extend its powers.'

'The Council's status quo ante position was: "we are not very happy even with the ground we conceded to the Commission. We would like to push back on some of that." Not everybody felt like that, but a number of countries were on that page.'

In addition, some Member States were set to keep the Commission at a distance, who they thought was out to grow its powers. One interviewee reported an attaché participating in the Council working party to have put it simply: 'at the end of the day, we do not trust the Commission. We do not trust the Commission on this package.' Some were also driven by an objection that

'the case had not really been made for such a hefty institution and it ought to be possible to do this at a lower level of resource than was being proposed' (the words of an NRA official).

Going further, there was a commonly held view amongst Council delegations, foremost the UK, to oppose the creation of more agencies. This was described by one ministry official as a 'political' as opposed to technical issue, 'because agencies cost money and that affects the budget and so on'. These were objections in principle against the creation of any more EU agencies, for budgetary as well as substantive reasons, as summed up in the following statement by a ministry official:

'One was never worried about what the [EU] agency would do. One just didn't want an agency, no matter what it was doing. We just didn't want any more agencies.'

This is corroborated by the following statement from a Commission official:

'The Member States were simply saying "we don't want any more of these bodies. We don't want more of these agencies because you said you were not going to set up any more." [They] didn't want it for budgetary reasons, but they also did not want it for substantive reasons. The two went together.'

Some objected that the Commission's intended EU agency would be conveniently placed to protect the EU telecoms budget which had come under pressure and would even operate (in the words of one NRA official) as a 'human management tool' to protect Commission personnel who might be adversely affected by impending changes to employment conditions unless transferred to an EU agency. One Council attaché commented:

'Some Member States mistrusted the Commission's intention in setting up the EU agency, perceiving this a convenient tool to protect the Commission's budget and transfer Commission personnel who might otherwise be affected by an employment freeze.'

Some Member States, for example the Netherlands, took the view that it would not be conducive to facilitating the transition from sector-specific regulation to EU competition law in telecoms (now one of

the express objectives of the Regulatory Framework), if States were to support ‘any kind of body that would have as their first objective to survive over time’ (a senior ministry official). Others however focused their scepticism on the fact that the Commission was trying to take control over sensitive policy issues like spectrum, the regulation of which is, in many Member States, left with the ministry rather than the NRA.

The distrust towards the Commission was potentially complemented by a healthy dose of scepticism towards their own NRAs. On the one hand, Member States sought to protect their own, sometimes newly-established, regulators. But on the other hand, they were not overly impressed by the track record of some of the regulators (not necessarily their own), especially with the existing Article 7 procedure. As one NRA official commented:

‘Governments may not trust the Commission, but they also don’t like to have at home independent regulators they cannot control.... The truth is that governments were afraid that regulators have more powers; powers that they cannot control themselves.’

Coalition-building

Following what one Commission official describes as a vehemently ‘hostile’ reception of the Commission’s proposals amongst national delegations,⁹⁴ the debates in the Council working party took off in earnest in early 2008. They were shaped considerably by the French Council Presidency (from June to December 2008) who, in July 2008, sought to bring especially the discussion over a new EU telecoms body into sharper focus in an effort to ‘clarify the positions of Member States before analysing amendments from the European Parliament’, inviting MS to express views on such a body’s ‘tasks’, the ‘need for permanent professional staff’ and ‘legal form’.⁹⁵ The exercise brought up clearly that Member States virtually unanimously opposed the creation a new Community body.⁹⁶ This led the French Minister of State to express, towards the European Parliament, Council’s ‘reservations about the idea of establishing a Community body’ and reluctance ‘at this moment in time’ to give the Commission any further binding powers, due to the ‘highly sensitive’ nature of the proposals.⁹⁷

They sought instead to strengthen the existing ERG by supporting it through a permanent secretariat, so as to improve its effectiveness, even if Council delegations still struggled to reach agreement on the finer details relating to the secretariat’s staffing numbers and the balance between administrative personnel

⁹⁴ Considering that when they were presented to the Council working party for the first time, ‘something like 25 out of 27 Member States were quite overtly and vehemently against the proposal.’

⁹⁵ French Council presidency room document to Working Party on Telecommunications and Information Society, ‘Discussion Paper on Alternatives to EECMA’, 3 July 2008, 53/2008.

⁹⁶ European Council, 10337/08, Progress Report from COREPER to Council on the Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (2007/0249 (COD)), 6 June 2008, p. 2; Council of the European Union (2007) 2877th Council meeting Transport, Telecommunications and Energy, Brussels, 12-13 June 2008, press release: 10410/08 (Presse 165), p. 9.

⁹⁷ Luc Chantel, French Minister of State for Industry and Consumer Affairs and President-in-Office of the Council, presentation to the European Parliament plenary debate, 2 September 2008, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20080902+ITEM-010+DOC+XML+V0//EN>

and telecoms experts.⁹⁸ The alliance-building exercise within the Council, therefore, then centred in essence on the question to what extent individual Member States would align their own proposed alternative to EECMA with the counter-proposal promulgated by MEPs (introduced below: a *Body of European Regulators for Telecoms*) which, whilst building on the good practice of the ERG, still involved setting up a Community body including permanent professional staff.

To move negotiations along, the French presidency placed increasing pressure on delegations in the Council working party to reach consensus on a counter-proposal, but whilst Member States might have agreed on the broad direction of travel, there were still coalitions or blocks.⁹⁹ A few Member States, including Holland, were prepared to support (in the words of one delegate) a ‘strong and independent’ body that would constitute an effective counterbalance to the Commission, especially in the context of Article 7 procedures. The Dutch government in particular stressed the need for a secretariat so as to enable the new body to largely ‘take over the tasks of the ‘article 7 taskforce’ of the Commission’. Others, including Germany in alignment with Spain, insisted on an intergovernmental solution, at least insofar as it would be tactically possible without having to concede ground on the veto question. According to one ministry official, they still ‘did not want an EU agency at all or the smallest one possible with no powers at all’.

Meanwhile, in the working party discussions over the proposed veto on remedies, the UK and France, pointing out the need for greater harmonisation of remedies, both initially expressed support in principle for an extended Commission power as long as the circumstances under which the new veto powers could be exercised would be more clearly defined. The UK delegation also suggested (in March 2008) that the advisory role on market reviews, which ERG had already been performing informally alongside CoCom, should be formalized and embedded in the European framework, with an obligation on the Commission to consult it and take utmost account of its opinions. The UK added that the effectiveness of the new body’s role in this procedure was a key factor to be taken into account, even if it meant it received EU funding. France held back on its political position when taking over the Council presidency in the second half of 2008, whilst Sweden and Denmark came out in support of extending the Commission’s powers. On the other hand, a majority of Member States, led most vociferously by Germany and Spain, continued to vehemently object to an extended veto, citing that this would constitute a threat to the EU’s institutional balance, would run against the principles of subsidiarity and proportionality and undermine the NRAs’

⁹⁸ Responses to the French Presidency in July 2008 indicate that Member States had varying idea on the details of the secretariat’s staffing numbers and whether staff should cover purely administrative responsibilities (including Spain, Germany and Portugal) or should include substantive telecoms experts (including Italy, Ireland, UK, Denmark, Sweden; this was also what the ERG preferred). Some Member States, such as the UK, also thought the new body should receive EU funding.

⁹⁹ French Council presidency room document to Working Party on Telecommunications and Information Society, ‘Discussion Paper on Alternatives to EECMA’, 10 September 2008, 63/2008; French Council presidency room document to Working Party on Telecommunications and Information Society, ‘Discussion Paper on Alternatives to EECMA’, 30 September 2008, 68/2008; French Council presidency note to COREPER, ‘Proposal for the Regulation of the European Parliament and of the Council establishing the Group of European Regulators in Telecoms’, 13 October 2008, 14048/2008; French Council presidency room document to Working Party on Telecommunications and Information Society, ‘Presidency Compromise Proposal for the Regulation of the European Parliament and of the Council establishing the Group of European Regulators in Telecoms’, 30 October 2008, 78/2008.

expertise in identifying appropriate remedies for their national telecoms markets. A minority of Member States, foremost the Netherlands, went further, asking for existing Commission veto powers (over NRAs' market definition and designation of significant market power) to be withdrawn. They argued that these existing powers were no longer necessary, given the option to initiate legal proceedings by way of *ex-post* challenge to an NRA's regulatory decisions. These were political coalition-building exercises amongst the Member States whose positions were dictated largely by the pursuit of their own domestic interests and preferences, in which in particular Germany, Spain, the UK, Sweden and the Netherlands played an instructive role.

Germany was repeatedly described as one of the most outspoken Member State against any extension of Commission competences, both in setting up an EU agency or by way of veto over remedies, for two reasons. On the one hand, there were concerns in principle within the German ministry about a shift in power towards Brussels. These concerns were, on the other hand, directly related to the personality of Mrs Reding who was perceived to be targeting the German market in particular. Germany therefore, in a coordinated effort between the German NRA and the German ministry, opposed both the EECMA and the veto on remedies, according to a German official 'in an offensive manner', even if it stirred critique from some of their counter-parts in other Member States concerned about needing to maintain a constructive dialogue with the Commission and, in particular, the European Parliament. In a classic coalition-building exercise, Germany sought (according to a ministry official) to 'build alliances', to 'find supporters' and 'people with whom you can coordinate your positions' and 'have the big players on your side'. Spain constituted a natural ally with historically strong links to its national incumbent and therefore similar interests to Germany, but Germany sought to attract a 'broad majority' in the Council.

Germany might have been overly ambitious in claiming to have all of the other Member States on its side 'the issue of the veto on remedies' (one official) but it was certainly true that, presenting a fairly united front in its proposed common position in November 2008, 'Council remained consistent' in promulgating a broadly intergovernmental institutional solution and in rejecting a fully-blown Commission veto over remedies. The German delegation supported an institutional structure that would not be an EU agency with minimal staff and strictly administrative functions (one attaché described it as 'preparing flight tickets for NRAs', no more), and although towards the end of the negotiations, they agreed to set up the Office formally as an EU agency, they did so only when they saw 'no alternative' (a ministry official). The German ministry saw the negotiations tactically, in what an official described a 'strategic decision': to offer nothing to the European Parliament would have possibly cost the price of having to give in on the veto on remedies. To ensure substantive powers would remain with BEREC (an independent body) and not spill-over to the Office (formally an EU agency), Germany (and others) sought to limit the number of Office personnel. The initiative was unsuccessful, but Council did secure tight regulation of the procedure for increasing Office staff.

Spain had particularly strong relations with Germany during the negotiations and formed a block also with Austria. Again, considerations over how their domestic interests might be most suitably protected guided their positioning. The Spanish government rejected the Commission proposals on the ground that were designed to 'take control away from what was previously in the hands of the Member States' (so a ministry official), with particularly intrusive effect in Spain where the ministry retains considerable regulatory

powers as the regulator CMT has competence only over market regulation but not over other regulatory domains including spectrum.

The UK's choice to support the proposition to confer further powers on the Commission was described as 'unusual' and rather 'isolated' in Council, with only Denmark and Sweden arguing along similar lines. However, it suited British interests to the dot. Stephen Carter, the UK telecoms minister leading negotiations at the time (whose personality one member of the European Parliament described as 'pretty influential in the outcome') was concerned about the quality of regulation elsewhere in Europe, as well as the UK operators' ability to expand into the European market, therefore taking a perspective that was heavily focused on the single market. One delegate summed up the UK's concern as being 'about the fact that some regulators [outside the UK] were not doing their job properly'.

The Danish and Swedish delegations had their own motivations for supporting the UK in its positioning. In the Danish case, according to one delegate 'the quite simple argument for this would be that Denmark, being a small country, would benefit from having a rather strong Commission having a veto over Member States' decisions.' Similarly, Sweden looked favourable at the Commission veto proposal, primarily because they agreed with the Commission that further centralisation would improve competitiveness on the EU telecoms market and this in turn would benefit the Swedish market. They were more sceptical in relation to the EECMA proposal, but also thought aspects of an EU agency could be efficient in enforcing more competitive market regulation. The Swedish considered themselves (in the words of one attaché) 'one of the last countries to give in' to those Member States who rejected the veto proposal (Sweden, alongside the UK and Denmark therefore abstained from the vote on the veto proposal at the Council meeting producing the common position, see below). However, their choice not to block the others States' vote was put down not to conviction but rather to a more general policy simply to 'never vote 'No' to whatever' in the Council.

The Netherlands' initial argument that the Commission's existing veto over the designation of relevant markets and the definition of significant market power was no longer justified and should be withdrawn, was heavily influenced by their own political experiences and market circumstances. An NRA official commented in relation to this Dutch position that as they 'had just had the referendum on the Euro Treaty, they were hardly going to support [the proposal on the veto on remedies], especially if it meant a removal of powers from the national level to the European level.' The ministry's position towards the Commission was described as 'defensive' by one government official, unappreciative in particular of its interference with the Dutch regulator OPTA's powers, whom the government considered to be better placed than the Commission to adequately regulate the Dutch market and, in the words of one official, 'only if [OPTA] are evidently wrong, then they should use the veto. But in principle they should accept what OPTA say because they are the experts.' However, unable to gain enough support from other Member States for the idea of rolling back the veto powers that had been conferred on Commission in 2002, the Dutch government switched tack later in the negotiations, accepting a limited extension, principally to avoid giving any ground on harmonization powers but perhaps also affected by the Commission's coinciding

decision not to veto an amended draft decision by OPTA relating to the regulation of access to cable networks.¹⁰⁰

By way of balance, the Dutch government argued in favour of an independent and strong body of regulators (drawing on the support of up to 25 administrative staff) whose consent the Commission would need to seek when exercising these powers. Their position was clearly driven by a deep mistrust towards the Commission. Not only did it stress the need for an independent body's independence because (in the words of one official) 'there is always the fear that the Commission is also expanding its powers within [that body].' There was also a more profuse sense that the Commission was out to grow its powers. One interviewee reported an attaché participating in the Council working party to have put it simply: 'At the end of the day, we do not trust the Commission. We do not trust the Commission on this package.'

Counter-proposal and common position (GERT)

Responding to the sceptical reactions from both Council and the European Parliament (on which see below), the Commission submitted substantially revised proposals on both the EECMA and on the veto question in November 2008.¹⁰¹ But the Council responded with a counter-proposal for an intergovernmental *Group of European Regulators for Telecoms* (GERT) whose advisory role would be formalised in the Regulatory Framework, though without establishing it as either an entity governed by EU law or one possessing a permanent Managing Director.¹⁰² It also proposed the establishment of a small supporting secretariat, but again not as an EU law body.¹⁰³ On the matter of the veto, the Council responded to both the Commission and the European Parliament (who, by that point, had come up with a compromise proposal), with a provision that further diluted the Commission's proposed veto power, limiting GERT to an opinion-giving role and denying GERT and the Commission the right to make binding decisions.¹⁰⁴

¹⁰⁰ This followed previous negative experiences in 2005, in which the Commission had threatened to exercise its veto in relation to decisions taken by the Dutch regulator OPTA relating to the regulation of access to cable networks and retail prices, forcing OPTA to eventually withdraw its decisions.

¹⁰¹ European Commission, 'Amended Proposal for a Regulation of the European Parliament and of the Council Establishing the European Electronic Communications Market Authority', Com(2008)720 final, 5 November 2008; Amended Proposal for a revised Framework Directive, COM (2008) 724, 6 November 2008.

¹⁰² 2907th Council meeting on Transport, Telecommunications and Energy, 27 November 2008, Press Release 16326/1/08 (Presse 345); Council of the European Union, Common Position adopted with a view to the adoption of a Regulation of the European Parliament and of the Council establishing the Group of European Regulators in Telecoms (GERT), 9 February 2009, Doc 16498/08; 2923rd Council meeting on Education, Youth and Culture, 16 February 2009, Press Release 6071/09 (Presse 33). GERT was to be led by a Board of Regulators made up of representatives of the 27 NRAs, following the ERG model. The Commission and NRAs would be under an obligation to take utmost account of GERT's opinions, advice or regulatory best practice.

¹⁰³ COREPER meeting on 20 February 2009, recorded in Council Presidency Meeting Document DS 167/09 of 26 February 2009.

