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New Governance as Political Compromise in European
Telecommunications: the Amended European Union Electronic
Communications Regulatory Framework

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DRAFT

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ABSTRACT

This paper explores the regulatory character of key parts of the latest incarnation of the EU telecommunications regulatory package, finalised at the end of 2009. Its core argument is that whilst the broad parameters of the modified Electronic Communications Regulatory Framework are couched in traditional 'hard' legal measures of the EU system, in the shape of Directives and a Regulation, in practice the EU's influence in the regulation of telecommunications across its Members' territories is likely to be much looser and bears many hallmarks of 'softer' or so-called 'new' governance. Here voluntarism, opinion-giving, advice taking and the pursuit of best practice are key features of the institutional and operational features of the revised regulatory system. The paper illustrates this argument through an analysis of institution and process: the new Body of European Regulators for Electronic Communications (BEREC), on the one hand, and the agreement reached in the new package on regulatory remedies, on the other. It argues that both BEREC and the new regulatory remedies process reflect European political compromises, due to the still inter-national character of European telecommunications, as much as the desire to promote flexibility and responsiveness in regulatory decision making.

INTRODUCTION

Since approximately the mid 1980s, the European Union (EU) has pursued the development of a policy framework for telecommunications. This has resulted, *inter alia*, in a European level regulatory framework periodically and successively modified in the pursuit of competition within and across the telecommunications markets of Member States. After a lengthy period of review and negotiation, the latest modification of what is now known as the European Electronic Communications Regulatory Framework (ECRF) was ratified by the EU on 18 December 2009 with a required implementation date of June 2011.

This paper explores the regulatory character of this latest incarnation of the EU telecommunications regulatory package. Its core argument is that whilst the broad parameters of the modified ECRF are couched in traditional 'hard' legal measures of the EU system in the shape of Directives and a Regulation, in practice the EU's operational influence in the regulation of telecommunications across its Members' territories is likely to be much looser and bears many hallmarks of 'softer' or so-called 'new' governance. Here voluntarism, opinion-giving, advice taking and the pursuit of best practice are key features of the institutional and operational context of the revised regulatory system. The paper illustrates this argument through an analysis of institution and process: the new Body of European Regulators for Electronic Communications (BEREC), on the one hand, and the agreement reached in the new package on regulatory remedies, on the other. It argues that both BEREC and the new regulatory remedies process reflect European political compromises, due to the still inter-national character of European telecommunications, as much as the desire to promote flexibility and responsiveness in regulatory decision-making. The latest phase in the development of telecommunications at the EU level, as much as any other, reflects the problem of deciding how much, and what kind of, power in regulatory decision making in telecommunications should take place at the European, rather than the national level.

The paper argues that compromise political outcomes of the kind illustrated in the cases of BEREC and regulatory remedies risk inefficacy through reliance on a level of

transparency, classic of soft or new governance, which has as yet been undelivered in EU telecommunications policy implementation. This risk has been heightened as a result of the European Commission's relative lack of success in securing the degree of supranational control proposed, in both the cases of BEREC and regulatory remedies, at the outset of the process of modification of the EU's regulatory framework in 2006. The paper proceeds as follows. The next section undertakes a brief review of the main features of the recent evolving landscape of regulatory governance in the EU, placing particular focus on the emergence of post corporate state and, beyond that, 'new' kinds of governance forms and associated practices. A key concluding argument of this section is that, in its attempt to solve perceived problems of governance, the EU has shown a willingness to draw together hard and soft forms of governance. Thereafter, the paper turns its attention to an illustration of this feature of EU governance in recent developments in the telecommunications sector. A brief characterisation of the nature of the development of the EU telecommunications policy package is provided. The paper then turns its attention to the case studies of BEREC and regulatory remedies to illustrate how, both in respect of institution and process, more flexible, looser forms of regulatory governance are likely to play a key role in the revised ECRF, some of which represents a continuation of past practices, rather than the more radical changes called for by the European Commission at the start of the review. These sections of the paper highlight how this outcome was driven significantly by the need to compromise in order to ensure progress in policy development. The risks inherent in such an approach are highlighted alongside its advantages. The final section of the paper draws some brief conclusions on the significance of the case for an understanding of regulatory governance in the EU as well as the development of telecommunications regulation.

