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THE POTENTIAL OF SOFT GOVERNANCE IN THE EU INFORMATION SOCIETY: LESSONS FROM THE EU ELECTRONIC COMMUNICATIONS REGULATORY FRAMEWORK

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INTRODUCTION
Telecommunications have been seen by the EU, since the early 1990s, as an important aspect of the Information Society (European Commission 1994), though telecommunications policy-making and governance has tended to evolve separately from the more mainstream policy context set by the EU for the Information Society (and thematic variants thereof). Most research on EU policy for telecommunications has focused on the efforts made by the Union to create and maintain liberalised markets within Member States. Here, the EU's well developed 'hard' single market legislation-making and competition policy powers have been deployed to pursue classic 'negative' market-making integration, thus apparently a rather different set of circumstances than that pertaining in Information Society policy, which is underpinned by soft governance (see Harcourt 2008). However, less well emphasised in academic research has been the long-standing use by the EU in telecommunications of measures from the soft governance policy tool kit. Such usage has been developed quite strongly by the European Commission around efforts to ensure the transposition and implementation of a welter of directives agreed to by Member States since the early 1990s. It has also to a lesser extent been manifest in legislative policy outcomes generated from negotiations that led to recent modifications of the telecommunications regulatory framework (Simpson 2011, forthcoming). Analysing the case of EU telecommunications from this angle allows experiences - and the lessons from them - to be drawn together and considered in the context of the EU's pursuit of the Information Society through soft governance measures.

This is the essential purpose of this paper. In so doing, it contributes to work which underlines the challenges of using effectively soft governance as an Information Society policy measure. The paper has two key findings. First, the EU's employment of soft governance as a policy tool to stimulate effective transposition and implementation of agreed measures in telecommunications has been utilised alongside the threat (and use of) hard legal sanction. Though something of a complementary tool in this respect, evidence suggests that it has only been partially successfully. This is clearly illustrated, somewhat ironically, by the claims made by the European Commission in its most recent review of the telecommunications regulatory package, of ineffective compliance by Member States, despite many years of soft governance activity. An interesting feature is the prominent 'naming and shaming' aspect of soft governance which has become, in effect, a victim of its own circumstance, since the longer it persists, the more evidence of its only partial effectiveness mounts. It is also the case that such activity can sour relations between the European Commission and national regulatory authorities, with knock on implications for any attempts made by the former to increase its hard regulatory powers of enforcement. Relatedly, the second finding of the paper centres on the EU's more limited drawing on soft governance as a product of decision-taking, highlighted by the example of the EU's telecommunications regulatory remedies procedure. The precise outcome here has been 'hard' legislation in the shape of a directive which stipulates soft governance measures. The paper argues that, in this case, there is evidence to reinforce existing work which suggests that soft governance has been utilised as a tool of piecemeal inter-institutional political compromise in controversial negotiating circumstances. This illustrates paradoxically, both a strong reluctance among Member States to enhance the European

Commission's hard supranational power yet a recognition of its continuing importance in ensuring the effective harmonisation of telecommunications across the EU.

Overall, the paper argues that soft governance in telecommunications has been used as a 'second best' policy tool. If used in this way, the chances of it delivering its potential for common purpose, innovativeness and efficacy in the service of the public interest at EU level is considerably undermined. Telecommunications, though frequently cited by the EU as a core aspect of the Information Society, adds further weight to the argument that soft governance will struggle to deliver the goals of the Information Society, broadly defined. The paper proceeds as follows. The next section provides a brief synopsis of the features of the EU's policy initiative in the Information Society begun in the early 1990s. Following this, the paper explores some of the findings of the burgeoning literature on soft governance in respect of its likely explanatory power for policy developments in telecommunications and the Information Society. The subsequent two sections of the paper explore evidence on the use of soft governance in the two key instances of the implementation of the telecommunications regulatory framework and the 2009 agreement on a revised procedure for the consideration of regulatory remedies in telecommunications. The final section of the paper comments briefly on the significance of soft governance in telecommunications, and by extension, the Information Society policy initiative of the EU.

THE EU, SOFT GOVERNANCE AND THE INFORMATION SOCIETY

The EU's early engagement with the policy area of the Information Society stretches back to the beginning of the 1990s and provides an important insight into why this policy area emerged as a case in which soft governance – specifically the Open Method of Coordination (Hodson and Maher 2001) – became prominent. The increasing significance of Information and Communications Technologies (ICT) in social and economic life from the 1960s led to a series of arguments, emanating principally from academia, around its distinctiveness and, more questionably, its potentially discontinuous nature. Advocates of the 'post-industrial' society highlighted the increasing importance of information in technological and economic life (Bell 1974). Emphasis was placed on the emergence of a new service economy populated by workers with high levels of knowledge and skills. Whilst such a development promised economic growth, it also risked the creation of social divisions (Touraine 1974). Post-industrialism would thus give rise to the Information Society (Toffler 1980; Masuda 1983). More recently, concerns about the technological determinism in these early accounts led to the postulation of alternatives with emphasis on social relations, such as Informationalism (Castells 1996), as well very strong criticisms of the idea of the Information Society as discontinuous (see May 2002; Schiller 2007).