¹⁰⁴ 2907th Council meeting on Transport, Telecommunications and Energy, 27 November 2008, Press Release 16326/1/08 (Presse 345); Common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic

The Council left little doubt that whilst it had a number of ‘intellectual’ objections (in the words of one ministry official) to the Commission’s push for more centralised regulation over what continued to be divergent national markets, Member States’ primary concern was of a political nature. Functional pressures may have persuaded them to improve their mutual coordination efforts so as to strengthen the internal market, and this alone might explain why they sought it necessary to agree on further institutional reform. But their distinct preference for an intergovernmental or transnationally-networked regulatory model over the centralisation proposed by the Commission also followed a strong political pull from the opposite direction, namely their reflex to protect their own national sovereignty.

Relations between ministries and the Commission remained guarded during the negotiations and interaction between them largely focused on a string of ‘high-level’ meetings, set up upon the Member States’ request. They followed (according to one participating ministry official) ‘a rather loose format where everybody could express opinions’ but without any serious engagement on either side to reach decisions or improve relations. The formulaic nature of these meetings did not compare with the Commission’s regular, frequent interaction with NRAs in the same period, both by formally communicating with ERG and with delegations from individual regulators in a more informal setting. One ministry official for example observed:

‘There was regular discussion [from the Commission] with the ERG, but there was nothing with member states. Only the Council and then the Council working group but there was nothing in between. And then there were these high-level meetings. But don't expect too much from them.’

Some Member States had particularly bad relations and therefore no contact with the Commission at cabinet level, especially Spain and Germany, but they maintained some contact between ministry officials and the officials in the Commission services. Another ministry official for example commented that

‘with the technicians [in the Commission D-G civil service], I had good relations with the people from the commission at my level. But regarding the possibility to have influence or to discuss more than in the room, trying to influence the Commission in the corridors, from our position it was impossible.’

Similarly, this quote from an interview with a Commission official:

‘[High level meetings by the Commission with the government side] were more formal, with less of a network element to things. I would say that the relationship to the ministries was still rather formal.’

Tensions between Council and the Commission grew as Commissioner Reding had personally warned against the Member States’ intention to incorporate an enhanced ERG as a private legal entity under Belgian law. According to Reding, ‘we certainly do not want a Belgian private body, alien to the Community

communications networks and services , 16496/08, 9 February 2009; 2923rd Council meeting on Education, Youth and Culture, 16 February 2009, Press Release 6071/09 (Presse 33).

approach and the guarantees it provides, to become involved in European decision-making'.¹⁰⁵ The disagreement went so far that when ministers took their vote on their proposed Common Position text, with the Commission in the room (a meeting which Reding herself described as a 'constructive crisis'¹⁰⁶), the Commission objected to the proposed text, prompting the requirement that Council pass its position by unanimity. A unanimous vote was duly passed,¹⁰⁷ in a highly unusual move by ministers to overrule the Commission's concerns. A member of the European Parliament considered Mrs Reding's defeat in the Council vote as 'quite an important indication of a shift in power in legislative decision-making', away from the Commission in favour of the Council of Ministers. Even though Mrs Reding 'tried to block' Council's counter-proposal, 'she couldn't'; 'it was fairly unprecedented for a Commissioner to be overruled.' An NRA delegate in turn described her personal reaction as 'devastated'.

Despite the unanimous vote, some Member States remained not fully satisfied. The UK government for example had expressed hope that 'we should be able to do better than this and had hoped for, at a minimum, a [Commission] Decision which would impose an obligation on NRAs to comply or explain publicly why they have not.'¹⁰⁸ When it came to the vote (in late 2008), the UK delegation had supported the proposed Regulation setting up GERT but abstained (alongside Sweden) from the vote on the Framework Directive.¹⁰⁹ The UK supported the GERT Regulation again at the Council Meeting in February 2009 that formalised its Common Position. But it but abstained from voting on the Framework Directive, inter alia, because:

'we wanted a strong corrective mechanism if the remedies adopted by the NRAs were not appropriate. The Commission had proposed that its own power should be extended so that it may veto such remedies. This was acceptable to us – if appropriately constrained and justified – but was anathema to the majority of Member States. This resulted in a Common Position that only allowed the Commission to issue an opinion... based on expert advice from the new advisory body [GERT]. Such an opinion would not be legally binding. We felt strongly that we should be able to

¹⁰⁵ Commissioner Viviane Reding, presentation to the European Parliament plenary debate, 2 September 2008: 'We certainly do not want a Belgian private body, alien to the Community approach and the guarantees it provides, to become involved in European decision-making.'

¹⁰⁶ Press release: MEMO/08/744, 27 November 2008.

¹⁰⁷ Note by Lord Carter of Barnes, UK Parliamentary Under-Secretary, Department for Culture & Media and Sport, 4 December 2008, Hansard Written Answers and Statements, at www.theyworkforyou.com.

¹⁰⁸ Memorandum dated 6 April 2009 to the House of Commons European Scrutiny Committee from the UK government Minister for Communications, Technology and Broadcasting at BERR, Lord Carter of Barnes, House of Common European Scrutiny Committee, 16th Report (2008-9) printed on 22 April 2009, Chapter 1, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xiv/19iv03.htm>

¹⁰⁹ Council of the European Union (2008) 2907th Council meeting Transport, Telecommunications and Energy, Brussels, 27 November 2008, press release: 16326/1/08 (Presse 345), p. 10-11. Only the Netherlands abstained from the vote on GERT. See also the Note by Lord Carter of Barnes, Parliamentary Under-Secretary, Department for Culture & Media and Sport, 4 December 2008, Hansard Written Answers and Statements, at www.theyworkforyou.com; who presented the UK at the Council meeting in November 2008. Minister's letter to the UK House of Commons European Scrutiny Committee of 15 December 2008, as cited in House of Common European Scrutiny Committee, 16th Report (2008-9) printed on 22 April 2009, Chapter 1, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xiv/19iv03.htm>

do better than this and had hoped for, at a minimum, a [Commission] Decision which would impose an obligation on NRAs to comply or explain publicly why they have not.¹¹⁰

As well as shaping the political coalitions, dynamics in the Council working party at this stage in the negotiations were also shaped by the individual personalities, and the affiliation, of the national representatives. According to one ministry official, the ministries see themselves as technicians, whereas attaches to national permanent representations in Brussels are generalists:

‘The representatives in the working group are the attachés [to the permanent representation] and they don't have the deep knowledge of the technical issues and maybe the consequences... And we technicians tried to inform them about everything about that.’

According to another ministry official, the

‘dynamic [of the ministry's relationship] with the permanent representation is interesting.... It does come down to the personality of the individuals. ... If I go to a meeting, I [as ministry official] expect to speak. So even though the permanent representative is the permanent member of the committee, there is no point me spending government money to go to Brussels, if I don't speak at the table, because I am the expert and she is the representative. ... So that sometimes creates some tension.’

Negotiations with European Parliament

The same reflex to protect their national sovereignty also drove the Member States' in their tactical approach towards the European Parliament. By rejecting the Commission proposals at First Reading in September 2008 (see below), the European Parliament had set the negotiations on a laboured course. At the same time as rebuking the Commission, it also managed to distance itself from an intergovernmental solution – of retaining an independent regulatory network of NRAs - which might have pandered to the Council of Ministers. And in turn, ministers' vote at the Council meeting in November 2008, which passed a devastating blow at the Commission, also set the negotiations with Parliament on course for an escalation. According to one participant in the Council working party:

‘after that, we had such a unified position in the Council that whatever the Parliament wanted, we said: no, we have already given up all our room for manoeuvre.’

Council claimed that by constructing a ‘two-tier model’ – maintaining an independent network and supporting it by a small EU-funded agency - it had managed to ‘strike a balance between ... the institutionalisation of a private-law body comprising European regulators [and] the establishment of a Community body whose independence must be guaranteed.’¹¹¹ Drawing on the advice of their NRAs,

¹¹⁰ Memorandum dated 6 April 2009 to the House of Commons European Scrutiny Committee from the UK government Minister for Communications, Technology and Broadcasting at BERR, Lord Carter of Barnes, House of Common European Scrutiny Committee, 16th Report (2008-9) printed on 22 April 2009, Chapter 1, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xiv/19iv03.htm>

¹¹¹ Luc Chantel, French Minister of State for Industry and Consumer Affairs and President-in-Office of the Council, presentation to the European Parliament plenary debate, 2 September 2008,

Member States objected that coordination could be achieved, in the words of one NRA official, ‘at a lower level of resource than was being proposed’ by the European Parliament. Parliament however didn’t quite see it that way. Towards the sharp end of the negotiations, relations between the European Parliament and the Council showed increasing signs of strain as MEPs openly vented their frustration at the Council Presidency’s absence from the Parliamentary debate as ‘completely unacceptable.’¹¹²

According to one ministry official, there was a ‘huge discrepancy’ between Parliament and the Council on what they expected the new regulatory body to be and how it would be funded. To negotiate constructively, some Council members took a strategic decision to prioritise the veto question. In the words of one delegate to the Council working party:

‘it was relatively clear if we wanted to prevent the veto on remedies, we would have to tactically offer the Parliament something [on the agency question].’

The fact that the European Parliament and the Council of Ministers were at logger heads over the legal structure and the financing of the new body, and the extent to which it needed independent administrative support, meant negotiations reached a critical point in late-2008. Laboured attempts to reconcile their positions continued to fail; especially as they were not fully aligned on what to propose as an alternative to an extended Commission veto either. To move closer towards compromise, individual Member States, separately or in coordination were taking their positions to MEPs. A view regularly expressed in our interviews spoke of ‘interchanges’ between national governments and MEPs, to the point where ministries would be lobbying parliamentarians to ensure counter-drafting to the Commission proposals was coming up. Rapporteurs were involved in these exchanges, but they also extended to other key MEPs including for example the Chair of the relevant parliamentary, Angelika Niebler MEP.

Some delegations on the Council working party entertained particularly good relations to their national MEPs, which they used to help move negotiations along and out of the impasse. As the Framework review began, according to one industry representative

‘there was a new wave of MEPs and the rapporteurs appeared to be much more in hoc to their national governments and taking the view from their national governments.’

These links were not always restricted to national representative and Council delegations also addressed the Parliamentary rapporteurs directly, irrespective of nationality. The Dutch ministry for example corresponded with rapporteur Catherine Trautmann MEP, responsible for handling the veto dossier; and with Malcolm Harbour MEP, also one of the rapporteurs on the Framework review but handling the review of the Citizens Rights Directive rather than institutional issues. As a UK Conservative MEP, Malcolm Harbour was also in regular contact with the UK ministry, including the minister for telecoms at the time,

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20080902+ITEM-010+DOC+XML+V0//EN>

¹¹² E Mann MEP, presentation to the European Parliament on 5 May 2009, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090505+ITEM-003+DOC+XML+V0//EN>: ‘I hope that we will see the next Council Presidency here more often, because we cannot continue to operate in this way’

Stephen Carter. Relations between the ministry and this MEP were described as ‘good’, although the Labour government was in power at the time. The Spanish delegation in turn confirmed it had direct contact with Pilar del Castillo MEP, the rapporteur responsible for the agencification issue, regardless of her Populist party background at a time when the Spanish government was Socialist; but it also entertained strong relations with the Spanish Socialist MEP Francisca Pleguezuelos who was opposed to the Commission’s initial proposals. Potentially, relations might have gone as far as managing the final draft that came from the European Parliament at First Reading. A Commission official for example opined that ‘Mrs Pilar Del Castillo [the EP rapporteur handling the agency issue] totally bought the Spanish line.’ One Commission official claimed, ore generally, to be ‘fairly sure’ that Member States would be ‘briefing Parliament’ and ‘lobbying their MEPs and ensuring that counter-drafting was coming up.’ An interview with an official in the European Parliament confirms this:

‘The ministries were there [in the European Parliament] all the time. They would develop the final wording anyway.’

In particular the fact that the German Parliamentary group took the national line, seemed to make a difference. Given Germany had a coalition of the two main parties in Berlin at the time, the two largest national groupings in the European Parliament acted as one, giving them considerable influence during this period, as by far the largest grouping taking the government line, which was closely aligned with the interests of the national incumbent Deutsche Telekom. In the interest of stimulating new investment, the Coalition agreement between the two strongest German parties at the time contained stimulations in favour of a regulatory holiday for Deutsche Telekom.

Triologue and Compromise

Differences were eventually resolved following trialogue negotiations (between Council, the European Parliament and the Commission) initiated by the Czech Council Presidency in early 2009 and resulting in a compromise two-pillar structure that separated the substantive decision-making body, eventually named *Body of European Regulators for Electronic Communications* or BEREC (an independent entity) and its administrative Office (formally an EU agency).¹¹³ By agreeing to set up BEREC and its Office as a two-pillar structure, the Council had strengthened its bargaining position on the matter of the extended veto, and Parliament eventually agreed to a watered-down Article 7a procedure that would not confer any further binding powers on the Commission.¹¹⁴

¹¹³ European Parliament, Position adopted at second reading on 6 May 2009 with a view to the adoption of Regulation (EC) No .../2009 of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, EP-PE_TC2- COD(2007)0249; summary at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1076627&t=e&l=en>

¹¹⁴ European Parliament, Legislative Resolution of 6 May 2009 on the Council common position for adopting a directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, P6_TA(2009)0361; summary at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1076624&t=e&l=enon>

But negotiations, including within the Council, had remained tense until the very end, as the Member States fended off a last-minute attempt by the Czech Presidency to elicit their agreement to a compromise one-tier solution that would have set up the new body as a small EU agency but subject to safeguards to ensure its independence from EU institutions.¹¹⁵ The Czech Presidency considered it necessary to show some flexibility on the agency issue to win parliamentary support for the Council's position on the new Article 7 and 7a procedures.¹¹⁶ This reflected the tactical thinking of many Member States, including Germany and Spain, who maintained their fervent opposition to any extension of the Commission's veto. But, for many delegations the Presidency's compromise proposal was unacceptable because it leaned too far towards Parliament and the Commission on agencification.¹¹⁷

When the proposal was considered in a key meeting of the Council working party in March 2009, discussions highlighted the complexity of these internal divisions. According to the Presidency, the European Parliament insisted on setting up a body governed by EU law and funded by the EU, but most Member States continued to oppose this, suggesting instead a supporting body or secretariat, which would be governed by EU law under control of Council or by the Commission. The Czech Presidency pointed out that Parliament would be unlikely to accept these proposals, and this would risk jeopardising agreement on the whole package. A blocking minority of Member States however insisted that the Presidency text differed too far from the earlier Common Position which they preferred. Eventually, acknowledging that they would have to give some ground to the European Parliament to secure agreement at the Second Reading, the Council formulated an alternative compromise,¹¹⁸ relying extensively on suggestions and proposals from the NRAs, which eventually secured parliamentary agreement.¹¹⁹

Some of our interviewees considered that the Council of Ministers came away as the formal institutional winner of the negotiations in the sense that it managed to thwart the Commission's aggressive moves towards supranationalisation. According to one industry representative, there was a sense that it came 'down to the Member States, and the regulators to the extent that they are aligned with, and are influencing, their own government.' One Council delegate for example recounts that the two-tier proposal was 'something we invented during one long night.... We knew we had to come up with something new and to create a new dynamic, to be able to move.' In some Member States, this meant officials in national permanent representations in Brussels worked closely with national ministries, for example one 'perm rep' delegate recounts that 'one talk ended at midnight, and we spent the next three hours drafting a proposal, and we sent it to the capital.'

¹¹⁵ Council Presidency trialogue agenda of 24 February 2009 and Meeting Document DS167/09 of 26 February 2009

¹¹⁶ Meeting Document DS 167/09 of 26 February 2009.

¹¹⁷ Meeting 'D 178', 2 March 2009; the proposal was then considered in a key meeting of the Council working party on 3 March.

¹¹⁸ On 27 March 2009, the COREPER meeting agreed on the final compromise proposal.

European Parliament, Position on the BEREC Regulation, adopted at Second Reading, 6 May 2009, EP-PE_TC2- COD(2007)0249; European Parliament, Legislative Resolution on the Council Common Position on the Framework Directive, adopted at Second Reading, 6 May 2009, P6_TA(2009)0361.