REGULATORY GOVERNANCE IN THE EU

Paradigmatic changes in the European and global political economy within the last 25 years have made the topic of regulatory governance of prime importance for policy-makers at national and international levels. The well documented decline of the corporate state and the growth of marketisation (that is market values and practices) in a range of sectors where the state was formally both owner and manufacturer/service provider

generated the problem of managing, beyond the parameters of competition law, the functioning and development of key parts of the economy. The solution spawned a raft of independent public regulatory authorities (Heritier 2002), initially at the national level (Thatcher 2002). However, the liberalisation of formerly uncompetitive sectors that the decision to marketise involved was also expressed in the language of international economic integration or, taken to its ultimate conclusion, globalisation (Dicken 2003). Thus, states faced often simultaneous, inter-related challenges of developing from former government responsibility and action, independent governance forms and functions to address the perceived challenges of an era of increasing market based competition, domestically and internationally. Governance has thus become a multi-faceted and complex phenomenon. A key feature is the degree of hierarchy present in any governance system, reflecting the extent of state, juridical, or more broadly, public authority therein.

Increasingly, sectors of the economy formerly under state control have had their evolution determined and managed by public appointees constituted in regulatory bodies at national, and occasionally, European level. As this process has developed within the wider marketisation project embarked upon by European governments, it has been inevitable that private actors have begun to play increasingly significant roles in governance. However, the process has not necessarily given the latter a prime role, let alone a determinative one, in governance. Paradoxically, whilst private actors are encouraged to engage in the governance process, particularly at the EU level through consultation and lobbying, the key role of public authorities as market shapers and managers has prevented this possible prominent role from occurring. Through time, such sector specific regulation has shown some signs of giving way to market governance through the parameters of the legal system, in this case through competition law.

Less hierarchically, systems of regulatory governance have developed in which public and private actors work together (Kohler-Koch and Rittberger 2006). Here, it is important to make a distinction between private actors as regulators solely, on the one hand, and as both regulators and regulatees, on the other. In the former case, it is possible for the state to appoint a private regulatory body to oversee the functioning of a particular (sub)

sector. Though rare, there is some evidence of this in the electronic network communications sector in Internet governance, albeit with strong hierarchical public policy supervision (Christou and Simpson 2008). In the latter case, a system of private interest self-regulation exists, which could be state or juridically sanctioned and shadowed, such as in certain aspects of press regulation, or constructed through the motivation of market participants (see Verhulst and Price 2005). A recent example of the latter was the early governance of the UK's Internet country code top level domain (see Christou and Simpson 2009).

This spectrum of governance forms since the decline of the corporate state in Europe has, commensurately, generated a series of practices determined by the degree of hierarchy present in the system of regulatory governance in question. Early manifestations in sectors into which independent public regulation was introduced tended to place national (and occasionally international) regulatory authorities as central. The latter interpret a regulatory remit from legislation and develop regulatory practices around key functions such as market monitoring, and, where necessary, behaviour modification through sanctions and development of existing regulatory parameters and commensurate rules. However, less rigid practices of regulatory governance have more recently also emerged, originally associated with less hierarchical systems in which at least some degree of private actor influence and authority is evident. Here, 'softer' regulatory action associated with generating shared understanding of what are appropriate behaviours is relevant. Thus, the production of statements of desirable performance standards and reference performance benchmarks are characteristic. Important too, is the generation of professional opinions and advice aimed at modifying future behaviour. Such systems and their associated practices with the intention to operate flexibly and promote openness, discursiveness, shared understandings and, ultimately, common purpose, have recently emerged under the term 'new' governance (Eberlein and Kerwer 2004). Operating effectively, advocates argue, that these practices can increase the innovativeness and efficacy, as well as promoting the democratisation, of regulatory governance systems.

For European states, particularly since the mid-1980s, the EU has been utilised as a partial means of developing and implementing regulatory governance in chosen sectoral markets. This also provided an at the time much needed shot in the arm to European integration efforts and resulted in claims of the birth of the European ‘regulatory’ state (Majone 1996) to complement, in theory at least, the ‘regulatory’ state at the national level (Seidman and Gilmour 1986). Thus, the development of regulatory governance of various kinds and the pursuit of European integration at EU level through the last two and half decades have become intertwined, though not always harmoniously. In particular, policy actions taken by the EU in a raft of areas covered by the pursuit of the Single European Market initiative (European Commission 1985), not least in telecommunications, have often been exemplars of the ideas and practices of international regulatory capitalism (Levi-Faur, Jordana and Gilardi 2005), on the one hand, and, on the other, the ongoing, increasingly multi-dimensional, struggle between supranational and intergovernmental based European integration. The tension between the two forces, as candidly illustrated in telecommunications, is often played out in the context of the practical necessity of having to conduct at the European level some form of regulatory governance activity which may have a direct bearing on national regulatory conditions and practices. Thus, unsurprisingly, recent work by Borzel (2010: 192) has found ‘a combination of different forms of governance that cover the entire range between market and hierarchy’.