The ideas around the Information Society present an important example of the adoption of concepts developed about ICT in the academic world, into political and policy-making environments (Cawood and Simpson 2000). The EU became aware of the strategic technological and economic significance of IT and telecommunications through the 1980s, though tended to focus, for the most part, on the task of developing cross-national, often public-private, research and development partnerships as part of successive phases

of its Framework Programme for Research and Technological Development. However, in the early 1990s, the EU began to articulate its ICT policies much more broadly in terms of the Information Society, adopting many of the ideas that had been developed in academia to that point.

In 1993, the then EU President Jacques Delors made a particular point of emphasising the importance of the Information Society in the EU's pursuit of future employment growth and economic prosperity (European Commission 1993). The Information Society as a policy idea proved strategically useful for the EU, particularly the European Commission and specifically its Information Society and Media Directorate. It was portrayed as a much more over-arching and comprehensive policy idea than specific 'sub-sectoral' initiatives in IT, telecommunications or the audiovisual fields. The Information Society policy area thus suggested that the EU was in the process of taking action in a new deeply important arena. The EU also developed its Information Society policy flexibly, making possible that a wide number of policy constituencies might identify with it. Thus, for example, the 1994 Bangemann Report, *Europe and the Global Information Society*, drawn up for the most part by the industrial elites of Europe's ICT companies and the Commission, viewed the Information Society from a strong technological and industrial perspective. Here, emphasis was placed on upgrading communication network infrastructure and the speedy creation of new ICT services. This would deliver social and economic prosperity, though would be primarily private sector driven and required the complete liberalisation of telecommunications infrastructures across the EU by governments to facilitate its development (European Commission 1994). The idea of the EU Information Society was not simply a cloak for propounding ICT industrial policy, however. As something of a repost, the part of the European Commission responsible for employment, economic and social affairs articulated a more cautionary approach than the thinly veiled economic determinism of the Bangemann Report. It created its owned social constituencies-informed High Level Group on the Information Society which highlighted concerns about the creation of a digital divide and asked the EU to take policy action to counteract this possibility, urging 'more effective instruments to support demand-led regional policies for those areas/regions with a development shortfall where the potential benefits of technology are unlikely to filter through' (European Commission 1997).

This milieu of opinion undoubtedly contributed to the shape which a raft of EU Information Society policies have taken since the mid-1990s, with themed versions successively known as the EU Information Society Action Plan, eEurope, i2010, and the recently launched Digital Agenda (European Commission 2010). Throughout, the European Commission has emphasised the fundamental significance of the initiatives. For example, it quite dramatically described its eEurope proposals as a "political initiative…not just about technology…[but affecting]…everyone, everywhere" (European Commission 1999: 4-5). Over a more than 15 year period, a relatively stable series of themes - albeit given fresh packaging in successive programmes – has been in evidence. For example, in 1994, the EU launched an Action Plan, containing a number of modest measures of an economic and social bent which was affirmed two years later by the Commission's proposal to focus on the four key areas of developing appropriate market and regulatory conditions; investment in research on ICT; effective targeting of

regional aid money to Information Society related issues in respect of public services; and an exploration of global ICT trade matters as they would affect Europe (European Commission 1996; European Council of Ministers 1996). Proposals for the eEurope initiative focused on providing universal access to digital services for individuals, schools and businesses; encouraging digital literacy; and promoting consumer trust, social cohesion and inclusiveness yet at the same time specified measures to create e-commerce, smart card technology and a capital market for European high technology small and medium sized enterprises (European Commission 1999).

It is interesting to note the Commission's declaration in putting forward the Information Society programme in 1996 that "the multi-faceted nature of the Information Society implies a need for greater policy co-ordination between the various Community policies and between the Community's different instruments and funding mechanisms" (p5). This goal merely served to point up the difficulty of putting together a measurably coherent policy programme in such a diffuse and unwieldy policy area. In part as a consequence, the EU chose to utilise soft governance measures to develop the 'mainstream' programmes of its Information Society policies. Academic analysis of these to date has underlined the limitations of such an endeavour. Lodge (2007) finds a lack of relationship between performance indicators and objectives, with the latter being very broad in nature. A related issue is a looseness of the Information Society subject field which tended to grow and incorporate new areas, some of which related to more traditional policy measures, and which made the task of appropriate integration of policy measures very difficult. Relatedly, Lodge is sceptical about the reporting of achievements under the Information Society banner, many of which appeared to be initiatives outside the OMC process set by the EU for the Information Society. Overall, 'standards had no directing capacity, information gathering offered only very little truly comparative information to encourage "benchmarking" or "learning with others" and voluntary adjustment pressures seemed hardly present' (Lodge 2007: 358).