It was clear from many of our interviewees that, right up until the end game in these negotiations, guarding their sovereignty, competence and influence was of the utmost importance to Member States. This would define not only their relationship to the other formal political actors in Parliament and the Commission, but also, at national level, to their NRAs. According to one NRA official,

‘From the governments’ point of view, to have an informal network like IRG or ERG which they cannot control ... [meant] they were afraid that they were giving too many powers to the regulators, powers they could not control.’

On the other hand, political and technical arguments did overlap, according to one ministry official:

‘There is always this fear that the commission is also expanding its powers within BEREC. ... It is ... [politically] defensive, I must admit. But we also think that if [our national regulators] do their job, [they] can do better than the Commission. That is also an element. If they have done a market analysis, the Commission should not do that also. They should accept it. Only if it is evidently wrong, then they should use the veto.’

The European Parliament’s moderate supranationalism

Report and First Reading (*BERT*)

The European Parliament, which might normally be expected to support further supranationalisation,¹²⁰ did not side with the Commission either. Whilst sharing the Commission’s disillusionment with ERG to a degree, and sympathetic to the plan to further improve regulatory consistency on the EU telecoms market, Parliament expressed reservations both on the proposed EU telecoms authority (EECMA) and regarding a possible Commission veto over the design of regulatory remedies. The European Parliament shared much of the Commission’s frustration at the ERG’s shortcomings (in the words of one NRA delegate, many MEPs questioned ‘whether the ERG really was sufficient and what it was actually useful for’) and was sympathetic to the plan to further improve regulatory consistency. They were outspoken in their support for a more supranational solution, yet unprepared to endorse the Commission’s centralisation effort because they were not fully convinced by the Commission’s substantive arguments (for example, a strengthened network suited Parliament because as a ‘college of regulators’ (one MEP), it would provide a source of information for MEPs). But some MEPs were also alienated by the Commission’s political stance, setting these negotiations up to become an institutional power play. In the words of one MEP, ‘the Commission has got carried away with big ideas of building a new power base, instead of leaving local regulators to get on with the job.’¹²¹

¹²⁰ Parliament had shown strong support for the Commission’s previous harmonisation attempts in 1999-2002, as emphasised by Malcolm Harbour MEP (presentation to the European Parliament on 2 September 2008): ‘[I]t was this Parliament that argued for the Commission’s role under Article 7. We supported that role, against the Council at the time.’

¹²¹ *EurActiv.com*, 14 November 2007

Parliament's Industry, Research and Energy (ITRE) Committee had the responsibility of considering the Commission's proposals. The Chair, Angelika Niebler MEP, thought the Commission should focus on improving cooperation among the NRAs. Claiming to speak for a majority of MEPs, she considered this better suited to diverse market conditions than an EU agency, which could have no such detailed understanding.¹²² She was also sceptical about the Commission's proposed veto extension. The committee appointed Pilar del Castillo Vera MEP as rapporteur on the proposed agencification, who concluded in her report, published in July 2008, that a centralised EU agency would 'hinder European competitiveness, adding red tape by creating a large bureaucracy' and that it was contrary to the principle of subsidiarity, 'unnecessarily remote' from national markets and would increase regulatory uncertainty.¹²³ In her view, while 'current coordination mechanisms can and should be improved', the Commission had failed to demonstrate that 'Europe has a Single Market problem of the size and nature to justify a radical change in institutional set up.'¹²⁴ Meanwhile, the Committee on Budgets criticised the EECMA proposal for putting excessive strain on resources.¹²⁵ And the rapporteur on the Framework Directive, Catherine Trautmann MEP, came out against the veto on the design of regulatory remedies, arguing that it would shift the balance of power to the Commission and the new EU agency, to the detriment of the NRAs.¹²⁶

Adopting the ITRE Committee's report,¹²⁷ the European Parliament responded to the Commission's EECMA proposal with an alternative proposal for a *Body of European Regulators in Telecoms* (BERT)¹²⁸ that was to be based on the practice of the ERG,¹²⁹ but have a supranational structure incorporating an independent secretariat, headed up by a Managing Director, partly financed out of the EU budget and

¹²² Reported in www.europeanvoice.com, 6 March 2008. <http://www.europeanvoice.com/article/imported/meps-oppose-redirecting-s-regulator-plan/59362.aspx>

¹²³ European Parliament, A6-0316/2008, Report on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)), Committee on Industry, Research and Energy, 17 July 2008, Rapporteur: Pilar del Castillo Vera, p. 89.

¹²⁴ 'A Guide from EECMA to BERT', Rapporteur Pilar del Castillo Vera MEP, 25 March 2008, p.3

¹²⁵ Jutta Haug MEP, Committee on Budgets, presentation to the European Parliament, 2 September 2008, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20080902+ITEM-010+DOC+XML+V0//EN>: 'To put it plainly, as things stand, we do not have enough money... for this agency in either form.'

¹²⁶ Reported in www.theparliament.com, 28 April 2008. http://www.theparliament.com/no_cache/latestnews/news-article/newsarticle/telecoms-package-comes-under-fire-from-meps/

¹²⁷ European Parliament, A6-0316/2008, Report on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)), Committee on Industry, Research and Energy, 17 July 2008, Rapporteur: Pilar del Castillo Vera

¹²⁸ European Parliament, P6_TA-PROV(2008)0450, Legislative resolution of 24 September 2008 on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD))

¹²⁹ European Parliament, A6-0316/2008, Report on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)), Committee on Industry, Research and Energy, 17 July 2008, Rapporteur: Pilar del Castillo Vera, p. 89.

accountable to Parliament and Council.¹³⁰ Just as the ERG, BERT would be composed of NRA representatives who would also make up its Board of Regulators. NRAs and the Commission would be under an obligation to take 'utmost account' of its opinions, common positions and guidance, but BERT's remit would be limited to economic market regulation, excluding security or spectrum.

MEPs also rejected the proposed Commission veto over draft regulatory remedies. Instead they adopted the ITRE Committee report prepared by Catherine Trautmann MEP, proposing a dispute resolution procedure based upon the principle that only if the Commission and BERT (acting by a simple majority) agreed that a proposed remedy is not appropriate, could the Commission issue a reasoned decision requesting the NRA concerned to amend the draft measure. Otherwise the NRA could go ahead but must take utmost account of BERT's and the Commission's opinion.¹³¹ Trautmann herself described the procedure as a mechanism for 'co-regulation' in which 'each body has its rightful place: The Commission may raise doubts about a remedy but cannot completely reject it, unless BERT also delivers a negative opinion.'¹³²

With these counter-proposals, the European Parliament set itself up in opposition to the Commission but there was also a 'huge discrepancy' (ministry official) between its proposals and the intergovernmental solution of GERT, proposed by the Council of Ministers. Indeed MEPs vociferously defended 'independent European management, not a club of national regulators strongly influenced by national champions.'¹³³ Following proposals from the PSE parliamentary group in favour of a fully-EU funded alternative to the mixed financing model suggested by Pilar Del Castillo Vera MEP,¹³⁴ some MEPs even advocated robust EU

¹³⁰ European Parliament, A6-0316/2008, Report on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)), Committee on Industry, Research and Energy, 17 July 2008, Rapporteur: Pilar del Castillo Vera, p. 90. European Parliament, P6_TA-PROV(2008)0450, Legislative resolution of 24 September 2008 on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)), Amendment 37.

¹³¹ Committee on Industry, Research and Energy, A6-0321/2008, 22 July 2008, Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorisation of electronic communications networks and services (COM(2007)0697 – C6-0427/2007 – 2007/0247(COD)); Rapporteur: Catherine Trautmann, p. 109. P6_TC1-COD(2007)0247, Position of the European Parliament adopted at first reading on 24 September 2008 with a view to the adoption of Directive 2008/.../EC of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

¹³² Catherine Trautmann MEP, presentation to the European Parliament plenary debate, 2 September 2008, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20080902+ITEM-010+DOC+XML+V0//EN>

¹³³ David Hammerstein MEP, Verts/ALE group, presentation to the European Parliament plenary debate, 2 September 2008

¹³⁴ Erika Mann MEP, PSE group, presentation to the European Parliament plenary debate, 2 September 2008

funding arrangements in order to ‘to ensure that we make BERT a European body and that we in the European Parliament retain control of it.’¹³⁵ According to one ministry official:

‘The Parliament said quite early that it did not want EECMA, but it was in favour of creating some sort of institutional structure. This always has to do with the fact that EU institutions can, of course, by influencing other EU institutions, always take further influence on the national level.’

MEPs’ contributions to the Parliamentary debate in September 2008 illustrate these supranational sentiments, across political lines. Jutta Haug MEP for example suggested that

‘We must all work together... to ensure that we make BERT a European body and that we in the European Parliament retain control of it.’¹³⁶

Edit Herczog MEP, on behalf of the Internal Market and Consumer Protection (IMCO) Committee, expressed the following view:

‘We still think that BERT should be accountable to and transparent to the European institutions. However, a condition for this is Community funding; co-financing by the Member States ... would pull this organisation out from under the control of the European Union and the European Parliament. We cannot contribute to this.’¹³⁷

Erica Mann MEP of the PSE group was outspoken:

‘[T]he Commissioner was perfectly correct in stating that we want a European structure and have no wish to create structures that do not dovetail with the European legal system.’¹³⁸

Members of the Vers/ALE parliamentary group emphasise the need for EU funding and against an intergovernmental solution:

‘It goes without saying... that its funding must be European.’¹³⁹

‘The Greens are against making [EECMA] just a club for regulators funded by them, lacking transparency and without sufficient controls or the right of veto on the part of the European Commission. The independence of the new body is questionable’ and the fact that the Commission’s original proposal has been watered down is a ‘shame’ because ‘consumers need independent European management, not a club of national regulators strongly influenced by national champions.’¹⁴⁰

¹³⁵ Jutta Haug MEP, presentation to the European Parliament plenary debate, 2 September 2008

¹³⁶ Jutta Haug MEP, presentation to the European Parliament plenary debate, 2 September 2008

¹³⁷ Edit Herczog MEP, Internal Market and Consumer Protection Committee, presentation to the European Parliament plenary debate, 2 September 2008

¹³⁸ Erika Mann MEP, PSE group, presentation to the European Parliament plenary debate, 2 September 2008

¹³⁹ Rebecca Harms MEP, Verts/ALE group, presentation to the European Parliament plenary debate, 2 September 2008

¹⁴⁰ David Hammerstein MEP, Verts/ALE group

And similarly, from another parliamentary group:

‘BERT should be fully financed from Community funds, because we quite simply need an authority or institution that is committed to the European internal market and because national regulators should be granted more rights in the other Member States.’¹⁴¹

However, defending a mixed funding model for BERT, Del Castillo Vera MEP considered this would be ‘compatible with the concept of shared responsibility’, a ‘common denominator’ of the revised Regulatory Framework.¹⁴² Other MEPs also weighed in with a more moderately supranational view, notably Malcolm Harbour MEP, the UK MEP who in this review was rapporteur on substantive issues (the ‘Citizenship Rights Directive’), but who had been heavily involved in the institutional issues in previous reviews. Harbour considered it was

‘time for the regulators not just to accept responsibility, at a national level, for implementing the regulation consistently, but also to take on a share of that Community policymaking work. In my view, whatever we end up with will only work if they have a stake in that body.’¹⁴³

Negotiations and Compromise

As a formal veto player in the ordinary legislative procedure, the European Parliament had more clout than the Commission in the formal process and some interviewees described its contribution to the institutional outcome as ‘key’ (Commission and NRA official). Some singled out the parliamentary rapporteurs as ‘very very influential’ (Commission official), not least because on the institutional issues (and despite their party political differences) Pilar del Castillo Vera MEP, who had taken on the dossier on EECMA, and the rapporteur on the Framework Directive Catherine Trautmann MEP (from the socialist group), whose responsibilities included the proposed veto on remedies, worked ‘very closely together’ so as to ensure consistency between their dossiers.

The following view, by a member of the European Parliament, represents what appeared to be a more widely shared sentiment amongst MEPs at the time:

‘The issue that [Reding] was trying to address, which is the fact that the Framework was not being implemented consistently across European countries, was accepted as being a problem. But actually, the last thing we wanted was having a big central regulator that the Commission would establish, trying to enforce and to impose their external will on the Member States. You would get much better results if the Member States’ NRAs own the results of what they are doing and feel committed to it, because it is their project, and it is not something that the Commission is imposing from outside.’

Despite its supranational instinct, moderate voices in the Parliament gained weight. Rather than a fully-fledged agencification (centralised solution), a strengthened ‘network regulatory model’ presented to

¹⁴¹ Paul Ruebig MEP, PPE-DE group, presentation to the European Parliament plenary debate, 2 September 2008

¹⁴² Pilar del Castillo Vera MEP, presentation to the European Parliament plenary debate, 2 September 2008

¹⁴³ Malcolm Harbour MEP, presentation to the European Parliament plenary debate, 2 September 2008

many MEPs a 'workable' alternative (one MEP), provided there a sufficiently supranational element (both in terms of structure and funding) would be included. According to the same MEP, it was to combine

'a very clear principles-driven approach centrally with regulators who can respond to the market and have the flexibility to apply [those centrally-determined principles]'

The same MEP also describes the institutional compromise that Parliament finally agreed with Council, in similar terms, as attaining

'a balance between giving Europe an instrument to achieve a truly internal market in the telecoms sector and using the expertise available at the national regulatory level.'

According to this interviewee, in drafting their response to the Commission, MEPs even set about finding a formula that would allow them to 'completely amend the Commission's original proposal and turn it into the formulation of BEREC'. It meant that ERG had to be reformed:

'The regulators needed to develop a more collegiate position alongside their responsibility for national markets. They couldn't ignore the fact that they were part of essentially a college of regulators together with the Commission, on moving forward with a common European Framework' (same interviewee).

Another interviewee, from the Commission, explains it this way:

'Regulators were saying "we want to keep up the peer review approach. We don't want to have the Commission above us, coming at us saying: you did wrong and I decide in your place." And the MEPs in charge of the dossiers were saying "okay we have peer review and okay we don't accept that the Commission comes and decides. But in that case, the peer review needs to be really serious. It cannot just be about being very nice to each other and nothing happens."'

As the negotiations progressed, Parliament played an active role in the drafting process, and some of our interviewees thought that it was the driver behind the final text, especially on the veto. Whilst a perspective from within the Commission was that 'I would not credit any fundamental idea to have come out of the European Parliament', interviewees from within Parliament claimed that the BEREC proposal came 'basically from Parliament, with some fine-tuning from the Council' and that Parliament's secretariat 'were drafting all the time'. The latter view is corroborated by some outside voices too. One independent expert described the fact that Parliament, contrary to what they had previously expressed during the 1990s and early 2000s was not in favour of the European regulator this time, as a 'key' factor in the negotiations. A Commission official thought especially Catherine Trautmann MEP to have been 'very very influential in this whole thing' and her team was given credit for the evolution in particular of Article 7a. And again, an interviewee from within the European Parliament describes:

'The idea to have a system where the Commission was in the game but could not decide by itself and where the regulators had a voice... seemed to convince a lot of people in the Parliament... [and Trautmann] had that in mind from the start. Her first working paper, before she released the draft report, was already talking about it.'

Further on,

‘it was the secretariat of ITRE that collected these ideas of the rhythm and the interaction [and] translated that into the proposal on Article 7a.’

In this process, Parliament drew widely on resources in the rapporteurs’ offices and ITRE Committee secretariat where opinions could be filtered, condensed and where drafting occurred. It also relied on strong links to permanent representations as sources of information (sometimes, these would be better informed than the Council presidency); using these connections as a way of ‘hearing both sides’ (an interviewee within the European Parliament). These interactions went beyond what the Treaty specifies and meant that some MEPs were influenced by the views of the national attachés in their permanent representations. Some MEPs, especially those personalities who had already been involved in the previous Framework Review in 2002 and the creation of the ERG, believed that NRAs really needed to own this process to make it function and harness their expertise. But MEPs were also pursuing the self-interest of their institution, following its supranational instincts: they were seeking to act as a catalyst in the negotiating process, expressing a strong preference for an EU institutional structure.