An interesting feature of the development of regulatory governance in Europe, particularly at the EU level, is some recent evidence of complexity in systems beyond the ‘straightforward’ characterisations of regulatory governance and practices described above. Thus, for example, in telecommunications there is some evidence of the development of international regulatory networks, promoted by supranational actors such as the European Commission, aimed at addressing perceived shortfalls in the supranational policy apparatus at EU level to deliver designated objectives in policy areas. A key question concerns the extent to which these are, or would become, in the eyes of those who designed them and those who participate in them, transnational in nature. The existence of variety across the spectrum of regulatory governance at EU level

raises the interesting possibility for innovativeness to occur within its various sectors of practice. It is certainly possible to explore potential complementarities of some of the more hierarchical forms and, by contrast, some of the more flexible practices of regulatory governance. Such experimentalism may possess the potential to enhance the quality and efficiency of regulatory governance. This paper shows how the latest revision of the EU telecommunications framework provides examples of such intra-sectoral variety. Here, the EU has sought to employ softer governance practices, from within the ‘new’ governance policy toolkit, in tandem with better established, more hierarchical, elements of regulatory state governance such as EU Regulations, Directives and Decisions. The existence of this kind of policy innovation, which has been utilised in telecommunications since the early part of the last decade, raises the interesting issues of the motivations behind such policy activity, the extent to which it has been the subject of political contestation and is thus controversial, as well as its chances of success. After a brief characterisation of the development of EU telecommunications policy to the point of commencement of the 2006 review, it is to these issues that the remainder of this paper addresses itself.

TENSIONS IN THE CHARACTER OF EU TELECOMMUNICATIONS GOVERNANCE

Since approximately the mid-1980s, the EU has developed a policy package and attendant regulatory framework for the governance of telecommunications. This system has been framed by hierarchical legislation at the EU level, mostly in the form of market liberalising and harmonising directives (Michalis 2007). Telecommunications markets across the EU are now ordered according to competitive norms and practices, though an elaborate and costly system of ex-ante regulation is required to create and manage competition, implemented nationally by a series of telecommunications National Regulatory Authorities (NRAs) (Goodman 2006), notwithstanding the EU’s policy aspiration to see telecommunications governed exclusively by EU competition law. Overall, public legislative and regulatory actors have predominated, a key ongoing feature of which has been the balance of power between the national and EU level and

regular attempts to alter this, made, in particular, by the European Commission and often resisted by Member States. Telecommunications policy development at EU level has thus often been the subject of contestation between supranational and intergovernmental interests (Simpson 2009), both of which are present in the system though the former are significantly outweighed by the latter. This is often manifest at key points of policy review in EU telecommunications, the most important of which have been launched in 1992, 1999 and, most recently, 2006. A notable feature of these reviews has been the expression of frustration by the European Commission at perceived underperformance in the day to day regulation of telecommunications and proposals to rectify this¹. In the latter two policy reviews, part of the Commission's solution has been proposals to strengthen regulatory authority at EU level through enhancement of its own power in tandem with the creation of new European level regulatory-institutional resources. The broad aim here has been to create a new European level regulatory axis to ensure consistent and effective implementation of the EU's regulatory framework which would involve enhancement of EU hierarchical governance-based decision-making. Such efforts have been resisted, though not completely, by Member States. An interesting consequence of the political debate has been compromise solutions which aim to address the problems of regulation highlighted by the Commission through soft regulatory measures.