SOFT GOVERNANCE AND THE EU
The EU has developed into an elaborate system of legislation-making and regulatory governance in which non-hierarchical or soft governance has come to play a prominent role. The use of soft governance intensified after the launch of the EU's Lisbon Agenda (2000) which laid the ground for the introduction of the Open Method of Coordination (OMC) in which policy goals would be pursued and developed in selected policy areas through the use of a range of measures such as guidelines, timetables, benchmarks, procedures for the definition and sharing of best practice, implementation monitoring - including so-called 'naming and shaming'-, and peer review (Lodge 2007), all underpinned by voluntarism. The EU has since its inception struggled with the problems of creating an agreeably effective system of governance and the use of soft governance can be seen as an attempt to deal with familiar, persistent problems in an innovative fashion. Throughout, a key issue has been a tension between the pursuit of EU policy through supranational means, on the one hand, and intergovernmental means, on the other. A central concern is the extent to which the use of soft governance enhances the

policy convergence capacity (Citi and Rhodes 2007) of the EU and its Member States in selected policy domains.

Historically, EU institutions and Member States have sought to achieve progress through employing the directive as a hard, hierarchical legal measure whose requirement to be transposed into national law provided, in many cases, enough scope for flexibility to achieve progress. However, inevitably, even the directive's flexibility has not been enough to remove the tendency for Member States to balk at legislative measures whose consequences they consider to be excessively supranational in nature. The corollary is that such measures have often been perceived as restricting too much the degrees of freedom for manoeuvre at the national level. Beyond that, even if agreed to, the directive's flexibility in transposition has often led to a compliance problem in the implementation phase. Associated with this, and often exacerbating it, is the possibility of weakness in precision in the drafting of directives, particularly in technical areas, such as telecommunications, which would benefit from clarification and further development through time. This might not necessarily be of the kind or extent to require wholesale re-writing of the legislation and might be achievable through policy learning characteristic of soft governance environments. The implementation problem, if widespread and persistent enough, can potentially lead to *de facto* policy failure for the EU, unless the European Commission is prepared to utilise the European Court of Justice to take so-called 'implementation laggards' to task. Such hard legal action is likely to be effective eventually, though can be time-consuming, resource-intensive and politically unpopular. If implementation non-compliance is quite widespread, it can also create a breadth of negativity likely to prove damaging to future policy initiatives with the goal of further Europeanisation at their core. Instead, the use of soft governance measures, such as benchmarking, peer review and 'naming and shaming', have been posited as possible alternative solutions.

Certain EU policy areas are often rather unwieldy in nature. This can develop to be the case in times of change and uncertainty, often underpinned by significant technological turbulence and sectoral reorganisation as has occurred across recent decades in information and communications based industries. Such situations can lead to policy opportunities for the EU in terms of becoming involved in new domains, as was the case in telecommunications and the Information Society, but also to problems of coordination as new definitions of products, services and markets emerge and new indicators of sectoral growth are sought and developed. Policy range, complexity and uncertainty can lead to a tendency, therefore, for policy-making bodies keen to develop competence in new areas, to seek out flexible, voluntary measures of the kind epitomised by soft governance, which provide the capacity for policy learning as well as policy coordination. As shown in the case of the Information Society, these can also, however, be fraught with weaknesses.

Irrespective of the potential motivations behind the use of soft governance, some of which, ironically, have been employed with the aim of curbing its influence, the European Commission tends to be a key EU institutional actor in the range of processes around the pursuit of soft governance. It has played a role as gatherer of information

crucial in exercises involving peer review and bench-marking. However, it also plays an important role in processing information and reporting on the results of its analysis. This has manifested itself at key junctures in the life of wide-ranging programmes underpinned by the Open Method of Coordination, notably the Information Society, as well as, in the case of telecommunications, through a series of annual reports on the implementation of the EU telecommunications regulatory package (see below).

The Commission's role in soft governance processes sheds light on a possible distinction between its hard, legally mandated power, on the one hand, and, on the other, power that it could develop through the scope of persuasion exercisable through soft governance. This might be achievable through the Commission's sheer presence in the resource intensive activities around making soft governance work in areas like the Information Society and telecommunications. In the latter case, this has come to involve regular and close interaction with regulatory actors, both state and independent-public, at the national level which tend to retain material power in soft governance situations. In this way, the use of soft governance by Member States may provide evidence of the changing, adaptive nature of the Commission's pursuit of influence. At key junctures in telecommunications, notably in respect of activity around the negotiation process among Member States which is based on its proposals, evidence persists of its willingness to exercise policy entrepreneurial activities of a controversial nature. Here the Commission can aim to influence decision-making towards – but also away from – the pursuit of soft governance. The Commission is also displaying evidence of strategies to cultivate its influence in phases of the policy process beyond policy formation and decision taking which are driven by soft governance. Certainly, there is at least enough to suggest its potential for more intensive activity in this respect.