Several interviewees stressed that the close working relationship between the three rapporteurs helped Parliament to come up with coherent institutional proposals and elicit compromise during the end game. According to one NRA official:

‘The [three rapporteurs] agreed to work very closely together and they seem to get on very well on a personal level despite having different political backgrounds and they agreed to support one another but not interfere in one another’s area of specialism.’

Their operations were clearly tactical, according to one interviewee from within the European Parliament:

‘They were really trying to work together. It was important [given] the institutional game. It would have been easy for the Commission, or the Council to some extent, to use the differences between one report [and another]. It would have been easy for whoever to say “Parliament, in the negotiations, your position is not coherent. Either you have to change your proposals in the substance or the structure.” In order for that not to happen, [Del Castillo Vera MEP and Trautmann MEP] in particular had to work closely from the start.’

One MEP explains:

‘What we were interested in was not issues to deal with the ERG enhancing its own powers. We were actually interested in having a mechanism that was going to be workable and was going to deliver consistent outcomes and was going to deal with some of the problems surrounding consistent application. But at the same time, allowed regulators to deploy their expertise in a much more collegiate way, to make the package work better for everybody: for consumers, for citizens and businesses, which in a way they wouldn’t have been able to deal with a centralised

package, because the nature of each telecoms market is quite in terms of size, scale, incumbent, dominance, investment, maturity and a whole raft of other things.’

‘Our position all along was that the regulators needed to develop a more collegiate position alongside their responsibility for national markets. They couldn’t ignore the fact that they were part of essentially a college of regulators together with the commission, on moving forward with a common European framework. If regulators are outvoted, so be it. That is the way in which things will work.’

At the earlier stages of the negotiation, when Parliament initially debated the Framework Review (in September 2008, all three rapporteurs and others had urged the Council and Parliament to work as quickly as possible on this.¹⁴⁴ But even though the rapporteurs ‘worked very closely together’,¹⁴⁵ it was not until spring 2009 that a compromise with Council finally looked within reach. The ITRE Committee’s recommendation for the Second Reading in Parliament was finally passed in April 2009, with recommendations (1) to approve the Council common position on GERT with amendments following trialogue negotiations and adopting what was to be the final text of the BEREC Regulation as a result of compromise negotiated with Council;¹⁴⁶ and (2) to approve, with modifications, the Council common position on most aspects of the Framework Directive following trialogue negotiations (the issues of restriction of internet access remain open), including the adoption of the final text of Article 7a as a result of the compromise negotiated with Council.¹⁴⁷

In May 2009, during the final debates of the Framework review in the European Parliament, the compromise was described to have transpired ‘after much wrangling with the Council in a context where the three institutions started from very different positions’,¹⁴⁸ and it was pointed out that ‘the Czech Presidency has shown true leadership within the Council’.¹⁴⁹ The Second Reading vote was duly passed on 6 May 2009, approving, with amendments, the Council common position on GERT following trialogue

¹⁴⁴ Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20080902+ITEM-010+DOC+XML+V0//EN&language=EN>

¹⁴⁵ M Harbour MEP, debate in May 2009 at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090505+ITEM-003+DOC+XML+V0//EN>

¹⁴⁶ Committee on Industry, Research and Energy, A6-0271/2009 of 23 April 2009, Recommendation for Second Reading on the Council common position for adopting a regulation of the European Parliament and of the Council establishing the Group of European Regulators in Telecoms (GERT) (16498/1/2008 – C6-0067/2009 – 2007/0249(COD)), Rapporteur: Pilar del Castillo Vera; summary at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1062398&t=e&l=en>

¹⁴⁷ Committee on Industry, Research and Energy, A6-0272/2009 of 23 April 2009, Recommendation for Second Reading on the Council common position for adopting a directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (16496/1/2008 – C6-0066/2009 – 2007/0247(COD)), Rapporteur: Catherine Trautmann; summary at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1062401&t=e&l=en>

¹⁴⁸ C Trautmann MEP, debate at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090505+ITEM-003+DOC+XML+V0//EN>

¹⁴⁹ P Del Castillo Vera MEP, debate at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090505+ITEM-003+DOC+XML+V0//EN>

negotiations and adopting BEREC Regulation final text as a result of compromise negotiated with Council;¹⁵⁰ and also approving,¹⁵¹ with modifications, the Council common position on most aspects of the Framework Directive following trialogue negotiations (the issues of restriction of internet access remained open), including the adoption of the final text of Article 7a as a result of the compromise negotiated with Council.¹⁵²

Catherine Trautmann MEP concluded that the European Parliament, 'in voting in favour of this compromise on the telecoms package, will be indicating a clear choice: that of a regulated market, and not of unregulated competition',¹⁵³ whilst another MEP describes the institutional solution as 'a balance between giving Europe an instrument to achieve a truly internal market in the telecoms sector, and using the expertise available at the national regulatory level.' This was perceived by many in Parliament as a genuine compromise effort. A member of the European Parliament described the outcome as 'a package which Member States could live with.' According to Catherine Trautmann MEP, the Council accepted the institutional compromise by 'a very large majority'.¹⁵⁴

The Commission's entrepreneurship

Political positioning

The Commission has no formal role as legislative decision-maker, so to successfully defend its proposals, it had to rely on the European Parliament and Council (the formal veto players). But as the potential broker of a compromise between the European Parliament and Council of Ministers, the Commission could also use certain inter-institutional dynamics to its advantage. For example, despite disagreeing with aspects of her proposals the European Parliament in particular was unlikely to (as one NRA official put it) 'leave

¹⁵⁰ Position of the European Parliament adopted at second reading on 6 May 2009 with a view to the adoption of Regulation (EC) No .../2009 of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (EP-PE_TC2- COD(2007)0249); summary at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1076627&t=e&l=en>

¹⁵¹ P6_TA(2009)0361 European Parliament legislative resolution of 6 May 2009 on the Council common position for adopting a directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (16496/1/2008 – C6-0066/2009 – 2007/0247(COD)); summary at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1076624&t=e&l=en>

¹⁵² The final enactment was drawn out as a consequence of persisting differences on other aspects of the Framework. Events in summary: On 26 June 2009, European Parliament formally submits proposed amendments to the Framework Directive to Council. On 9 October 2009, Council rejects amendments, and the Directive is referred to conciliation procedure. Informal trialogues begin. On 26 October 2009, Council (second reading) approves the BEREC Regulation. On 4 November 2009, conciliation committee meeting on the Framework Directive, with agreement in early hours of 5 November. On 12 November 2009, the joint text of the Directive is formally approved by the conciliation committee co-chairs. On 13 November 2009, the Committee adopts its formal decision on the Directive, which is approved by Council (third reading) on 20 November 2009. On 24 November 2009, the European Parliament approves the Directive (third reading). The final act is signed on 25 November 2009 and published on 18 December 2009.

¹⁵³ Debate at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090505+ITEM-003+DOC+XML+V0//EN>

¹⁵⁴ C. Trautmann MEP, Speech to the European Parliament, 5 May 2009.

Reding standing in the rain.’ However, other ‘wider tensions going on at the time’ which had made the Commission ‘very unpopular’ especially in the European Parliament might have played against it. The fact that Reding ‘didn’t manage in the end’ to set up EECMA and was denied a veto over remedies was by some considered a ‘full victory over the Commission’ (NRA official) for those in the Council of Ministers, European Parliament and amongst NRAs, who opposed her plans. Aligning with the views of other interviewees too, a national ministry official considers the Commission’s political agenda was ‘too ambitious. They didn’t have the political capital to do it. At the end of the day, that’s it.’

Operating overtly entrepreneurially, the Commission fought its corner to exhaustion through the legislative process in defence of a supranational institutional architecture.¹⁵⁵ When the European Parliament rejected its initial proposals at its First Reading, interviewees variously described the Commission’s reactions to these rejections as ‘very outspoken’ or even ‘devastated’.¹⁵⁶ Commissioner Reding, whilst diplomatic in her response, was openly critical of Parliament’s counter-proposals, on the issue of agencification and the veto. She described the proposed co-regulation procedure as ‘heavy’ and indicated that more still needed to be done to ‘deliver coherent regulatory responses’,¹⁵⁷ emphasizing the importance of a binding Commission decision on regulatory remedies following the co-regulation exercise.¹⁵⁸ She cautiously welcomed Parliament’s proposal to set up a supranational body,¹⁵⁹ striking a conciliatory note by ‘agreeing on over 85 per cent of the amendments suggested by the European Parliament’,¹⁶⁰ but on the detail, underlined the need for a supranational Administrative Board and for close cooperation with the Commission in vetoing remedies, and also proposed drafting that would further tighten up cooperation amongst NRAs.¹⁶¹ Reding continued to argue that in ‘the interests of the

¹⁵⁵ E.g. V. Reding statement following Council meeting, available at http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=4181, 12 June 2008; V. Reding statement following Parliamentary (ITRE) Committee vote in July 2008, MEMO/08/491, 8 July 2008; V. Reding speech to the European Parliament, Plenary session, 2 September 2008; V. Reding statement to ERG, *EurActiv.com*, 3 September 2008; V. Reding press release prior to and following Council meeting on 27 November 2008, MEMO/98/739 and MEMO/08/744, which she describes as a ‘constructive crisis’ (MEMO/08/744).

¹⁵⁶ European Parliament, Legislative Resolution on the Proposal for a Regulation establishing EECMA, 24 September 2008, P6_TA-PROV (2008) 0450; Position on the revised Framework Directive, 24 September 2008, P6_TC1-COD(2007)0247.

¹⁵⁷ Commissioner Reding’s follow-up statement on ITRE vote in July 2008. Press release, MEMO/08/491, 8 July 2008, ‘Commission welcomes European Parliament vote to strengthen the EU’s Single Market for Telecoms but important questions remain open’, at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/491&type=HTML>

¹⁵⁸ Viviane Reding, presentation to the European Parliament plenary debate, 2 September 2008: ‘It surely makes sense that when the body advises that there is an internal market problem, in conjunction with the concerns raised by the Commission as the guardian of the Treaty, then there should be consequences.... because we cannot accept that, having been through the very lengthy Article 7 review process the notifying national regulator can say ‘thank you very much for your point of view, but I prefer my approach’ and to simply act as if nothing had happened.’

¹⁵⁹ Speech to ITRE 8 July 2008 and to Parliament plenary 2 September 2008

¹⁶⁰ Press Release, MEMO 08/739 of 26 November 2008, ‘Telecoms Council, Brussels, 27 November

¹⁶¹ Summary at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1055558&t=e&l=en>: The European Parliament adopted 164 amendments at 1st reading on 24 September 2008. In its amended proposal, the Commission accepts 75 of these amendments in their entirety. It accepts 32 in part or subject to rewording. In particular, the Commission accepts the establishment of a new body called "Body of European Telecoms Regulators" and inserts some new drafting underlying the importance of reinforcing the cooperation between national regulatory authorities. It should be noted that the Commission rejected 57 amendments.’

internal market, and of legal certainty, there must be a power for the Commission to require the notifying national regulator to change its approach.¹⁶² Addressing the European Parliament in July 2008, she made her continuing scepticism further explicit:

'I welcome the good intentions behind the idea of creating a new Body of European Regulators for Telecommunications (BERT). However, businesses and consumers in Europe are interested in results, not in lengthy procedures. I have doubts whether BERT and the heavy Article 7-procedure now created will be able to deliver coherent regulatory responses to the regulatory obstacles still far too present in Europe's single telecoms market. Questions remain especially as regards the financing of the new Body as well as its capability to arrive swiftly and efficiently at common positions. Here, a lot of further work is indispensable.'¹⁶³

The Commission submitted substantially revised proposals on both the EECMA and on the veto question in November 2008,¹⁶⁴ summarised as follows:

'the Commission accepts the creation of a Body of European Telecoms Regulators and inserts new wording stressing the importance it gives to cooperation between national regulatory authorities.... The Commission also takes account of amendments concerning the procedure to promote greater regulatory coordination and coherence of proposed solutions.'¹⁶⁵

Although the Council of Ministers rejected these, when negotiations stalled in late-2008, the Commission urged the Council and the European Parliament to 'sit down together without delay and get down to work on a common approach'¹⁶⁶ and submitted further comments following the Council's common position in February 2009.¹⁶⁷ Growing increasingly frustrated at Member States' recalcitrance to give way on questions relating to the institutional governance of the new regulatory body, the Commission highlighted the need to reach a 'satisfactory settlement'.¹⁶⁸ It continued to seek to influence the negotiations as much

¹⁶² *EurActiv.com*, 3 September 2008

¹⁶³ Press release, MEMO/08/491, 8 July 2008, 'Commission welcomes European Parliament vote to strengthen the EU's Single Market for Telecoms but important questions remain open', at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/491&type=HTML>

¹⁶⁴ COM (2008)720 final, Amended Proposal for an EECMA Regulation, 5 November 2008; COM(2008) 724 final, amended proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorization of electronic communications networks and services, 6 November 2008.

¹⁶⁵ <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1055560&t=e&l=en>

¹⁶⁶ Press release: MEMO/08/744, 27 November 2008. See also Reding's response to the rejection of merging EECMA and ENISA: http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=4181 (V. Reding statement following Council meeting, 12 June 2008)

¹⁶⁷ Commission Communication COM (2009) 78 final, 17 February 2009

¹⁶⁸ COM(2009) 78 final, Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common positions of the Council, 17 February 2008 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0078:FIN:EN:PDF>).

as possible, vociferously arguing for more centralisation during the trialogue procedure and until the final vote in 2009.¹⁶⁹

Strategic interests

Reding may have deliberately 'set the bar high' when setting out her ambitious political agenda for centralisation initially, with a view to provoking the formal veto players, when really she sought to 'wake up' NRAs and 'to drive the network of regulators towards greater awareness of the European dimension when regulating... to support cross-border regulatory approaches' (a source within the Commission). Of course, such an interpretation of events conveniently downplays the Commission's political defeat when eventually, her political ambitions were watered down, but it does carry plausibility.

In hindsight, Reding's provocative political ambition meant that the Commission successfully managed to avert the 'worry' (a Commission official) that an informal private-law association such as IRG would 'develop into the key contact network in Europe', which might have served as a precedent for removing certain market regulatory decisions from the competences of the European institutional framework altogether, transferring them into the intergovernmental realm. Whilst politically defeated in its original plans for institutional reform, the Commission still managed to secure that the emergence of a private association of regulators as the main contact network in Europe, which at one point had been a serious possibility or threat, was averted. Moreover, in BEREC the Commission is now presented with a stronger transnational network than the ERG was, upon which it may rely heavily for administrative oversight of national regulatory practice and implementation, and whose key function is to stimulate, through soft forms of governance (opinions, common positions, guidance etc.) further regulatory consistency and convergence amongst NRAs.

Despite the political defeat, the outcome in other words suits the Commission in the sense that by strengthening the ties between the Commission and the (now formally constituted) transnational regulatory network, it improves the Commission's entrepreneurial oversight over Member States' administrative implementation of the Regulatory Framework, and the chances to ensure more consistent regulatory application. It enables the Commission to bind the NRAs ever more tightly to its own work, in order to oversee national implementation without having to carry it out itself; seeking to fill capacity gaps there, but still striving for overall control of the process. In this way, the Commission stands to gain from the existence of transnational networks, to which it may delegate (acting entrepreneurially) the supervision of Member States' implementation of European legislation, in this case the Regulatory Framework. So, the Commission, whilst facing defeat regarding its initial reform proposals may still mark the outcome as a success in those terms; and even if the Commission was not the driver that of that outcome, it still benefitted from it institutionally.