The remainder of the paper exemplifies this through an analysis of two aspects of the most recent period in the review and revision of the EU telecommunications regulatory package: the creation of the Body of European Regulators in Electronic Communications (BEREC) and EU policy for regulatory remedies. The review of what, since 2002, has been known as the Electronic Communications Regulatory Framework (ECRF) began in late 2005 with a call for input from interested parties. Subsequent to this, in June 2006, the Commission released a communication document on the review summarising its proposals (European Commission 2006a) as well as a Staff Working Document (European Commission 2006b) and an Impact Assessment document (European Commission 2006c) providing greater detail on the relevant issues and its proposals. From this, a second consultative phase was launched which culminated in a report on the

consultation and revised proposals in 2007 (European Commission 2007). After a protracted period of consideration by the European Parliament and European Council of Ministers a revised framework was eventually agreed in November 2009, which should become operational by mid 2011. The latest review has been one of the most controversial and fractious periods in the history of EU telecommunications policy.

THE BODY OF EUROPEAN REGULATORS IN ELECTRONIC COMMUNICATIONS

The June 2006 documentation produced by the European Commission launching its ECRF review did not contain any proposals to create a new European level regulatory body. The idea itself was by that stage not a new one, having been proposed three times during the 1990s. It was, however, an unpopular one with EU Member States, having been firmly rejected on each occasion. On the last of these occasions, an initial proposal by the European Commission stemming from the 1999 Review of Electronic Communications (European Commission 1999) would have established a High Level Communications Group to take regulatory decisions, composed of NRAs and the European Commission, the latter with a voting right (Michalis 2004). Interestingly, whilst rejected, a compromise outcome was the creation of the European Regulators Group (ERG) in 2002. The ERG was composed of EU NRAs and chaired by the Commission in a non-voting capacity. Rather than being the kind of supranational decision-making body with hierarchical decision making power the Commission wished, the ERG was 'intergovernmental' in nature and operated according to the parameters of soft or 'new' governance. It was in essence an advisory-only body to the Commission. The intention was that NRAs would convene to share regulatory experiences and develop best practice standards and benchmarks, reaching agreement through the pursuit of consensus. However, the ERG did not exhibit the openness often associated, in theory at least, with soft governance bodies (Sutherland 2008).

As the implementation of the ECRF proceeded, the European Commission too became increasingly dissatisfied with certain aspects of the ERG. However, that it eventually

proposed, in November 2007, as part of its post-consultation proposals to Member States, a draft Regulation to create a new regulatory body, initially to be called the European Electronic Communications Market Authority (EECMA), appears to have been driven by two additional reasons. First, the Commission at the time was involved in a dispute with the German government over proposed legislation to grant Deutsche Telekom a regulatory holiday in return for investment in high speed broadband, or so-called next generation, infrastructure. Second and as significant, however, was the personal wish of the then Information Society and Media Commissioner, Viviane Reding, to see the establishment of a new, supranational regulatory body, on the agenda for Member States to consider (Sutherland 2008).

In its draft Regulation proposing the new body, the Commission highlighted persistent differences in regulatory practice across the EU which was allowing unfair competition in telecommunications markets to be maintained. The proposal for EECMA directly challenged the soft governance modus operandi of the ERG for its delivery of only 'loose coordination among regulators' which resulted in 'lowest common denominator' (European Commission 2007: 9) regulatory solutions. There are two core aspects to the proposal of EECMA by the Commission which provide strong suggestions of a desired move away from the kind of compromise loose or soft governance which the Commission appeared to be suggesting was ineffective in delivering the goals of EU telecommunications policy. First, EECMA would be an independent body established within the EU institutional framework. It would thus become 'a Community body subject to the same rules of administration and budget that apply to all Community bodies' (European Commission 2007b: 6). EECMA was to have a Board of Regulators comprised of the Heads of the EU's telecommunications NRAs, which, very importantly, would take decisions on the basis of simple majority voting. It was also to have a very strong supranational dimension. EECMA's Administrative Board, which would oversee the Board of Regulators, was to have half of its members appointed by the Council of Ministers and half by the European Commission, thus giving the latter strong influence in the future evolution of not only the Board, but, indirectly, EECMA as a whole.

Second, whilst EECMA would be an advisory body - except in respect of decisions taken on telecommunications markets with a trans-European character – its intended relationship with the Commission would give it, de facto, decision making power over Member States in key areas. Here, the advice received by the Commission would be used by the latter to inform decisions in respect of the powers of veto which the Commission already held and, very importantly, proposed an expansion of as part of the revised regulatory package, specifically regulatory remedies (see next section). The epistemic, technocratic nature of EECMA's work in considerable part could have provided the Commission with a degree of legitimacy which it might not have been able to claim against those interests which would accuse it of being politically motivated. Linked to this, the NRA membership of EECMA's Board of Regulators could serve as a means to co-opt to the European (as opposed to the national) view, and create attitudinal transformation among, NRAs. This was likely to reduce the possibility of the kind of decisions being taken at national level over which the Commission would have to exercise a veto. If it did have to do this, nevertheless, it would have the weight of support of EECMA behind its decision. A movement in this direction would have amounted to a very significant European supranationalisation of regulatory decision-making as well as an increase in the Commission's power as an actor in the European telecommunications policy landscape (Simpson 2009).