An interesting development in regulatory governance at EU level has been the use of hard and soft governance measures in tandem (Citi and Rhodes 2007). This has tended to involve the creation of a piece of hard legislation, usually in the form of a directive, some of whose specific measures stipulate what might be termed 'operational soft governance'. A key example in the broad area of the Information Society was the EU's Directive on Electronic Commerce (European Parliament and Council 2000) which addressed so-called information society services whose definition encompassed any service or service related activity carried out electronically at a distance. In essence, as a piece of hard legislation, the directive laid out a series of legal provisions whose aim was to ensure that the Single European Market in e-commerce was created. However, the functioning of the specific measures of the directive was much more loosely specified and reflected many of the characteristics of soft governance. For example, in respect of information requirements to be placed on e-commerce providers, the Directive mandated minimum requirements, on the one hand, yet on the other instructed Member States merely to encourage self-regulatory bodies of e-commerce providers to develop codes of conduct regarding information to be provided to e-commerce customers. The creation of such codes of conduct was also merely encouraged in respect of the specifications of e-contracts and the liability of intermediary e-commerce service providers and the participation of consumer bodies in drawing up and reviewing the enforcement of such provisions (European Parliament and Council 2000).

Taking this kind of hybrid approach was useful to the EU for a number of reasons. First, around the time of the directive, there was considerable uncertainty about the evolution of the e-commerce within the information society. The EU wished to ensure that it did not put in place any regulatory conditions that might hamper European firms in the evolving global marketplace of the Internet. Second, because of the rapidly evolving nature of Internet technology, the EU was keen to ensure that it did not put in place measures which would have to be reversed in the short-to-medium term as a result of new technology-based services for which existing arrangements might prove something of a regulatory straightjacket. As a corollary, and thirdly, taking such an approach ensured that the policy framework for the regulation of commercial activities conducted through the Internet would be seen as distinct from other better established areas of electronic communications regulation, notably telecommunications but also broadcasting. Historically, these areas had, at key moments highlighted the difficulty of creating effective Europeanisation of policy. Because of the convergent nature of the Internet and Information and Communications Technologies, it was certainly possible to view the development of e-commerce through a telecommunications - and to a lesser extent an audiovisual - policy lens, something which the EU studiously avoided doing. The Directive on E-Commerce provided a strong indicator that the EU wished to regulate the Internet, and Internet commerce in particular, in as light touch a fashion, as possible, something which was in step with broader regulatory thinking at the global institutional level (Christou and Simpson 2007).

TELECOMMUNICATIONS, THE EU AND SOFT GOVERNANCE –
TRANSPOSITION AND IMPLEMENTATION
The creation of a regulatory framework for telecommunications at EU level pre-dates the development of the Information Society agenda, having its roots in a number of market liberalising and harmonising directives of the late 1980s-early 1990s. Around the time that the EU was beginning to articulate a policy stance on the Information Society, it was also pursuing vigorously an agreement among Member States on the liberalisation of telecommunications services. The telecommunications liberalisation project became linked politically to the pursuit of the Information Society through the Bangemann Report which urged Member States to put in place measures to liberalise telecommunications infrastructures across the EU in complement to the agreement which they had reached in 1993 on comprehensive telecommunications services liberalisation (European Council of Ministers 1993. Whilst this duly transpired in 1994 (European Council of Ministers 1994), it is unlikely that the launch of the EU's Information Society agenda was the key factor in the agreement made by Member States.

Since the point of these landmark agreements which pledged Member States to take the necessary measures to liberalise and harmonise their telecommunications markets, a battery of hard legislation has been developed, mostly in the form of directives, with the purpose of the creating a Single European Market in telecommunications. The telecommunications regulatory package has been developed and refined through the last 20 years and now takes the form of the Electronic Communications Regulatory

Framework (ECRF), the latest legislative revisions to which should take effect in Member States through 2011.

A notable feature of the development of EU telecommunications policy has been the consistently problematic transposition and implementation of agreed hard legislation. Whilst, not unusual per se, telecommunications is noteworthy for the way in which the EU, through the activities of the European Commission, has employed soft governance measures as a means of trying to ensure more effective transposition and implementation. This has two important implications. First, it underscores the problematic nature of the use of hard legislation in the effective creation of policy convergence among EU Member States. Whilst hard legislation can secure agreement to take action, it does not by any means guarantee that the necessary action will occur. Second, the use of soft governance measures by the EU in this aspect of telecommunications policy is also indicative of the Commission's search for a complementary and/or alternative means to taking Member States to the European Court of Justice to secure compliance. Here, there is strong evidence that the EU has employed soft governance measures in conjunction with the hard governance mechanism entailed in the functioning of the European Court of Justice.