It is an outcome that aligns also with the wider institutional context we have seen in areas of networked governance in the EU. The Commission has had an ambivalent and at times fraught relationship with the type of (informal or formalised) transnational regulatory network such as the IRG, ERG and now (more uniquely) BEREC. On the one hand, the Commission continues to treat informal private-law associations

¹⁶⁹ V. Reding speech to the European Parliament, Plenary session, 6 May 2009.

such as IRG with a high degree of suspicion on the ground that their existence might serve to set a precedent for removing certain market regulatory decisions from the competences of the European institutional framework altogether, transferring them into the intergovernmental realm. As one Commission interviewee stated, ‘the worry was really that IRG would develop into the key contact network in Europe.’ These worries would be compounded by parallel developments in other sectors at the time, most notably the emergence of transnational regulatory networks in the field of financial services regulation.¹⁷⁰ Reding offered a robust response: ‘We certainly do not want a Belgian private body, alien to the Community approach and the guarantees it provides, to become involved in European decision-making.’¹⁷¹

The Commission has, on the other hand, increasingly begun to co-opt these networks into its policy-making processes, and co-operating with them, with a view to monitoring the ‘administrative sovereignty’¹⁷² of the Member States, and their discretion over how to implement European framework legislation. Acting entrepreneurially, and with limited resources to oversee that implementation activity, the Commission pushes transnational policy networks that monitor national units more closely to achieve greater consistency. It has a vested interest in the emergence of such networks because they might also justify new fields of EU steering where, hitherto, the EU had little or no involvement. Sometimes a transnational network is the only way the EU might realistically play a role in a particular field.¹⁷³

The Commission therefore has, where appropriate, promoted delegation to these transnational networks. It fosters coalitions with private stakeholders to bridge gaps in its supranational powers (incomplete vertical delegations to the EU in particular sectors) and regulatory capacities (successful regulation is inconceivable without drawing on the expertise of these partners).¹⁷⁴ It even uses the creation of informal networks as a ‘back road to the informal harmonization of regulatory practices’, in a trend ‘towards developing networked administrative structures in which the Commission and national administrative units create closer cooperative arrangements.’¹⁷⁵ The trend fully resounds in our interviews and is reflected in the following comment (by a Council delegate) on the Commission’s interest in establishing a close cooperation with NRAs, individually and as part of a transnational network, in the telecoms sector:

‘The Commission has a tendency, if one wanted to be cynical about it, to get around the ministries so as to gain greater influence at the level of the regulators. Once legislative formulations are agreed and enacted, the Commission has a primary interest in how these formulations are

¹⁷⁰ Reference to literature

¹⁷¹ V. Reding speech to the European Parliament, Plenary session, 2 September 2008.

¹⁷² S. Hix, *The Political System of the European Union* (2005, Palgrave), 32.

¹⁷³ J. Scott and D. Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ (2002) 8(1) *ELJ* 1, 7.

¹⁷⁴ B. Eberlein and E. Grande, ‘Beyond Delegation: Transnational regulatory regimes and the EU regulatory state’ (2005) 12(1) *JEPP* 89; B. Eberlein and A. Newman, ‘Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union’ (2008) 21(1) *Governance* 25.

¹⁷⁵ M. Martens, ‘Administrative Integration through the Back Door? The Role and Influence of the European Commission in Transgovernmental Networks within the Environmental Policy Field’ (2008) 30(5) *European Integration* 635, 635 and 638 (reference omitted)

translated into practice. ... The Commission really wants to ensure the day-to-day application of those provisions in the Directives is also consistent. And for that, it needs the regulators.'

This was interpreted as serving the Commission's own interest in the long run:

'The Commission is playing games with the Council and with the regulatory level, hoping that their competitive relationship will lead to a situation where both have information deficits.'

Harlow for example has described how the Commission has (at times) encouraged transnational networks, a form of softer coordination, as 'a useful starting point' even if they remain 'a second best resting point' on the way to achieve further integration.¹⁷⁶ In this vein, in our interviews, it was made clear that the possibility that the Commission would look at BEREC, a formalised transnational network, as a starting point to keep alive the issue of further centralisation in future reviews of the Regulatory Framework (even if it considered it second-best at the time) should not be dismissed out of hand: 'there are some people who think that [BEREC] is merely putting off the day when we agree to have a centralised regulator' (NRA official), even if others consider it 'highly unlikely to evolve within the foreseeable future' (Council official). In fact, as we will see below, it did not take long until the Commission, as recently as 2016, re-initiated attempts to push this sector towards a more centralised structure, but once more it was rebuffed, replicating much of the dynamic in this earlier Framework review.

Concrete political (and personal) ambitions aside, the Commission stands to gain from the formal recognition of BEREC as a considerably stronger transnational network than ERG, designed to stimulate, through soft forms of governance (opinions, common positions, guidance etc.), more consistent regulatory practice amongst NRAs; and to whom it may delegate the task of monitoring how the Member States discretion over how they implement the Regulatory Framework. Acting entrepreneurially, and with limited resources to oversee that implementation activity, it is ultimately in the Commission's supranational interest to push a transnational policy network like BEREC to monitor national units more closely to achieve greater consistency; to bridge gaps in its supranational powers and regulatory capacities;¹⁷⁷ whether or not it may use the creation of BEREC as further 'back road to the informal harmonization of regulatory practices'.¹⁷⁸

Cabinet v Commission services

Recognising these opportunities, the Commission services in the D-G Information Society, operating under Reding's Cabinet, appeared to be less enthusiastic about radical institutional reform than the latter during these negotiations; perhaps because they were more in tune with national regulators due to their ongoing cooperation with NRAs in the existing ERG. They shared the Commissioner's growing frustration at the

¹⁷⁶ H. Wallace, 'An institutional Anatomy and Five Policy Modes' in H. Wallace, W. Wallace and M. Pollack (eds), *Policy-Making in the European Union*, 5th ed (OUP 2005), 85

¹⁷⁷ B. Eberlein and E. Grande, 'Beyond Delegation: Transnational regulatory regimes and the EU regulatory state' (2005) 12(1) JEPP 89; B. Eberlein and A. Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union' (2008) 21(1) *Governance* 25.

¹⁷⁸ M. Martens, 'Administrative Integration through the Back Door? The Role and Influence of the European Commission in Transgovernmental Networks within the Environmental Policy Field' (2008) 30(5) *European Integration* 635, 635 and 638 (reference omitted)

failure of NRAs to apply adequate regulatory remedies to deal with competition shortfalls on their telecoms markets (and the ineffectiveness of the ERG's soft law disciplining at forcing them to do so). They were also enticed by certain institutional advantages of setting up an EU agency as, effectively, a 'human resource management tool' for the Commission (an NRA official); and, to an extent, they shared Reding's beliefs as to the need for a supranational institutional architecture. But they did not want to set up an EU central regulator 'as a monument to [the Commissioner]' (a member of the European Parliament). In fact, far from considering a strengthened transnational network of NRAs as second-best behind a centralised solution, the Commission services in the D-G on Information Society, presenting the initial proposals alongside the Reding Cabinet but more sensitized than the latter on account of their ongoing cooperation with NRAs in the existing ERG, took a more moderate view on the issue of institutional reform than the Cabinet, and especially on the desirability of an EU "super-regulator".

Various interviewees described the Commission services' 'good relationship with the regulators', a 'network of contacts' between the D-G and NRAs, with the services going 'to great lengths to be friends' with ERG; but also remaining 'levels of mistrust', made visible in the continuing existence of IRG. One interviewee, and independent expert, described Reding, in contrast, as a 'brutally political person who didn't always have such a happy relationship [with NRAs] because she was political, and they weren't.'

Forming part the same transnational community of expertise as those working in NRAs, members of the Commission services were prone to regard this window for institutional reform as an opportunity to implement what Eberlein and Newman have referred to as a 'de-politicisation strategy',¹⁷⁹ insisting on a scientific (evidence-based) approach to regulation, robust peer-review and the creation of, in the words of one Commission interviewee, a 'common way of looking at things' amongst regulators. The D-G's initial bargaining position, as one Commission interviewee further explains, was broadly to accept that they would 'rely more on the interaction among the regulators' rather than forcing a centralised institutional structure, provided such interaction would be sufficiently strengthened to render it more effective, and therefore, would be supported by an EU-funded secretariat with 40-50 staff (which, for legal reasons had to be set up as an EU agency but would otherwise be controlled by the NRAs' themselves).

Following the publication of the Commission's initial legislative proposals reflecting the Cabinet's attempt at more centralised reform, the D-G position was also adapted to those; but internally, the Cabinet's views remained distinct from those of the D-G services, also reflecting their different roles. We noted in interviews for example that the Cabinet's views and those of the D-G services were not fully aligned on the issue of where the BEREC Office should be located. In the words of one Commission official, 'the Cabinet interfered on [the issue of] the location', and it became highly politicised, with the Cabinet being described in one interview as 'giving lollipops to people who were doing favours in other areas.' Another interviewee describes the BEREC Office critically as a 'missed opportunity' when compared to the initial ambitions of the Commission services, not least because it has relatively few staff and is based in Riga

¹⁷⁹ B. Eberlein and A. Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union' (2008) 21(1) *Governance* 25, 35 and 45.

(Latvia), away from Brussels. We also heard the following comments from Commission officials in our interviews:

‘I was seeing ... that one could not rely that much on procedures to achieve this common coordination. It was more a question of creating a sort of common received wisdom, a common way of looking at things. ... I would always rely much more on the interaction among the regulators than on any procedure as a way of [forcing things].’

‘My main motive was that we needed to give them [the NRAs] 40 to 50 people [as a secretariat] who worked for them... After six months, they will realise that there are a number of common problems. ... once they sit down and they see what these problems are, they will take views that are very similar to those of the commission’

‘That idea [of extending the veto on remedies] came from the Cabinet, not from the services... [the Head of the services] knew what we were being sent down to do. It was a big ask.’

‘The Cabinet was so distrustful of what ... the services were going to do, that they even sent somebody down to observe what [they] were doing at the [Council working party] meeting, which is very unusual.’

‘[The Commission services] did an extremely good job ... persuading the [regulators]... [they] convinced the heads of the NRAs that this could be an extremely useful body if it was structured in a way that [services] might have done it, had [the D-G] been given a free hand from the beginning. I think [the services] removed every single one of the substantive decision-making powers of this body. ... If you see people coming on board towards the end of the process, it is to this beast which had been tamed.’

‘We were actually rather satisfied with the result, at the services level.’

‘There was also exchange [by the Commission services] by telephone and by e-mail with the ERG about how the negotiations were going. There was a network of contacts going on.... [but] there were other levels of mistrust besides our good working relationships. You had the IRG grouping.’

And summarising the perspective of a ministry official on this point:

‘The Commission was... looking for some expert body. They addressed themselves to the ERG. And they talked very closely to the ERG because they want to have this expert body. In the opinions of the member states, this was to [sidestep] the member states. So that is how it was felt. The Commission wants to cooperate with the NRAs, and then the member states they are losing grip more and more.’

The institutional outcome in 2009 – BEREC and the BEREC Office, with a coordinated procedure on remedies in Article 7/7a – constituted a ‘classic’ EU compromise, in the sense that it reflects the preceding political struggle or ‘turf-war’ between the formal EU political players in the Council, the European Parliament and the Commission. But, as we will see in the following section, the process also followed a

rather more informal institutional dynamic: the existing regulatory networks of NRAs (ERG and IRG) became heavily involved in the negotiations that generated BEREC as an 'agencified network' enabling NRAs to continue to operate a collaborative, soft-law, transnationally-network regulatory model, albeit one that is now subject to greater formalisation than before. Especially the larger and well-resourced NRAs were involved in the process, and the UK's regulator Ofcom was, according to many of our interviewees, one of the most influential NRAs. According to one NRA official, the outcome was considered 'a full victory for Ofcom' who (according to an industry representative), 'put a huge amount of effort into this'.

The role of NRAs and their network

The growing autonomy of NRAs

Though ultimately it was the Member States in the Council and the MEPs in the European Parliament that had to form coalitions to block aspects of the Commission's proposed reforms, their primary advisers were NRAs that had long cooperated with one another in the IRG and ERG, as well as other transnational institutions, to produce a cohesive transnational community of expertise that was perfectly capable of building its own coalitions to mobilize against the Commission's proposals. NRAs had become increasingly autonomous of their political principals in national ministries, not only due to the standard range of principal-agent issues (time constraints, differing time horizons, informational asymmetries, unintended consequences and so on) but also due to the sheer complexity of regulating a sector undergoing such rapid technological change (digital convergence, mobile communications, the internet etc.).¹⁸⁰ Moreover, as the sector became increasingly international, in part accelerated by EU interventions, the NRAs found themselves interacting ever more intensely with their counterparts in other Member States such that their power grew collectively and in parallel with (and to some extent in competition with) that of the Commission. As one ministry official put it, 'you can only have a win-win situation if Ministry and regulator are working together so closely that they do not let Brussels divide them apart.'

Compared to their situation during the previous Framework review (1999-2002), NRAs were operating from a position of strength, despite the criticisms the Commission levelled against them individually and collectively as E/IRG. As another ministry official observed, 'between 2002 and 2006 clearly markets had developed, and the role of the regulator had become more important.' They had not only accumulated considerable expertise in applying the Regulatory Framework but had also greatly improved their political profile: both *de facto*, as their regulatory role became more important, and *de jure*, following the explicit recognition of their independence in the 2002 Framework (which was then further strengthened in the 2009 Framework). For example, in our interviews one Commission official thought that building NRA independence into the 2002 Regulatory Framework, 'meant that they were building in resistance to any subsequent attempt to harmonise.' Levi Faur describes the role of NRAs as the 'national regulocrats' who enjoyed considerable autonomy in regulating their national telecoms markets; autonomy that was

¹⁸⁰ D. Levi-Faur, 'The Politics of Liberalisation: Privatisation and regulation-for-competition in Europe's and Latin America's Telecoms and Electricity Industries' (2003) 42(5) *European Journal of Political Research* 705.

threatened by the proposed reforms.¹⁸¹ The ERG had become a major locus of regulatory decision-making – a powerful new player or ‘regulocracy’ – that could draw on the domestic power bases of the NRAs and the transnational connections between them to rival (to an extent) the power of the Commission.

Some NRAs, like the UK regulator Ofcom, had emerged as extremely high-profile and well-resourced institutions, and collaboration among the NRAs increased as they grew accustomed to working with one another. The following comments make a similar point, some starkly:

‘[In the UK for example] they had thinned out their ministries so much at times that they didn't have any people left to participate in Council working groups, and then my colleague from Ofcom was sitting there. ... Therefore, at times, Ofcom represented the British position in the Council working group.’ (NRA official, but note the comment does not specify whether this involvement focused on the institutional or substantive issues)

‘[Ofcom] are very well respected. The problem is, when they go and say something that is often taken as a UK view because they are quite high profile.’ (ministry official)

‘In the UK, sometimes the people from the Ministry complain when you talk in the corridors. They say “we have no people anymore, so we cannot do it. And Ofcom is telling everybody what to do.”’ (ministry official)

‘In our government, we don't have a general director for communications. There is no department specialising in telecommunications. So they rely on [the NRA] for [preparing expert opinions]’ (NRA official)

‘We don't have a Ministry for telecoms for the past 20 years.... Just one person works with the Minister on telecoms. All the intelligence is in the regulator. The regulator does all the legwork and they might even go along to the meetings. I have seen it happen several times.’ (independent consultant)

Generally, governments were ready to exploit their regulators’ strengths, drawing on NRAs’ regulatory expertise to articulate particularly complex regulatory problems and to develop potential solutions and alternatives, even if their role creates its own tensions too, for example a fear in governments that they lose control over substantive (and institutional) issues. According to another NRA official,

‘[Ofcom] have a perfectly strong working relationship with the ministry, but they don't always agree, and ... are by this stage adult enough to accept that.’

The Commission, too, draws on NRAs’ growing role and expertise, particularly through the existing regulatory network. The ERG informally began to provide expert opinions to the Commission when the latter exercised its veto powers in relation to individual NRAs’ market analysis or their designation of operators’ significant market power, well before this opinion-giving function was formally assigned to

¹⁸¹ D. Levi-Faur, ‘Regulatory Networks and Regulatory Agencification: Towards a Single European Regulatory Space?’ (2010) *Jerusalem Papers in Regulation and Governance*, No.30.