The reaction to the proposal of EECMA was negative from a whole range of governmental, regulatory-institutional and commercial players (Financial Times 29.6.06) and eventually resulted in its mutation into a typical EU political compromise weighted towards subsidiarity and away from supranationalism. The ERG, which stood to be subsumed and replaced by the new body, expressed concerns, particularly in respect of being part of any process of veto-extension at the European level over national regulatory decisions. Instead, indicating a preference for the continuation - but also the possible development - of the kind of soft governance functions characteristic of its operation, it expressed a preference for extension of its 'regulatory "coordination" function' (Viola

2007: annex 2, p3). It was also, however, keen to emphasise that it had, of its own volition, become potentially more dynamic, through the introduction of majority voting. Big national Member State players and most of their commercial incumbents, notably France, Germany, Spain and the UK, were not in favour of the proposal either. Equally important, the European Parliament not only expressed opposition, but took significant steps to ‘water down’ the supranational dimension of EECMA through a counter proposal, in September 2008, for the creation of a Body of European Regulators in Telecommunications (BERT), instead of EECMA. Specifically, whilst BERT would be an EU body, it would not have a part-supranational Administrative Board and would only receive a third of its budget from the EU, the remainder coming from the national level through the NRAs. The EP was adamant that it did not want the new body to become a supranational European agency. Rather it ‘would be based on the good practice of the ERG’ (European Parliament 2008: 78).

The formal EU decision-making process on the matter continued to prove controversial. The European Council of Ministers, like the EP, initially expressed strong opposition to EECMA (European Council of Ministers 2007). In the light of the EP’s proposed modification of the initial Commission proposal, the latter, in November 2008, put forward a revised version to the Council for a new Body of European Telecoms Regulators (BETR) which still contained the key supranational ingredients of the Administrative Board and stipulated BETR’s involvement with the Commission, in the proposed regulatory remedies veto process (see below) (European Commission 2008). This proposal was rejected by the Council, which eventually reached agreement with the EP on the creation of what is now known as the Body of European Regulators in Telecommunications (BEREC)². The finally agreed Regulation on the establishment of BEREC gives a clear indication of how, despite the Commission’s intentions, it is a compromise instrument of soft governance with a predominantly intergovernmental character. Here, according to the EU, BEREC was created as a result of the need for ‘strengthening of the ERG and its recognition in the EU regulatory framework...BEREC should neither be a Community agency nor have a legal personality. BEREC should

replace the ERG and act as an exclusive forum for cooperation among NRAs, and between NRAs and the Commission' (European Parliament and Council 2009: 2).

Nevertheless, as a counterweight to this of European character, an interesting feature of BEREC is its so-called Office, a professional and administrative arm which is 'established as a Community body with legal personality and...legal, administrative and financial autonomy' (ibid). In this respect, BEREC is funded through the EU budget, alongside loosely specified voluntary contributions from Member State level, possibly through the NRA. However, it is important to note that the Office will be subordinate to its intergovernmental Board of Regulators providing professional administrative support rather than decision-making input. The Board of Regulators 'take[s] all decisions relating to the performance of its functions' (European Parliament and Council 2009: article 5, para 1) acting by two thirds majority. BEREC has also an intergovernmental Management Committee made up of NRAs in equal membership with responsibility for the day to day operations of BEREC on which the Commission will also be a Member. Interestingly, the Regulation states that 'each Member shall have one vote' (ibid: article 7, para 1) implying that the Commission will have some decision-making influence in the Management Committee. The Regulation makes no detailed comment about the relationship between the Board of Regulators and the Management Committee.

Like its predecessor, the roles to be undertaken by BEREC are characteristic of soft governance. It is charged with the task of developing and disseminating regulatory best practice both among NRAs and the Commission and to third parties. It also provides opinions on draft decisions made by the Commission in respect of its competences. The relatively loose, advisory nature of its remit is confirmed in the assertion that NRAs 'shall take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC' (ibid: article 3, para 3) though, ultimately there is no obligation to adopt any of these. This remit, in conjunction with the failure of the attempt by the Commission to expand its regulatory veto to regulatory remedies, underlines the extent to which informal soft governance is a characteristic feature of key compromises in the latest review of the EU's telecommunications regulatory framework. It is to the topic of regulatory remedies that the paper now proceeds.