It is interesting to note that the EU's use of soft governance in the transposition and implementation aspects of telecommunications has its origins in the late 1990s, thereby commencing before the 2000 Lisbon Agreement and the adoption of the OMC in Information Society policy. Here, strong evidence of the use of soft governance is to be found in a series of 15 implementation reports published since 1997. The European Commission has developed into the key institutional player in respect of using soft governance measures in this aspect of telecommunications policy. From the outset, it 'pulled no punches' in citing concerns about Member States' failure to transpose legislation notably in France, Belgium, Greece, Ireland and Portugal (Humphreys and Simpson 2005: 69-71). In tandem with this 'naming and shaming tactic', the Commission has also shown itself willing to pursue hard legal measures through launching infringement proceedings against Member States, such as Spain in 1997 for its failure at the time to open up telecommunications infrastructures to competition. Such a set of tactics continued after the modification of the 1998 telecommunications regulatory package to create the ECRF, with Belgium, Germany, Greece, France, Luxembourg and the Netherlands having been subject to infringement proceedings in respect of ineffective transposition of legislation.

Throughout the last decade, the Commission has regularly and continuously highlighted failures of Member States to transpose and implement legislation, a particular focus being the accession states from central Europe. This process has often involved it being highly critical of National Regulatory Authorities, which in telecommunications have tended to play a key role in ensuring effective regulation commensurate with the specifications of legislation in place at the national level. Here, in 2008, for example, the Commission was notably critical about the time taken to resolve regulatory disputes, highlighting Belgium, Portugal and Italy as problematic cases (Simpson 2010).

In its latest report, the Commission continued to comment critically on progress in Member States, highlighting general areas of deficiency and 'name and shaming' underperforming Member States. It also linked persistent non-compliance of certain Member States with its taking of legal proceedings against them. In general terms, the Commission reported quite forthrightly that 'consumers and businesses are still faced with 27 different markets and are thus not able to take advantage of the economic potential of a single market'. Specifically highlighted problems were instances of (lack of) independence and ineffectiveness in National Regulatory Authorities, differences in wholesale and retail prices for services and 'the failure to apply remedies in a consistent, timely, transparent and predictable manner'. NRAs were also criticised for an inability to respond effectively to new developments in communications technologies and markets (European Commission 2010: 1). The Commission openly criticised Latvia, Lithuania and Romania noting that legal proceedings had been taken in respect of the structural separation of regulatory and operator ownership and control functions in their territories. Belgium and Luxembourg were criticised for producing 'limited results' in respect of carrying out regulatory reviews and putting in place regulatory remedies to address 'key bottlenecks' (European Commission 2010: 6). Italy, Germany, Belgium and Luxembourg were criticised for not acting quickly enough in respect of providing reference offers in the broadband market (specifically in broadband lines provision), thus potentially retarding the development of competition. In respect of universal service obligations, the Commission highlighted the existence of infringement proceedings for unsatisfactory implementation against Belgium, Portugal and Spain and noted its ongoing scrutiny of the Danish universal funding mechanism (European Commission 2010).

 A key advantage of using soft governance to ensure effective compliance is its use of persuasion to effect voluntary compliance with legally mandated requirements. However, despite the extensive use of soft governance mechanisms with this purpose in mind, the EU has not been able to secure the necessary degree of implementation without recourse to the European Court of Justice. This provides a strong indication of the limitations of soft governance. However, the quite extensive exercises entailed in soft governance processes do have potential advantages when used in conjunction with the formal mechanism of the ECJ. First, information gathering and processing has proved useful for the European Commission in gaining a picture of the extent of implementation and thus in putting together its case. Second, the exercises require relatively close liaison and relationship cultivation with the range of National Regulatory Authorities in telecommunications, though the evidence above points also to strong potential for a fractious relationship to develop here. Counterbalancing these considerations, however, is the concern that in using the soft governance mechanisms as it has done in respect of the transposition and implementation phase of the telecommunications regulatory framework, the Commission must tread a careful line between promoting the development of the framework as a success on the whole and, by contrast, highlighting its persistent deficiencies.

The above consideration aside, it was nevertheless clear that, at the commencement of the most recent review of telecommunications launched in 2006, the Commission considered there to be a lot more progress to be made in order to create a harmonised set of

telecommunications markets across Member States. In particular, it complained about the unacceptable and persistent lack of regulatory consistency across the EU's national telecommunications markets. This led to a series of proposals for revisions to the ECRF, several of which were particularly contentious. Among these, arguably the most controversial related to regulatory remedies, to which the paper now turns, since this matter provides an example of a set of circumstances in which the EU deployed soft governance measures in the process of policy decision taking.