BEREC under Article 7 of the Framework Directive in 2009. Against this backdrop, Thatcher and Coen describe the early stages of the negotiations as somewhat of a turf war, in which individual NRAs and their transnational networks participated as independent actors.¹⁸² This aligns with their self-perception as ‘key political figures’ that recognized ‘they got involved in political activity to achieve their goal.’¹⁸³

Initial positioning

From 2005 onwards, the ERG began to examine its role as a ‘driver towards greater harmonisation’ (NRA official), partly in response to Reding’s ‘fairly strong, some find somewhat exaggerated views’ on its ineffectiveness.¹⁸⁴ According to one NRA official,

‘we started, almost in parallel [to the Commission proposal], our own approach to improve harmonisation and regulatory consistency among regulatory agencies in the ERG. ... [But] we didn't see the real need and value added of a one size fits all approach.’

An official in the BEREC Office comments:

‘They [the NRAs] weren't complacent so as to say: ‘everything is working so well. We are all a happy family.’ There was a more critical feeling, also on the part of the NRA's. They focused on different things. For example, that we may need our budget for the secretariat and for the administrative organisational support and for the meeting rooms and for publications, studies etc. Then there were issues related to personnel, which is of course linked to the budget question. And then some broader the question: well okay, we are a club, a voluntary organisation, perhaps we should have an institutionally enhanced position.’

Acknowledging past deficiencies, ERG tried to head off the threat of an EU agency by committing to step up its own game to demonstrate that its decentralised, collaborative, soft law approach was effective, even while leaving scope for national innovations and justifiable variation.¹⁸⁵ In an effort to prove that it was more than just a “talking shop”, it signalled this commitment to improving its operational effectiveness as an agent of harmonization by establishing a permanent, enhanced secretariat in Brussels that would support both its own work and that of the IRG, which until then operated only a small virtual secretariat distributed across a number of NRAs.

Shortly after the launch of the Framework Review, NRAs sought to influence the agenda, relying on the ERG/IRG as a channel of communication to the Commission, though of course working through their government leads as well.¹⁸⁶ They contributed both to the public call for input and to the follow-up

¹⁸² D. Coen and M. Thatcher, ‘Reshaping European Regulatory Space: An Evolutionary Analysis’ (2008) 31(4) *West European Politics* 806, 826-8.

¹⁸³ A. Saz-Carranza and F. Longo, ‘The Evolution of the Governance of Regulatory Networks: The case of the European telecommunications regulatory network’ (2012) *Jerusalem Papers in Regulation and Governance*, Working Paper No. 41, at 29.

¹⁸⁴ C. Fonteijn, Chair of the Dutch NRA OPTA and of BEREC in 2011, the Communications and Competition law Conference of the International Bar Association, 16 May 2011 (Vienna).

¹⁸⁵ Madeira commitments, 6 October 2006, ERG (06)51, available at http://erg.eu.int/documents/erg/index_en.htm

¹⁸⁶ A. Saz-Carranza and F. Longo, ‘The Evolution of the Governance of Regulatory Networks: The case of the European telecommunications regulatory network’ (2012) *Jerusalem Papers in Regulation and Governance*, Working Paper No.

consultation and, under the ERG banner, responded in detail to individual requests for advice from the Commission. Internally, the ERG set up a working group that followed the review, discussed proposed amendments and drafted suggested responses, which remained in place throughout the negotiations. In practice, the NRAs used the IRG intensively as an informal forum where they could deliberate more freely in the absence of the Commission; re-badging their decisions as ERG positions whenever they sought to convey them as official documents rather than, as one of those interviewed put it, 'some private association taking some decision'.

NRAs reacted defensively to the Commission's push for further centralisation, opposing an EU agency 'on the grounds of subsidiarity' and suggesting that the ERG's coordination function ought instead to be extended, in particular because it had of its own volition become more dynamic by introducing majority voting.¹⁸⁷ NRAs acknowledged it was necessary to develop more consistent remedies, but argued that the process was all about identifying what would be the most appropriate measures in the light of each national market's circumstances, rather than a one-size-fits-all approach. Accordingly, they did not support any institutional change that would have conferred powers on the Commission to veto draft remedies or that added any 'new layers of unnecessary centralisation' and proposed instead to further step-up the ERG's role in the coordination of national markets.¹⁸⁸ They emphasised flexibility and responsiveness in regulatory decision-making and the need for implementation as close as possible to the relevant national market, alongside softer forms of disciplining and persuasion that they claimed would foster innovation, efficacy and accountability.

NRAs had first to establish how they would define their role in the negotiating process. One NRA official commented that 'we discussed [the Commission proposals] intensively in the ERG' and another that 'in the end, there was not just the negotiation - the struggle between us and the Commission - but also within the network, within the ERG, at times there were different positions.' The larger, better resourced NRAs were more inclined to assert themselves by taking a public position and issuing advice on different aspects of the review, including the proposed agencification and the veto extension. This contrasted with other NRAs that saw this as too political and argued these institutional dimensions were best left to their parent ministries and the European Parliament. Such concerns provoked, in the words of one NRA interviewee, 'some rather lengthy arguments' among the NRAs, at least during the early phases of the review, but these diminished as the negotiations progressed.' Indeed, another NRA official described these internal debates as a 'coalition-building exercise'.

The UK's regulator Ofcom was one of the most outspoken NRAs on these issues. It acknowledged 'legitimate concern' amongst operators that some NRAs were too slow and half-hearted in their implementation of the Regulatory Framework, but still expressed 'surprise' at *British Telecom's* support

41, at p. 29. The German ministry and BNetzA for example sat down 'early on' (ministry official and NRA official) to exchange views and align their positions on these institutional issues.

¹⁸⁷ ERG letter to V. Reding, 27 February 2007.

¹⁸⁸ ERG letter to V. Reding, 6 November 2007. ERG press release, 13 November 2007 http://ec.europa.eu/information_society/policy/ecomms/doc/tomorrow/erg_discussion/131107_erg_press_release.pdf

for the extension of the Commission's veto,¹⁸⁹ which was also supported by the parent ministry as essential to disciplining implementation.¹⁹⁰ Ofcom was clear, however, that although it wanted to tighten up implementation of the Regulatory Framework, it did not think it necessary to cede this veto to the Commission.¹⁹¹ It argued that the problem was better rectified by enabling NRAs to work more efficiently together to exchange best practice and to learn from one another's experiences; that centralisation, including the supranationalisation of regulatory power and an accompanying EU agency, were unsuited to diverse national market conditions and would not enhance the quality of regulation, which worked best when NRAs could reflect the different conditions on their markets.¹⁹²

Not all NRAs shared the same views on all issues, leading at times to strong discussions within the ERG/IRG as to how they should position themselves as a network.¹⁹³ As a result, the ERG would occasionally, at least initially, present alternative arguments or 'scenarios' in its formal advice.¹⁹⁴ At the same time, they also recognised that unless they managed to convey a unitary message in their external communications, they would diminish their collective influence and therefore showed considerable self-restraint in tempering their lobbying whenever their position was not uniform. As one NRA official remarks:

'You can... find some national nuances.... but ... we were 100% aligned towards the Commission on the substantive message, and also towards the individual contacts, the Parliamentarians and government ... we were almost fully aligned in our messages. So we [did] have a common ERG approach, especially on those institutional issues.'

Another NRA official however observes:

'At the time [during the public consultation], there were no unanimous views on that amongst the members of IRG. So what we did was to present to the Commission different ways of doing it.'

The NRAs that were inclined to defer to their political principals may have subsequently been emboldened by the opposition of their parent ministries and MEPs to the Commission's proposal. In this climate, they felt reassured that there was an appetite and willingness to hear from them. Compared to the previous Framework Review, there were growing signs among the NRAs of a 'sea-change in attitude' towards their political role, especially amongst the larger and most influential ones like Ofcom and France's ARCEP (according to an industry representative). Faced with similar questions, the NRAs (still reasonably nascent institutions during the previous review) had considered it inappropriate to comment on issues pertaining

¹⁸⁹ A. Blowers, International Director of Ofcom, Westminster eForum keynote seminar on The European Framework Review, as reported in www.zdnet.co.uk, 20 October 2006.

¹⁹⁰ For a contemporaneous understanding of the government's position on competitiveness and open markets in the EU, see Cabinet Office and the Foreign & Commonwealth Office, *Global Europe: Meeting the Economic and Security Challenges* (2007: HMSO).

¹⁹¹ E. Richards (Ofcom CEO), *Financial Times*, 14 January 2007 and 31 October 2007.

¹⁹² Reported in the *Financial Times*, 30 October 2007.

¹⁹³ The Italian regulator AGCOM for example appeared in principle not to be opposed to the idea of creating an EU agency to support the work of ERG whereas others, such as the Portuguese authority ANACOM, argued strongly in favour of the *status quo* with only minor institutional changes.

¹⁹⁴ ERG letter to V. Reding, 27 February 2007.

to their own governance structure but were now fully prepared to advise on these issues and, according to the same industry representative, ‘effectively employed lobbyists’ who knew their ‘way around the sort of political machinery of Brussels’.

Framing negotiations

Once formal negotiations between Council and the European Parliament had begun, the ERG’s direct involvement in the process continued, even if it became somewhat less visible. As one Commission official remarked:

‘[The ERG Chair] was very careful not to be seen to be lobbying for this. He was very astute about it. Because I think he knew that if he was seen to be lobbying for it on behalf of ERG, then people would say this was a stitch up by the regulators to give themselves more power.’

But the ERG continued to exercise its formal advisory role to the Commission, mainly by meeting with the Director-General, Fabio Colasanti, and his staff. ERG representatives would even be invited occasionally to work directly with Council, especially at the sharp end of the negotiations and particularly during the Czech Presidency’s laboured efforts to elicit consensus between ministers and the European Parliament. Even though the ERG had no mandate to negotiate directly with the European Parliament, its representatives continually engaged with key MEPs and it fell to the ERG Chairman to appear before MEPs at various times to explain the ERG/IRG’s work and to set out its positions on various issues. Beyond these formal encounters, the Chair and a core group of ERG representatives also met with MEPs individually in more informal settings. To give a flavour, various NRA interviewees explained:

‘Whenever another step had to be taken, [ERG] brought out press communications or sought contact with the [European Parliament’s] rapporteurs directly to discuss concrete proposals for amendment. Frequently, that would happen upon the Chair’s initiative.’

‘BEREC at the time had a working group, called ‘framework review’ or something like that, where we discussed the whole directive and where we drafted proposals. That influenced a lot of Member States.’

Compared with the systematic involvement sought by national energy regulators in the negotiations over the creation of an EU energy agency, which were taking place at the same time, the ERG’s formal appearances were more moderate. This reticence is partly due to the fact that ERG has traditionally been rather sensitive about getting involved in anything that might be labelled political and partly because it lacked (and saw itself as lacking) the means to project its soft power to influence the European Parliament or the Council of Ministers. These were skills that individual NRAs were better at deploying, using their own channels of communication to reach political institutions, either directly or through their connections with their parent ministries and permanent representations in Brussels.

In this endeavour, the ERG/IRG supplied the NRAs with a convenient platform to maintain good, sometimes informal communications with one another, to exchange views and ideas and to put together common agendas relatively fast, efficiently and effectively. Then, having developed their ideas and agendas in this way, NRAs disseminated them individually, using their soft power to influence their own

parent ministries and permanent representations, as well as key members of the European Parliament, to ensure that their positions shaped the formal negotiations. In this way, they reached both the Member States in Council whose primary advisers were the NRAs. At the same time, the European Parliament was looking at the network as someone to give a technical background on its own proposals in the negotiations. MEPs considered the NRAs to be independent participants in the debate, as one MEP put it, during the parliamentary debate of the BERT proposal: 'it would be interesting to hear how the Council ...and indeed the national regulators now stand on the funding issue.'¹⁹⁵

In their internal debates, NRAs would regularly adopt the IRG moniker to conduct their discussions in private. An industry representative observed that

'the IRG was this amazing intellectual resource for the ERG. It had working groups and so on. They did very good work for the ERG, my impression was.... They fed into the ERG.'

Various NRA officials also acknowledged this:

'[We met as] the IRG usually. When the Commission is not in the room, you could clearly see different groups of regulatory agencies, some more strongly pushing towards a non-agency.... It gave strength to the IRG co-operation.'

'We often acted as IRG during the negotiations because, although the Commission does not have a voting right in the ERG, it is quite difficult. ... In order for Parliament to understand that something was an official document, we often used the acronym E/IRG, just so they didn't think this was some private association taking some decisions. ... We keep the IRG going in order to be able to discuss things independently of the Commission.'

'In IRG, you had a framework project team that followed what happened daily in the negotiation process. So every time there was something on the table ... then somebody wrote to all the colleagues: 'do you know that this service will be discussed?' And they explained: 'those countries are in favour, and those countries are against it'. Very often it was very informal...We talked about it as a group, and then, in a bilateral way, everybody tried to influence their own ministry. We agreed a common approach, and then everybody tried to influence their own Ministry to have the right approach, according to us [the E/IRG], in the Council. Sometimes it worked [and] sometimes not.'

Being able to rely on regular, informal contacts with one another through their existing network, NRAs easily outperformed parent ministries that cooperated more formally in the Council and, according to one NRA interviewee, 'with low efficiency'. The decision-making process in the Council of Ministers followed the dynamic of political bargaining and intergovernmental politics, dominated by the personalities of the attachés of the national permanent representations in Brussels and to an extent by ministry experts and in some cases the attending NRA experts (if permitted to participate). The national delegation holding the Council Presidency manages and controls much of the agenda and discussion in the Council working party

¹⁹⁵ Erika Mann MEP, PSE group, presentation to the European Parliament, September 2008.

and at Council meetings. The context can be overly formulaic for meaningful debate, even ‘frustrating’, as one ministry official describes:

‘At the end, it is a room with 27 countries plus the Commission and observers. If you make the tour de table, you only have five minutes to present your position. ... It is very much [down to] the personal feeling of the attaché [which position to take].’

Another ministry official described the dynamics as follows:

‘Member states are loose. They don't cooperate very much. They are on their own. Everybody's making their point. ... Everybody is trying to do something. But nobody is doing anything collectively. They're all doing their own thing.’

In these exchanges, parties tend to place emphasis on attributing positions to their institutions rather than exchanging personal views, leaving informal conversations (if any) to be conducted in the breaks between meetings. They might draw on these opportunities to discuss matters in a more informal setting, but broadly speaking Member States form coalitions less by drawing on personal relations between delegates but rather by building an institutional rapport including lower and high-ranking ministry officials, including at director-general level ‘in order to keep that contact stronger’ (ministry official).

The personal interactions in the NRAs’ regulatory network, on the other hand, are more open, informal and regular. Several NRA interviewees stressed the importance of ERG/IRG as an effective channel of communication, emphasising, in one case, the personal element of the communication:

‘[It was] very important that we already knew each other. This type of informal relationship is more important than the structure.’

One ministry official observed that

‘the Member States, they all work on their own, but the NRAs work as a group, as a big cooperation.’

Moreover, having agreed on ERG/IRG positions as a reference point, individual NRAs would find it easier to manage potential confrontations with their government leads. As one NRA interviewee bluntly put it,

‘The ERG was the best vehicle for us to [raise concerns with the ministry] if it came up because clearly, it avoids direct conflict between an NRA and its sponsoring ministry. You can hide behind the other 26 Member States.’

Another interviewee, an independent consultant, remarked:

‘The NRAs are caught playing a very tricky game because if they are caught saying something which disagrees with their national delegation, they are likely to get into trouble. But they can hide behind an ERG flag. They can hide and say: “it's not ours. It is all the regulators together. And we're outvoted and so on. We had no idea”. For example, you would never know whether that common position had been passed unanimously or by a thin majority. It would never say.’