EU POLICY FOR REGULATORY REMEDIES IN TELECOMMUNICATIONS

The issue of regulatory remedies epitomises the tension between national and European levels in the development of EU telecommunications policy and was, consequently, one of the main areas of concern highlighted by the European Commission in its initial submission to Member States on the review of the ECRF. Noting the emergence of an increasing number of cross-national telecommunications service providers and users, the Commission also cited complaints received about regulatory inconsistency. At fault were NRAs who were producing divergent decisions in the face of similar regulatory problems in areas such as accounting separation, scope of access obligations, mobile termination rates, interconnection charges and unbundled local loop pricing, the wholesale level being particularly important. It was also the case that terms of award and conditions of use varied across the EU for radio spectrum and Voice over Internet Protocol (VoIP) services (European Commission 2006c 67-70). The Commission also noted that even where the same regulatory remedies were produced by NRAs, their implementation differed (European Commission 2006b). The independence and level of resourcing of NRAs was also questioned as was the approach to dealing with appeals against regulatory decisions of NRAs, some of which took more than 5 years to be resolved by national courts. It was further claimed that the stipulation of the 2002 Framework Directive that, pending an appeal, the NRA decision should stand was being ignored in certain Member States – in fact in some cases ‘suspension of NRA decisions was practically automatic’ (European Commission 2006c: 71). Separately, the Commission also claimed that in respect of some decisions it took, the NRA did not ‘carry out and re-notify a revised market review’ (European Commission 2006b: 17).

In its initial proposals in respect of remedies, the Commission focused on the article 7 procedure of the ECRF’s Framework Directive, defining it as a route to ensure that a more consistent application of regulatory remedies might take shape across the EU. The Commission claimed that in the areas in which it had been granted a veto on NRA decisions in the Framework Directive – that is, the definition of markets and the

assessment of significant market power (SMP) - greater consistency had resulted. As a consequence of this, it proposed an extension of its veto powers to cover regulatory remedies (European Commission 2006a 9). Justifying this, the Commission argued that 'consistency has been improved in the way that markets are defined and SMP is assessed, but only to a lesser extent in relation to the choice of appropriate remedies' where some remedies 'solved only part of the competition problem identified, appeared to be inadequate or might have produced effective results too late' (European Commission 2006b: 17-18).

In its impact assessment document presented after the first phase of the consultation, the Commission presented three policy options to Member States, each of which would have a significant bearing on the future treatment of regulatory remedies in EU telecommunications. The options were framed around the possibility of creating the new regulatory authority for electronic network communications discussed above. A first option, to create a Single European Regulatory Authority would have meant that the body would undertake market analyses and impose regulatory remedies directly. Any appeals against these decisions would, consistent with the supranational nature of the body, be dealt with by the European Court of Justice. A second option was presented to Member States which would have involved the creation of an independent European regulatory authority, to subsume the ERG and not be part of the EU supranational institutional apparatus, which would provide advice in market review procedures to the Commission. In tandem with this, the Commission's regulatory powers would be increased to oversee market analysis and regulatory remedies, including a veto right in the latter, as well the right to suggest appropriate remedies. The third option presented to Member States was the least radical and, according to the Commission, 'would rely on voluntary co-ordination without any transfer of power to a central authority' and would amount to a formalisation and enhancement of the 'coordinating role of the current institutions including the ERG' (European Commission 2007c: 77). Here, in respect of regulatory remedies, the Commission envisioned the production of a Recommendation in which it would specify the coordination role of the ERG in Framework Directive article 7 procedures and NRAs remedies policies. The Recommendation would also provide

guidelines on best practice, a classic soft governance measure. Beyond this, the Commission envisioned better coordination between national courts in respect of nationally based appeals in respect of regulatory decisions. Here, the Commission argued that ‘the ERG could play a more formal advisory role to the Commission in the Article 7 procedures...[where]...the Commission would take due account of the ERG’s position’. In the Commission’s own words, this option would create ‘a kind of self-regulatory framework among national regulators rather than an increased regulatory oversight of the Commission’ (European Commission 2006c: 77-78).