EU TELECOMMUNICATIONS AND SOFT GOVERNANCE AS A TOOL FOR POLITICAL DECISION-TAKING

The issue of creating an appropriate system for regulatory remedies sits at the heart of the pursuit of a harmonised set of telecommunications markets across the EU. Whilst a framework of hard legislation allowed the EU to put in place the parameters of a Europeanised system of telecommunications governance, it is important to note that this arrangement was far from completely supranational. Instead, EU telecommunications involves a balance between power exercisable at both the EU institutional and national levels (Thatcher 2001). In day to day operational terms, as might be expected, considerably more responsibility for the effective functioning of telecommunications markets resides nationally. Here, the decisions taken by National Regulatory Authorities are crucial and have proven particularly problematic for the European Commission in its ongoing analysis of the functioning of the regulatory framework after the implementation of necessary legislation. As a result, the Commission has for at least a decade aimed to secure what it considers to be a minimum necessary shift of power from the national to the European level to ameliorate the identified problems. This has more often than not implied an increase in its own hard legal responsibilities and power, something which has generated considerable controversy and resistance throughout.

In the review process that led to the creation of the ECRF in 2002, the Commission proposed - and perhaps unexpectedly was able to secure for itself - hard veto power over decisions taken by NRAs in the two key areas of telecommunications market definition and the designation of the existence of Significant Market Power in specified telecommunications markets (European Parliament and Council 2002). These two matters were vitally important in the evolution of liberalised competitive telecommunications across the EU. As telecommunications moved from former monopoly state ownership to competition-based markets, it was considered important to make a clear differentiation for competition purposes between a range of activities involved in the provision of telecommunications services. Equally, the historically dominant position of the former state owned telecommunications incumbents meant that measures were necessary to highlight the persistence of market share domination by these concerns in new markets characterised by regulated competition. However, designation of markets and determination of the existence or otherwise of unacceptable market power were only part of the task of creating harmonised, effectively functioning telecommunications markets across the EU in the eyes of the Commission.

Already clearly established as its preferred strategy in terms of developing necessary market modifying measures, in the 2006 review of the ECRF the Commission proposed further extension of its veto powers, under the so-called 'Article 7 procedure' of the 2002 Framework directive to the field of regulatory remedies proposed by Member State NRAs. In justifying its call, the Commission expressed strong criticism about what it saw as a series of differing decisions having being taken regularly by NRAs in similar situations, as well as regulatory remedies which were of poor quality in terms of their precision, detail and timeliness (European Commission 2006). This had proven to be the case in spite of the existence, since 2002, of the European Regulators Group (now known as the Body of European Regulators in Electronic Communications) composed of EU NRAs which met as an epistemic gathering to exchange best regulatory practice in very much a soft governance scenario. In discussing potential ways forward in respect of the persistence of the operational regulatory problems it highlighted, the Commission noted that developing some kind of soft governance framework to deal with regulatory remedies involving 'voluntary coordination without a transfer of power to a central authority' (European Commission 2007: 77), though possible, would be far from optimal.

As the debate on creating a regulatory remedies procedure as part of the revision to the ECRF continued apace through 2007-08, it became clear that there was particularly strong opposition to extending the Commission's veto rights from NRAs, which would have witnessed a direct diminution of their regulatory power as a consequence. Opposition was also expressed among certain MEPs, as well as national Member States, notably Germany, which had at the time been embroiled in a dispute with the Commission over a proposal to give Deutsche Telekom a 'regulatory holiday' in return for network upgrade investments (see Mallinder 2006; EurActiv.com: 14.11.07). By contrast, there was some support for the Commission's proposal from newer telecommunications service providers (Humphreys 2008).

The denouement of the negotiations on regulatory remedies provides an important example of the use by Member States and the European Parliament of soft governance measures to attempt to resolve a difference of opinion with the Commission. Here, the latter was given a greater say in the process of regulatory remedies, though no substantive increase in its hard power in the form of the veto it had asked for. Nevertheless, given the lack of any real support for a Commission veto on remedies from Member States and the European Parliament - which could have resulted in no further action on remedies at all - the outcome of the negotiations cannot simply be explained as a straightforward rejection of the Commission's proposals. Rather, the precise specifications of the new remedies procedure can be viewed as an indication of the perceived importance of the Commission as a regulatory actor in European telecommunications. They also provide evidence of the willingness of Member States to invest faith in soft governance processes as a way of ameliorating a widely recognised problem in the face of reluctance to transfer further hard regulatory power to the Commission. Here, the new procedure written into a revised (hard legal) Framework directive effectively allows the Commission merely to express its disagreement with a proposed NRA regulatory remedy, resulting in a short period of deliberation between the Commission, the NRA in question and BEREC which replaced the ERG as part of the modifications to the ECRF. If no agreement can be reached, the

new procedure gives the Commission the opportunity to issue a Recommendation specifying its requirements in the matter for the NRA, though ultimately adoption of these is voluntary (European Parliament and Council 2009).