Shaping compromise

Emboldened by the initial reactions of the European Parliament and the Council, the NRAs kept their work within the ERG focused, delegating the bulk of it to a working group, which was to further refine an alternative agenda to the Commission's proposals. One of the most important documents to come out of this set-up, not long after the Commission proposals were published, was a two-page summary of an enhanced ERG, or "ERG++", that was proposed as an alternative to the EECMA. This document proved to be an influential agenda-setter for the subsequent negotiations (one interviewee referred to it as the 'famous one-pager – consisting of two pages'). In it, NRAs summarised the case against the Commission, arguing that combined with the veto on remedies, the move to EECMA would shift the balance of power away from the Member States and the NRAs and towards the Commission, creating an institution that would operate remotely from the markets that it was supposed to be regulating and isolated from the NRAs with detailed knowledge of their national markets. They envisaged ERG++ as an advisory committee of NRA representatives (with the Commission as an observer) that would be embedded in the Regulatory Framework by way of a regulation and whose advice the Commission and the NRAs would have to take into 'utmost account'. Implicitly rejecting the extension of the Commission's veto, the ERG++ proposal referred to the need for a 'pause for reflection' in which the Commission could require an NRA to notify its draft regulatory remedies to the ERG++ for an opinion whenever it was concerned about their compatibility with the single market.

Many aspects of the European Parliament's counter-proposal mirrored arguments advanced by the ERG in its proposal for an ERG++,¹⁹⁶ and those similarities are probably not coincidental. Not only had the ERG, through its Chair, made formal representations to Parliament, but individual NRAs had lobbied key MEPs informally, including Catherine Trautmann MEP who was the rapporteur handling the veto dossier. It also suited the NRAs' that Trautmann and Del Castillo Vera MEP, who was the rapporteur on the agencification proposal, appreciated the connections between their two dossiers and were keen to work collaboratively and learn from the NRAs. NRA expertise meant they could supply technical detail on each dossier and on their interconnections.

The NRAs recognised the European Parliament was not a natural ally. While it criticized the Commission's proposed agencification, it agreed with the Commission's assessment that the NRAs were failing to implement the Regulatory Framework consistently and that the ERG was failing to force them to do so. The NRAs also understood that certain political dynamics within the European Parliament meant its MEPs considered it bad negotiating style to respond to the Commission's proposal with an outright rejection but would rather offer some form of institutional compromise. Playing a skilful political game and drawing on their technocratic credentials, they sought access to individual MEPs and especially the rapporteurs, not just to advance their preferences directly but also to try to demonstrate the interconnections between the two dimensions to the negotiation (agencification and the veto extension) in a way that might produce a coherent outcome. Several NRA interviewees emphasise MEPs' willingness to listen:

¹⁹⁶ See e.g. Explanatory Statement, ITRE Committee Report on the Proposal for a Regulation establishing EECMA, A6-0316/2008, 17 July 2008, p. 88 – 91.

'There were lots of Parliamentarians who were very interested in these issues but wanted a bit more of a sense of what was really at stake in the way that they would normally have scope to explore these issues. So a number of the more politically well-connected regulators, but operating in fairly close collaboration, would reach out to their own national MEPs and other MEPs that they would get to.'

'Although they were very much in favour of the European idea in regulating communications, they started to entertain the argument that the European idea might be more effectively developed by a group of expert regulators in a 'college' rather than an agency run by Mrs Reding.'

'We ended up in an interesting position where actually, as a regulator, we were having more influence through our technocratic credentials with those who were willing to listen in the European Parliament than we had with our own government'

'We sat down [with MEPs] and we expressed our concerns [with the Commission's proposal] saying: "it doesn't have to be this way. It can be another way. Let me explain how it would work." They were a bit sceptical at first because they didn't think that... [whatever we proposed] was very interesting. Everyone [in Parliament and Council] thought the other side wouldn't accept it.'

Most NRAs considered the Council of Ministers a more natural ally than the European Parliament, and again, the similarities between aspects of the Council's proposal and the ERG++ proposal are unlikely to be a coincidence. NRAs reached out emphatically to their government leads at ministerial level and their permanent representations in Brussels and were keen to make their expertise available to the Council working group. So, according to one NRA interviewee,

'some proposals and some texts were prepared by influential NRA's (the usual suspects - the big ones). Texts were presented by the ministries, but the texts themselves were written at NRA level, where there were very strong specialists.'

They also made sure their efforts were coordinated with their NRA counterparts through the ERG/IRG:

'Once the negotiations started, ERG disappeared, and we couldn't provide an opinion publicly. So we had these high-level messages from the ERG that we discussed internally, and then we tried to pass these positions to the ministries to let them know what the position of the ERG was, and to sell them the message that we agree on a set of elements, and that it would be good for them to agree on them also in the Council.' (NRA official)

The relationship between each NRA and its parent ministry is framed by national constitutional and administrative law (subject to harmonised conditions imposed by the Regulatory Framework that relate to NRA independence). How an individual NRA might bring its influence to bear over its national political principals depends therefore on how it is embedded in the national administrative system. Some were very successful in doing this, as this quote from an NRA official illustrates:

‘At the technical level, we worked very well together. They have experts in the ministry, and they are quite strong. They have up-to-date information. They participate in the meetings.... In this case, the coordination was very, very good; both at the expert level and at the political level. That's why we could participate in the Council working group and why we could pass on our proposals for amendments of the articles. It was a very good example of coordination.’

Not all NRAs had either the resources or political freedom to pursue such an active role, but the ERG/IRG meant those whose capacity was limited and that were nevertheless motivated to influence the process could still rely on better resourced NRAs to access information. Council working group meetings were often framed by the background presence of NRAs, in attendance as advisors, leaving scope for informal networking at the periphery of the meetings. In the words of one Council delegate involved:

‘It was noticeable that if Ofcom came to a [Council working group] meeting during those discussions, in the coffee break they were quite active in talking to their other counterparts, and in deciding where we should go on a particular issue.’

Those NRAs who could (like the UK's Ofcom), mobilised considerable resource to get the Council to push for an independent legal structure for the transnational network; including, at one point, a proposal to incorporate an enhanced network as a non-profit organisation under Belgian law, based on the IRG precedent. This attracted the scorn of Commissioner Reding against what she termed the ‘Belgian football club approach’, commenting that

‘we certainly do not want a Belgian private body, alien to the Community approach and the guarantees it provides, to become involved in European decision-making.’¹⁹⁷

Ofcom's CEO in turn announced that any binding Commission powers over draft regulatory remedies would only be acceptable if they were ‘exercised in a way which de-politicises the process to the maximum extent possible’, preventing the Commission departing from the advice of the regulatory experts ‘in pursuit of some political goal du jour.’¹⁹⁸ In an unusual move, Ofcom continued to lobby against the extension of the Commission veto right up until the end of the negotiating process, contrary to the position of its government lead. One NRA interviewee observed

‘at the last COREPER before the package went off for ratification in the Council, it was the UK government representative who was saying that we need to move further in the direction of the veto power for the Commission’.

Unable to lobby the Council through its government lead, Ofcom sought alternative channels, including the European Parliament and coalition-building with NRA counterparts that might have been able to influence Council through their own parent ministries and permanent representations. As the negotiations appeared to reach the end game in the first half of 2009, a collaborative effort among government officials and various NRAs (particularly Germany's BNetzA, which then held the ERG/IRG

¹⁹⁷ V. Reding speech to the European Parliament, Plenary session, 2 September 2008.

¹⁹⁸ E. Richards, Speech to the Communications and Competition Law Conference, Brussels, 20 October 2008.

chair, as well as ARCEP and Ofcom) enabled the Council, at working party level, to fend off a last minute attempt by the Czech Presidency to get agreement on a compromise whereby the new body would have been set up as an EU agency, subject to certain safeguards to ensure its independence from EU institutions.¹⁹⁹ The Council formulated an alternative compromise, relying extensively on suggestions and proposals from the NRAs, which eventually secured parliamentary agreement.²⁰⁰ According to one NRA official (although this has not been corroborated), Ofcom and ARCEP drafted a text and requested the ‘British and French delegations table it together’, and it took a ‘final push’ involving the mobilisation of high ranking government and NRA officials to persuade a group of like-minded Council representatives to table these proposals at the Council meeting.

It may have also helped that, at the time, the Czech NRA had seconded an employee to the ministry, providing a direct channel of communication to the ERG, according to (another) NRA official:

[‘During the Czech Council presidency], the regulator seconded at least one employee to the ministry, and whenever the ministry thought they would have some brilliant idea as to how to proceed then they would send their regulator ahead, and they would come to the [ERG Chair] and discuss their proposal.’ (NRA official)

Right through to the end game of these negotiations, NRAs were able to assert themselves as independent, political players in the process that led to the establishment of BEREC and the new Article 7 and 7a procedures; and to head off a further push towards greater centralisation of the EU’s regulatory architecture for telecoms. They proved capable of shaping, at the very least, the broad direction of travel of the Review, positioning themselves in opposition to the Commission in relation to central aspects of its proposals.

Beneath the institutional to and fro dominating the negotiations, right through to their conclusion, an important consensus had crystallised between ministries and MEPs: namely, that while the existing ERG needed to be reformed to improve its functioning, the best way of going about this was not to create a new European bureaucracy, but instead to strengthen the institutional governance of ERG so as to allow NRAs to intensify their cooperation and co-ordination and to develop best practice from the “bottom-up”, that would enable them to create a more uniform telecoms market in Europe.²⁰¹

The fact that these messages are closely aligned with the regulators’ own vision for their future institutional governance, as set out for example in their proposals for “ERG++”, is unlikely to be coincidental, given NRAs’ own skilful political positioning and entrepreneurialism. They were able to reach deep into the deliberation and preference-formation amongst Parliamentarians, and amongst ministries and government officials in the Council, individually and through the exiting ERG, described by its

¹⁹⁹ Meeting Document DS 167/09 of 26 February 2009.

European Parliament, Position on the BEREC Regulation, adopted at Second Reading, 6 May 2009, EP-PE_TC2- COD(2007)0249; European Parliament, Legislative Resolution on the Council Common Position on the Framework Directive, adopted at Second Reading, 6 May 2009, P6_TA(2009)0361.

²⁰¹ Progress Report from COREPER to Council on the Proposal for a Regulation establishing EECMA, 6 June 2008, 10337/08, p. 2; 2877th Council meeting on Transport, Telecommunications and Energy, 12-13 June 2008, Press Release 10410/08 (Presse 165), p. 9.

Chairman at the time as 'more than the sum of its parts.'²⁰² Relying on their technocratic credentials and using the existing network as a platform and channel of communication as well as a source of technical expertise, they were able to bring such expertise to bear on the day-to-day progress of the negotiations, gaining good access to the political players, and thereby shaping the detail of the institutional compromises which this process brought about.

The NRAs' motivations

When probed on the motivation for NRAs' proactive attitude towards bringing their own institutional ideas (what would constitute a sensible institutional architecture under a revised Regulatory Framework) to bear on the process of the Review, our interviewees offered, broadly speaking, two types of explanations. Many of them described the NRAs' approach as a defence or survival mechanism against what they perceived as an attempt by the Commission to encroach on their newly gained institutional powers. As one Commission official remarked, NRAs

'were probably more proactive [compared to 2002 review] because they were more heavily involved. Their powers were much more under attack as it were, via this article 7 veto. I think that is what galvanised them. I think also they were concerned about their entire organisation, the IRG and ERG. They were concerned about that. And they have had a few years of IRG and ERG in between.'

Another interviewee, an independent expert, thought that the ERG had a difficult relationship with the Commissioner because 'the regulators wanted to keep their powers, but Mrs Reding wanted them to give up powers and work at a European level.' And according to a ministry official,

'you got the impression that here is a body of regulators that are being told collectively that some of their decisions are crap. And they are saying "this is outrageous, and we will not accept the imposition of the Commission decisions." It is like a defence mechanism.'

Other interviewees, on the other hand, considered that the active involvement of NRAs on these institutional issues was driven too by a genuine effort to salvage the NRAs' common intellectual endeavour, a collaborative, transnational regulatory model, reliant on sharing of best practice and mutual learning, which they thought had proven successful thus far and which would be even more effective if further enhanced. Bringing NRA officials together from different Member States to work on discrete technical tasks generates mutual empathy and trust, as well as a degree of predictability and stability; the more sustained and intense their interactions, the greater the potential for re-socialisation.²⁰³ They

²⁰² Daniel Pataki, ERG Chairman, speech to ITRE committee, 27 February 2008

²⁰³ J. Beyers, 'Conceptual and Methodological Challenges in the Study of European Socialization' (2010) 17(6) JEPP 909.

formulate ‘common understandings’²⁰⁴ that they then internalise via processes of persuasion and social learning and which come to define, frame and channel their interests and even identities.²⁰⁵

NRAs are comfortable interacting with their counterparts from other NRAs in a soft law, transnationally-networked setting in which they see themselves as trying out different regulatory solutions in their different national “regulatory laboratories”, before coming together to share their results and learn from one another. In our interviewees, various NRA officials referred to these working methods as ‘a standard way for NRAs to find solutions to any inconsistencies’, as ‘BEREC’s way of doing things’, an ‘organisational dynamic’, or as a ‘bottom-up’ or networked regulatory approach. According to a Commission official, the ‘logic’ of establishing best practice aligns even with the Commission’s initiatives in its early harmonisation efforts in telecoms during the 1980s, to lay down best practice ‘as something to be followed and looked to as a method of bringing harmonised and consistent practice.’ An MEP also referred to the NRAs’ ‘networked regulatory model’ as combining ‘a very clear principles-driven approach centrally with regulators who can respond to the market have the flexibility to apply that.’ The ERG played an important role in consolidating peer review as accepted working method amongst ERG members. An NRA official similarly describes as an ‘issue of principle’ in this model

‘that if there is no way of identifying best practice ab initio, what you need is an “experiment, learn, share best practice and then develop a common approach” ... for how you arrive at the right answer. Having a network of regulators actively exploring and developing their own vision of best practice in what are quite often quite different market circumstances would then allow you to identify a common core of best practice that could then go into some harmonising instrument. But to get to that model you need to accept that all wisdom doesn’t rest with the European Commission.’

Interviews with another NRA official also reveal this:

‘We recognised, even if we did not make this explicit in any publication, that the Commission has a valid but different political agenda. Whereas the Commission wants to start from the end, from the beautiful idea of having a single market, we thought that you have to build from the floor up, achieving effective competition in each national market and then looking at it collectively, and then it should function.’

‘More important than the adopted opinion was the process and the getting used to that level of collegiate scrutiny as an alternative to being scrutinized by somebody who has got a slightly different agenda to yours.’

²⁰⁴ F. V. Kratochwil, ‘How do Norms Matter?’ in M. Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, 2000), at 53; F. Kratochwil, *Rules, Norms and Decisions* (Cambridge University Press, 1989), at 198.

²⁰⁵ M. Finnemore and K. Sikkink, ‘Taking Stock: The constructivist research program in international relations and comparative politics’ (2001) 4 *Annual Review of Political Science* 391; C. Reus-Smit, ‘The Politics of International Law’, in C. Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004).

'[NRAs] raised the flag of efficiency, of the real need of having such a huge centralisation when, according to the concrete proof we had during the first implementation of the framework, such a big bureaucratic system was really not needed.'

'What we wanted, we definitely wanted, was some sort of ... upgrading of ERG... We talked at the time of "ERG ++" ... No one was bought in to having support staff of 140 or whatever the Commission's original proposal was; or even half of that, if you said that half of them were doing ENISA type activities. But certainly, most NRA's were comfortable with having what's now become the BEREC Office, the secretariat as we used to call it.'

'IRG was a trial. We tried to convince the Commission not to advance the European regulator. If we could show that ERG and IRG worked, and we believed that they worked, [then we could convince the Commission to go along with that model]'

'We understood how we worked and we believed in our point of view, so we put in a lot of effort.'

'[The operators] weren't driving it. It wasn't one of those situations where you had telcos saying to us, the regulator, "you've really got to stop this happening". It was much more driven by ... Ofcom and other like-minded European regulators who felt that a better job would be done by a sort of federal college model than by the agency model.'

'We were very clear that the ERG needed reform and needed to become a more effective body in terms of the behaviour of its members and their response to various policy and regulatory challenges. Our view was that we were more likely to get across Europe the kind of process towards the telecom sector that we favoured, namely reasonably tough pressure of big incumbents, and the relatively liberal approach to markets, that's what we stood for.'

'We continued our line [on opposing the veto and the agency]. It was in line with the majority of NRA's. That's possibly to do with the position from which we enter this discussion. We enter it from a more substantial perspective. And they, the Ministry, enter it from a more political perspective, which is maybe why they traded it for something else.'