Tellingly, at this juncture, the Commission admitted from the initial phase of its consultation that most NRAs were not in favour of it obtaining any regulatory remedies veto oversight powers. Nonetheless, in its assessment of the three options presented, it declared itself very much in favour of the second, though it was noted that even this was unlikely to deliver full regulatory harmonisation. The Commission noted the risk of relying on the kind of voluntary cooperation, not least between NRAs, bound up in the third option it presented to Member States. Pointedly, it declared that ‘there are insufficient guarantees that the voluntary co-ordination would work in practice’. Overall, the Commission argued that ‘it would be more difficult to guarantee the consistency of all NRA’s decisions over remedies, especially since the Commission comments do not have the legal status of a Decision’ (ibid: 83-85). In a separate staff working document on the review, the Commission declared its long term intention to overcome the problem of elements of the article 7 procedure being spread across the Framework Directive and a 2003 Commission Recommendation by creating a single EU Regulation, a move that would certainly serve to concretise this part of the ECRF. However, this has not, at the time of writing, materialised. In this document, the Commission also criticised the practice of certain NRAs of splitting the notification process to the Commission into, initially, an analysis of market definition and/or SMP assessment and, thereafter, SMP assessment and/or proposed remedies (European Commission 2006b: 17).

Despite the Commission’s arguments, reaction to its proposed veto extension to regulatory remedies proved extensively negative. The International Director of the UK

regulator, Ofcom, Alex Blowers, argued that it 'was too early to conclude that there is a problem concerning harmonisation of regulatory measures', whilst the Chair of the ERG contended that 'local regulators will always be best placed to understand and appreciate the vagaries of local markets' (Mallinder 2006). It was even claimed the Competition Directorate of the Commission itself was initially concerned about the reform proposals (Parker, Edgecliffe-Johnson and Laitner 2007). Elsewhere, the German MEP, Angelika Niebler, argued that clarification was required 'especially as far as the Commission's plans to gradually extend its own competencies are concerned'. More forcefully, the UK Conservative MEP, Malcolm Harbour, noted that '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' (EurActiv.com, 14.11.07: 4-5). The German government argued that the Commission's veto powers might even be removed, rather than strengthened (Humphreys 2008). In response, EU Commissioner Reding contended that in 'the interests of the internal market, and of legal certainty, there must be a power for the Commission to require the notifying national regulator to change its approach' (EurActiv.com, 3.09.08: 2). Elsewhere, some new entrant companies and, notably, the UK incumbent BT, welcomed the Commission's proposal (Humphreys 2008).

Despite this opposition, the Commission's presentation of its proposal to Member States in November 2007 did contain the proposal for a veto on remedies. The European Parliament in September 2008 rejected the Commission's proposed veto (EurActiv.com, 17.11.08). Thereafter, in November, the EU Council of Ministers produced an agreement which diluted the Commission's proposed veto power to an opinion giving role (EurActiv.com, 28.11.08). A revised version of the Framework Directive was adopted by the EU in December 2009 containing a number of significant changes and additions to the article 7 provision on remedies, though absent a right of veto for the European Commission, and largely in line with its least preferred third option presented to Member States from the consultation. In the revised Framework Directive, NRAs are instructed to 'work with the Commission and BEREC to identify the types of instruments and remedies best suited to address particular types of situations in the marketplace' (European Parliament and Council 2009: article 7, para 2). This replaces the looser, more

intergovernmental, instruction in the previous version that NRAs shall ‘seek to agree on the types of instruments and remedies best suited to address particular types of situations in the market place’ (European Parliament and Council 2002: article 7, para 2). In respect of the already granted Commission veto on NRA decisions on market definitions and SMP, a key aspect of the revised directive is the declaration that the Commission ‘shall take utmost account of the opinion of BEREC before issuing a decision’ (European Parliament and Council, 2009: article 5) which introduces an extra layer of advice giving into the procedure. The amended directive also included a specific requirement on NRAs to amend or withdraw measures vetoed by the Commission within six months of the Commission’s decision (ibid: article 6).