CONCLUSION

The evidence in this paper on the specific uses of soft governance in EU telecommunications points strongly to its limited potential to contribute to the realisation of the policy goals of the Information Society, more broadly. Whilst EU Information Society policy is a broad umbrella-like policy field employing the soft governance Open Method of Coordination, telecommunications is for the most part more 'traditional', in the main delivered through a battery hard legislation with compulsory stipulations of a harmonising and liberalising bent. However, as the hard policy framework for telecommunications was put in place, so too emerged evidence of the limitations of these negative integration measures, in terms of transposition and implementation. Here, the European Commission has put in place a broad and resource burdensome system in which hard and soft governance are used in order to secure the effective implementation of the telecommunications regulatory package agreed to by Member States. Making a precise judgement on the success of soft governance in this context is difficult. On the one hand, there is little doubt that the process of implementation has proceeded smoothly for the most part: this is to be expected for legislation which has negotiated the often tricky and protracted EU decision making process. The information gathering and performance monitoring and reporting activities of the European Commission are undoubtedly useful to the latter as it seeks to influence the course of telecommunications policy development. It also links the Commission more closely with NRAs. However, evidence suggests that the sometimes controversial nature of this process has led to a strong desire among NRAs to ensure where possible that the Commission's power is not strengthened. Further, it is unlikely to be the case that the soft governance measures put in place by the Commission would be successful without the hard legal recourse to the European Court of Justice for non-compliance. Equally, the ongoing struggle between the European Commission and Member States over implementation is indicative of the fact that both the soft and hard governance measures around the processes of implementation are problematic.

Rather differently, the use of soft governance in EU telecommunications in the recent consideration of regulatory remedies provides evidence of soft governance as something of a 'second best' tool of political compromise. As noted above, the agreement of what is a convoluted modified remedies procedure is interesting in that it illustrates succinctly how important an actor the European Commission has become in telecommunications, yet at the same time the continued strong reticence from Member states to see any extension of hard veto power to the Commission. Certainly, giving the Commission a greater say in the remedies procedure through a potential increase in its soft governance influence is regarded as 'second best' from the Commission's own perspective, though a decision which, like many in the history of telecommunications, it has had to go along with. In telecommunications, Member States proved more willing to give the Commission hard veto power in respect of the more low volume, quantifiably calculable

matters of market definition and Significant Market Power. The work on remedies is likely to be higher volume, arguably more contentious and something where national variety is likely to be a key factor, all of which mitigated against the Commission's chances of securing hard veto power over it. The Commission has continued to complain post the agreement, based on evidence gathered from, among others, the UK, Sweden, Greece, Poland and Portugal, that the time and resource requirements attached to regulatory appeals are having a detrimental effect on the workload of regulators. It was openly critical of the performance of Germany, Belgium and Luxembourg noting that 'lack of clarity in remedies further delays their take up and also tends to provoke disputes which further consume regulators' resources' (European Commission 2010: 6). An interesting future line of research will be the ways in which the Commission chooses to cultivate the potential for soft power in the new procedure. The latter gives it scope for increasing the loudness of its complaints, though the extent to which this will constitute anything other than noise over substance remains to be seen (Simpson 2011).

However, the Commission has also given an indication that its well-developed powers of interpreting legislation in its favour politically may become manifest if the soft governance arrangements of the new remedies procedure are seen to be ineffective. Here, it appears to have interpreted Article 19 of the revised Framework directive as leaving open the possibility for it in the future to take direct action to eradicate instances of long term regulatory divergence at the national level, something which the outgoing Commissioner for Information Society and Media, Viviane Reding, has signalled its intention to use. However, to avoid this kind of controversy and potential acrimony between the EU and national level in the future, the soft governance arrangements in the remedies procedure need to address the inevitably high demands on those that will implement them. They should not, therefore, be considered as a second best or fallback option when hard governance measures prove inadequate or are impossible to agree at EU level, as seems to have been the case. This is particularly important in respect of the kind of behaviour modification goals which underpin the EU's adoption of soft governance in the remedies procedure which to be achieved are likely to require a strong degree of interaction intensity (Lodge 2007) of a positive kind between the Commission and NRAs. There is evidence that this relationship has been problematic to date, however. Overall, the case of the limited use of soft governance in telecommunications highlighted in this paper does not suggest that it is a strong or effective route to the realisation of the Information Society throughout the EU.

REFERENCES

Castells Manuel (1996) *The Rise of the Network Society*, Oxford: OUP

Cawood, John and Seamus Simpson, (2000) "Building the Information Society from the Bottom-Up? EU Public Policy and Community Informatics Initiatives in North West England" in Michael Gurstein (ed.) *Community Informatics*, London: Idea Group Publishing, pp151-172.

Humphreys, Peter and Seamus Simpson (2005) *Globalisation, Convergence and European Telecommunications Regulation*, Cheltenham: Edward Elgar.