Implications for BEREC's operation

Our detailed account of the negotiations leading to the establishment of BEREC and its institutional architecture, reveal that this architecture cannot be attributed to one single factor, nor the influence of a particular political actor. BEREC and the Article 7/7a procedure did not emerge as the result of any crisis provoking a public outcry, nor the diffusion of a particular model, nor did it straightforwardly follow a functional rationale (indeed there were significant benefits attaching to a more centralised regulatory structure that would surely have accelerated the creation of a genuine single market in telecoms). Clearly, other variables, in addition to functionalist pressures, determined the path of these negotiations too. First, the Council of Ministers flexed its intergovernmental muscle, rejecting even a revised and toned-down institutional proposal from the Commission and defending instead an intergovernmental network of NRAs without any extension of the veto. Secondly, the Parliament took an unusually step in not supporting the Commission's attempt to create a centralised structure. But, pursuing a more moderately supranational

line, it did go along with its attempt to get NRAs to produce consistent regulatory outcomes, formalising their existing network and establishing an EU-funded BEREC Office in support of BEREC. Finally, the institutional compromise that was eventually reached between these two formal players owes much to the (soft informal) influence of NRAs in the negotiations. The ERG emerged as an independent and extremely active advisor especially in the consultation phase of the negotiations and their early stages. Individual NRAs then took it upon themselves to lobby key MEPs and to reach into Council, coordinating their actions through ERG and IRG.

The dynamics of these negotiations have shaped the character and the operation of BEREC and the BEREC Office today: especially BEREC and its networked way of working, operates through procedures the NRAs “own” and are therefore committed to. The fact that NRAs were heavily involved in the process of establishing BEREC and the BEREC Office sensitized its members to the continuing precariousness of their institution. After the negotiations completed, they were clearly aware that

‘if BEREC does not deliver in the forthcoming 2 to 3 years, the debate on a more centralistic European regulatory authority may very well come back with a vengeance. This is very clear to the Heads!’²⁰⁶

‘Everybody in BEREC now, and if they don’t know I will tell them, knows that if we don’t deliver, we’re going to be in trouble. If we fail to come up with a credible opinion track record then Europe will have a claim to say, you’ve failed.’²⁰⁷

This commitment to effective working has persisted into the present, shaping BEREC’s operation and governance. Whereas the ERG took decisions by consensus, BEREC under the current architecture is subject to formal decision-making rules including voting on a two thirds majority basis. In our interviews, several NRA officials confirmed they were in principle ‘still looking for consensus’, and some were concerned that voting would encourage the ‘rules of diplomacy’. But they also agreed that ‘the quality of our materials has improved a lot’ as a result of the new voting rules. As one NRA official observed, ‘common positions do not any more simply reflect the lowest common denominator but attempts at more clearly prioritizing certain regulatory options above others.’

BEREC itself has actively sought to improve its own governance further, and a particular concern in recent years has been to address any ‘undesirable bureaucratic burden’ affecting the BEREC Office.²⁰⁸ A study evaluating BEREC and the BEREC Office, produced by the Commission in 2012 and endorsed by the European Parliament in 2013 (as required under the existing Regulatory Framework) confirmed the

²⁰⁶ C. Fonteijn, BEREC Chair, Communications and Competition Law Conference of the International Bar Association, 16 May 2011 (Vienna)

²⁰⁷ Chris Fonteijn, reported in the *New York Times*, 3 and 4 July 2011. Meanwhile, the Commission services expressed confidence that BEREC would improve its oversight because of the need to develop a common approach and take positions on cases where the Commission has doubts on proposed remedies, which makes the interaction amongst NRAs more intense. See Fabio Colasanti, reported in the *New York Times*, 3 and 4 July 2011.

²⁰⁸ BEREC Input to the European Commission on the BEREC and BEREC Office Evaluation Exercise, BoR (12) 118, p. 7; available at: http://berec.europa.eu/eng/document_register/subject_matter/berec/others/1073-berec-input-to-the-european-commission-on-the-berec-and-berec-office-evaluation-exercise.

overall effectiveness of BEREC's governance, but it noted room for improvement though for the BEREC Office.²⁰⁹ This, according to one NRA official in our interviews, has been the very reason for continuing the more informal IRG

'not just because we now have the IRG Brussels office [whereas the BEREC Office is based away from Brussels, in Riga], but also because the BEREC Office is subject to a disproportionate burden of EU rules and procedures for an office that small.'

The Office does, on the other hand, provide the NRAs with a public platform and infrastructure to publicize their achievements in terms of effective market regulation and co-ordination. They have also been able to rely on the infrastructure of BEREC to provide input (including through an internal BEREC working group or 'project team'), whenever the network is scrutinised, challenged or subject to external evaluation.

Continuing resilience

Following its formalisation, contacts between BEREC and the Council were scarce, at least initially. Just as they did in the ERG previously, NRAs in BEREC refrained from overtly political positioning or lobbying, and instead focused on framing the regulatory agenda in more indirect ways to generate momentum, for example by publicising technical advice, producing white papers and organising public workshops. Increasingly, as its role has become more established, BEREC is acting more on its own initiative, pushing advice, rather than just acting on requests. For example, it monitors Article 7/7a procedures and reports on them annually, paying ever closer attention to the consistency of remedies.²¹⁰ As the BEREC infrastructure has gradually established its operation, it has also seemingly improved trust from the political institutions in its work; leading, for example, to some rapprochement between the BEREC network and Member States in Council. On the one hand, Council continues to look at BEREC with some indifference, sometimes uncomfortable with its increased influence. But, on the other hand, some Member States have become increasingly open towards the network, as one NRA official puts it,

'accepting that BEREC is an independent entity. It does not depend on the Commission. It is independent from other institutions. So, they started trust BEREC more... It is too soon to tell, [but] ... I think [the Member States] are now looking at BEREC as a professional body that could help them to take decisions.... The Council is asking BEREC for its expertise.'

Much depends on the flow of information between individual ministries and their NRA in the national setting,²¹¹ as another NRA official points out:

²⁰⁹ Pierre, P., Hanssens, S., Szenci, K., Kauffmann, A., Simpson, S., Boeger, N. and Corkin, J., *Study on the Evaluation of BEREC and the BEREC Office*, 2012, The Publications Office of the European Union; European Parliament, Report containing its Opinion on the Evaluation Report regarding BEREC and the Office, 13 November 2013, A7-0378/2013. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0378+0+DOC+XML+V0//EN>

²¹⁰ This goes back to one of its first work programmes, back in 2011, it committed to analysing the implementation of common positions on 'significant market power' remedies in relation to wholesale market in unbundled access, broadband access and leased lines

²¹¹ Where relations are good, NRAs also sometimes attend meetings of CoCom (the intergovernmental Communications Committee), usually on their ministry's invitation.

‘We try to keep the flow of information with the ministry on BEREC issues; to share with them the information. We don't have all the competences at [the NRA]. The issues BEREC deals with, for example consumers or spectrum... when they fall under the competences of the ministry, we try

Arguably, the intensity and the dynamics of the negotiations back in 2007-9 have played a significant role in explaining BEREC's strengthened role and its institutional resilience. Having been heavily involved in the drafting that led to the current institutional structure, the European Parliament sees BEREC as its ‘own’ creation too. And while the Commission has raised the issue of greater centralisation again in the interim (in 2013 and more recently in 2016), it also, as we have seen, does look at the network as a “critical friend” – a source of transnational expertise - even if it will regularly argue that BEREC's working practices require some fine-tuning and improvement. Arguments that were discussed so exhaustively 2007-9, still frame these institutional debates today. But so far, BEREC and the BEREC Office have proven resilient, and have averted renewed threats of an EU regulatory agency.

In 2013, the Commission briefly raised the idea of a single EU regulator for electronic communications again, in the wake of discussions on a new regulation to further improve the single market in electronic communications (the ‘Connected Continent Regulation’), but it quickly dropped this again in its formal proposals in September 2013.²¹² Similarly, during a recent review of the Regulatory Framework, in 2015, the Commission (as well as the European Parliament) considered a strengthening of supranational resources to improve the effectiveness of market-coordination, placing some renewed institutional pressure on BEREC and the Office.²¹³ In a quick response, BEREC made clear why it considered further centralisation unnecessary as the existing institutional architecture was sufficient to achieve a balance of ‘consistency of regulatory approaches’ on the one hand, and on the other hand NRAs’ ‘ability to address the particularities of their national markets’.²¹⁴

The Commission concretised its revived plans for greater centralisation in September 2016, with a renewed proposal for a (revised) Regulation on BEREC,²¹⁵ including provisions to merge the BEREC and the BEREC Office into a fully-fledged EU agency. This, the Commission set out, was commensurate with BEREC's growing tasks, especially given the move to a Digital Single Market in Europe. According to the Commission in 2016:

²¹² European Commission, *Proposal for a Regulation laying down Measures Concerning the European Single Market and to achieve a Connected Continent*, COM (2013) 627 final, 11 September 2013, available at: [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2013\)0627_/com_com\(2013\)0627_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2013)0627_/com_com(2013)0627_en.pdf)

²¹³ Speech by Commissioner G. Oettinger before the BEREC Board of Regulators, 10 December 2015, available at: https://ec.europa.eu/commission/2014-2019/oettinger/announcements/speech-berec-board-regulators-meeting-telecoms-review_en

²¹⁴ BEREC, *Opinion on the Review of the Regulatory Framework BoR (15) 227*, available at http://berec.europa.eu/eng/document_register/subject_matter/berec/press_releases/5590-berec-adopts-its-opinion-on-the-review-of-the-regulatory-framework

²¹⁵ European Commission, *Proposal for a Regulation establishing the Body of European Regulators for Electronic Communications*, COM/2016/0591 final, 14 September 2016, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0591&from=EN>

'BEREC and the BEREC Office have had a significantly enhanced role, in particular in cross- border matters ... and gained experience in ensuring a consistent implementation of the regulatory framework. It seems appropriate and necessary to build on this experience by turning both together into a fully-fledged agency. The new agency, which will have a broader mandate, should continue the work of BEREC and continue the pooling of expertise from NRAs. Given that BEREC's brand identity is already well established and we seek to build upon it plus in light of the not insignificant costs of changing its name, the new agency should retain the name of BEREC.'²¹⁶

The proposal also included a significant increase in both budget and personnel for BEREC and the Office. But once again, both Council and the European Parliament were reluctant to accept these proposals and the Commission's arguments.²¹⁷ The European Parliament's report on the legislation deleted the proposed provisions on agencification.²¹⁸ The reaction from NRAs and BEREC, their interactions and positioning, was strongly reminiscent of its entrepreneurship during the 2007-9 negotiations, with the BEREC Chair in 2016 (at a time when the head of German BNetzA, Wilhelm Eschweiler held the post) commenting in defensive terms that 'if you turn BEREC into the ACER agency that would in the end strengthen the influence of the European Commission'. He also pointed out that 'the flexibility [BEREC has within the current Regulatory Framework] is not as huge as people think. There is a framework, there are limits. But markets are so different, so you need flexibility from the national side.'²¹⁹

Later, in 2017, the succeeding BEREC Chair (now the Head of France's ARCEP, Sébastien Soriano) commented in similar terms, pointing out that while BEREC was not lobbying politically, nor arguing simply for the sake of self-preservation, it did feel strongly about making the case for 'not less regulation, but better regulation' in the sector. On behalf of the network, he insisted that BEREC was 'part of the institutional landscape' which, through the BEREC Regulation, 'recognizes [its] role of expert and adviser to the co-legislator, so we are just working in this framework.'²²⁰ Once again, BEREC has been putting forward its voice as independent adviser, relying on its technical credentials and framing the (institutional) agenda in this way, rather than overtly committing to institutional lobbying; although, as we have seen in

²¹⁶ European Commission, Proposal for a Regulation establishing the Body of European Regulators for Electronic Communications, COM/2016/0591 final, 14 September 2016, p. 3

²¹⁷ See <https://euobserver.com/digital/137706>

²¹⁸ ITRE Committee, Draft Report of 27 February 2017 on the proposal for a regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications (COM(2016)0591 – C8-0382/2016 – 2016/0286(COD)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPART%2bPE-600.889%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>; followed on 16 October 2017 by ITRE Committee Report (A8-0305/2017) on the proposal for a regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications (COM(2016)0591 – C8-0382/2016 – 2016/0286(COD)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0305+0+DOC+PDF+V0//EN>; see, along similar lines, the IMCO Committee Report of 18 May 2017, summarised here: [https://uk.practicallaw.thomsonreuters.com/w-008-2514?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-008-2514?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

²¹⁹ See <https://www.euractiv.com/section/digital/news/telecoms-regulators-fight-back-against-commission-plan-for-new-eu-agency/>

²²⁰ See <https://mlexmarketinsight.com/insights-center/editors-picks/Technology-Media-and-Telecoms/europe/unapologetic-berec-chief-wants-better-not-more-regulation>

the 2007-9 negotiations, this may not have stopped individual NRAs, from lobbying the Parliament and Council, using BEREC as a platform for coordination and communication amongst them. BEREC's institutional response was, perhaps for that reason, technical but robust, stating that:

'As well as being inconsistent with the conclusions and recommendations of the Commission sponsored assessment and the European Parliament's resolution, the Commission's proposals do not build upon BEREC's strengths and assets, but rather purport to start from scratch and replace what has worked with an over-engineered, costly and bureaucratic structure which runs counter to Europe's broader "better regulation" agenda.'²²¹

The fate of these latest Commission proposals was eventually sealed in late 2017 when the Council, taking into account Parliament's unenthusiastic position, formally proposed a compromise text that, instead of moving towards further agencification, introduced minimal structural change but strengthened BEREC's independence and transparency mechanisms. Rather than introducing a fully-fledged agency, Member States preferred to keep the networked, two-tier institutional structure intact. They also rejected the idea that (an agencified) BEREC should be able to adopt binding decisions, as proposed by the Commission, and also opposed to additional powers the Commission had sought to influence decisions taken by BEREC.²²² In conclusion, therefore, BEREC's networked institutional architecture has once more proven resilient, and political actors in Parliament and in the Council, followed a similar logic to those we have seen displayed during the 2007-9 negotiations; but so did the NRAs. Their confidence as independent institutional players, valued for their role as a transnational community of expertise, has, if anything, been further strengthened. The ground that was laid during the Framework negotiations in 2007-9, has held in the interim, and it appears to provide a strong foundation for their networked institutional architecture.

²²¹ BoR (16) 213, BEREC high-level Opinion on the European Commission's proposals for a Review of the Electronic Communications Framework, p. 12, available at: https://www.viestintavirasto.fi/attachments/lausunnot/Berrec-high-level-opinion-on-the-european_0.pdf

²²² Council of the European Union, Public Document 14376/17 of 27 November 2017, 2016/0286(COD), available at <http://data.consilium.europa.eu/doc/document/ST-14376-2017-INIT/en/pdf> See also <https://euobserver.com/digital/140121>; <https://www.telecompaper.com/news/eu-states-push-to-keep-berec-outside-brussels-control--1221846>;

Appendix: Interviewees

Affiliation	Role	No. of interviews
European Commission	D-G Information Society (senior management*)	2
	D-G Information Society (management)	1
	Commissioner cabinet	1
European Parliament	ITRE Committee	1
	MEP	1
	MEP office	1
Council of Ministers	Member of Council working party (ministry official)	5
	Member of Council working party (permanent rep)	2
	Council secretariat	1
National regulatory authorities	All interviewees at management level, of which:	21 (total), of which:
	AGCOM (Italy)	2
	ANACOM (Portugal)	1
	BIPT (Belgium)	1
	BNetzA (Germany)	2
	CMT (Spain)	1
	Competition Authority (Estonia)	1
	ComReg (Ireland)	1
	CTU (Czech Republic)	1
	Hakom (Croatia)	1
	ISTS (Denmark)	1
	NMHH (Hungary)	1
	Ofcom (UK)	5
	OPTA (Netherlands)	1
	PTS (Sweden)	1
RTR (Austria)	1	
BEREC Office (EU agency)	Management level	1
Industry representatives	Management level	4
Independent experts	Academic (professor)	1
	Consultancy (management level)	2