Citi, Manuele and Martin Rhodes (2007) 'New Modes of Regulatory Governance in the European Union: A Critical Survey and Analysis', in Knud-Erik Jorgensen, Mark Pollack and Ben Rosamond (eds) *Handbook of European Politics*, London: Sage, 463-82.

EurActiv.com (2007) 'EU States to Reject Brussels Telecoms Review', 17 November, available at: http://euractiv.com/en/infosociety/eu-states-reject-brussels-telecoms-review/article-177250

European Commission (1993) 'Growth, Competitiveness, Employment: the Challenges and Ways Forward into the 21st Century', Brussels: Com(93)700, December.

European Commission (1994), 'Europe's Way to the Information Society: An Action Plan'. Luxembourg: European Commission', Com(94) 347, 19 July.

European Commission (1996) Proposal for a Council of Ministers Decision Adopting a Mulliannual Programme to Stimulate the Establishment of the Information Society in Europe, Brussels, Com(96) 592.

European Commission (1997) "Information Society. Final Report of the High Level Group of Experts - Press Release". Available at http://www.ispo.cec.be/hleg/buildpress.html.

European Commission (1999) "eEurope - an Information Society for us all. Communication on a Commission initiative for the special European Council of Lisbon, 23-24th March 2000", Brussels: Com(99)687, pp4-5.

European Commission (2006) 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for Electronic Communications Networks and Services, SEC(2006)816, Com(2006)334final, 29 June.
European Commission (2010a) 'Digital Agenda: Commission Outlines Action Plan to Boost Europe's Prosperity and Well-Being', IP/10/581, 19 May, Brussels.

European Commission (2010b) 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Progress Report on the Single European Electronic Communications Market (2009 15th Report), SEC(2010)630, Com(2010)253, 25 August.

European Council of Ministers (1996) 'Council Resolution of 21st November 19996 on new Policy Priorities Regarding the Information Society', Brussels, OJ NO C 376, 12.12.96.

European Council of Ministers (1993) 'Council Resolution of 22nd July 1993 on the Review of the Situation in the Telecommunications Sector and the Need for Further Development in that Market', Luxembourg: 93/C213/01, 06.08.1993.

European Council of Ministers (1994), 'Council Resolution of 22nd December 1994 on the Principles and Timetable for the Liberalisation of Telecommunications Infrastructures', Luxembourg: Office of Official Publications of the EC, OJ No C 379, 31.12.94.

European Parliament and Council (2000), 'Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce)', OJ L178/1, 17.7.2000.

European Parliament and Council (2002), 'Directive of the European Parliament and Council on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive)', Brussels, PE-CONS 3672/01, 4 February.

European Parliament and Council (2009) 'Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 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', OJL 337, Vol 52, 18 December.

Harcourt, Alison (2008) 'Institutionalising Soft Governance in the European Information Society' in David Ward (ed.) *The European Union and the Culture Industries – Regulation and the Public Interest*, Aldershot: Ashgate, pp7-31.

Hodson, D. and I. Maher (2001) 'The Open Method as a New Mode of Governance. The Case of Soft Economic Policy Coordination', *Journal of Common Market Studies*, 39:4, 719-46.

Humphreys, Peter (2008) 'The Problem of Inconsistent Regulatory Implementation and the Review of European Union Regulatory Policy', Proceedings of the 17th Biennial Conference of the International Telecommunications Society, Montreal, June 24-27.

Humphreys, Peter and Seamus Simpson (2005) *Globalisation, Convergence and European Telecommunications Regulation*, Cheltenham: Edward Elgar.

Lodge, Martin (2007) 'Comparing Non-Hierarchical Governance in Action: the Open Method of Co-ordination in Pensions and Information Society', *Journal of Common Market Studies*, 45:2, 343-65.

Masuda Yoneji (1983) *The Information Society as Post Industrial Society*, Oxford: OUP.

Mallinder, Lorraine (2006) 'European Commission Mulls Telecoms Veto', *European Voice*, 6 June.

May Christopher (2002) *The Information Society – A Sceptical View*, Luton: Polity Press.

Schiller Dan (2007) *How to Think About Information*, Illinois: University of Illinois Press.

Simpson, Seamus (2010) 'Governing Information Infrastructures and Services: States, Markets and the Public Interest in Telecommunications' *Aslib Proceedings*, 62(1), 46-56.

Simpson Seamus (2011) '"New" Governance in European Union Policy-Making – Policy Innovation or Political Compromise in European Telecommunications, *West European Politics*, forthcoming.

Thatcher, Mark (2001) 'The Commission and national governments as partners: EC regulatory expansion in telecommunications 1979-2000', *Journal of European Public Policy*, 8 (4), 558-84.

Toffler Alvin (1980) *The Third Wave*, New York: Bantam Books.

Touraine Alain (1974) *The Post Industrial Society*, London: Willwood House.