These changes aside, the most significant aspect of the amended Framework directive concerns the specification of procedures in respect of consistent application of regulatory remedies. In cases where the Commission disagrees with a proposed NRA regulatory remedy in respect of a service provider, it will have one month to notify the NRA and BEREC how it believes this would be counter to the single market or incompatible with EC law. This will then trigger a three month period where BEREC, the Commission and the NRA ‘cooperate closely’ to try to agree on what is the most appropriate regulatory measure in the case in question, a period in which ‘the views of market participants’ are taken into account (ibid: article 7a, para 2). Within six weeks of the commencement of the three month period, the directive requires BEREC to issue an opinion on the Commission’s objection. If BEREC does not agree with the Commission’s position or does not issue an opinion, or where the NRA amends or maintains its draft measure, the Commission, within a month after the end of the 3 month period, having taken ‘utmost account’ of BEREC’s opinion, may issue a ‘recommendation requiring’ the NRA to amend or withdraw its measure and suggesting proposals for amendment. Within a month of the Commission recommendation, the NRA must give notice to the Commission of its adopted final measure, though this period may be extended if the NRA wishes to undertake a public consultation on the matter. In cases where the NRA decides not to amend or withdraw its measure on the basis of the Commission’s recommendation, it shall provide a justification for this (ibid: article 7a, paragraphs 3-7).

Nonetheless, the soft governance measures of the procedure aside, a potentially interesting aspect of the revised directive is contained in Article 19 and the specific future possibility of the Commission trying to use this to issue Decisions, which are directly enforceable, in respect of remedies should longer term regulatory divergence at the national level on key issues be identified. The potential gravity of this issue as a Commission veto on remedies through the back door, motivated a clutch of 14 EU Member States, comprising, among others the UK, Germany, Spain and Italy³ to declare, after the revised regulatory package was finalised, that any such decisions in respect of article 19 should refer only to market definition and SMP matters. In an interesting and potentially significant riposte, Information Society and Media Commissioner Reding stated that the Member States' declaration had no legal basis and that the European Commission would apply article 19 to the issue of regulatory remedies on the justification of a threat to the internal market (T-REGS, 2009).

CONCLUSION

The policy outcomes of the 2006 review of the ECRF provide a clear illustration of how the EU continues to use operational policy solutions from the soft or new governance policy toolkit couched in a more hierarchical legislative framework to ensure the evolution of its telecommunications regulatory framework. This reflects an uneasy compromise between the European Commission's desire to devise European level solutions (involving further transfer of power from the national to the EU level) and Member States' desire to see precise policy solutions devised at the national level within a shared set of legal-regulatory parameters agreed at the EU level.

Supranational regulatory solutions, such as the creation of a European level regulatory authority with powers to devise and see directly implemented regulatory remedies across the EU have proven politically unpalatable to Member States. This arrangement is arguably not preferable either for the European Commission since it would take away a lot of its current power and create uncertainty in terms of any future relationship that it

might have with a new body of this kind. It is also currently difficult to justify in practice, given the relatively small number of telecommunications services delivered through cross-national markets.

To what extent then can the institutional and procedural compromises highlighted in this paper create increasingly similar regulatory practices across harmonising - though largely separate - EU telecommunications markets? BEREC amounts only to an incremental modification of the ERG. It is likely still to be a body operating along 'intergovernmental' lines, albeit with a Europeanised administrative Office. In respect of considering regulatory remedies, its remit is advisory to a body, in the shape of the European Commission, which continues only to have a recommendation-making say on the subject. However, the new remedies procedure does create the scope for closer cooperation among its NRA Members and the Commission – the already strong network character of EU telecommunications governance enhances this potential. Here, the deliberative processes that might lead to recommendation making, best practice dissemination and bench-marking may be more important than the relative procedural weakness of the new measures on remedies. Members of BEREC are NRAs which have the potential to utilise knowledge gained at the EU level in their work nationally.

The risk is, however, that to work the measures require a degree of cooperation which the Commission was sceptical about seeing realised – BEREC may simply amount to little more than a continuation of the ERG. Nonetheless, in the new system, institutionally and procedurally, the European level will have a new presence. That is will be characterised by the features of soft or new governance raises a question over its potential to deliver - measures from the soft governance regulatory toolkit whilst politically expeditious may be practically inefficacious. The political compromise inherent in the creation of BEREC and the new procedure on regulatory remedies allowed progress. Whilst the Commission did not achieve its policy goals, a further degree of soft Europeanisation was created. In practice, NRAs may now be forced to act more quickly and uniformly and the potentially closer relationship between them and the Commission may be a spur to this. However, the pull of the national level is still likely to be strong and to ensure that

telecommunications will remain firmly an inter-national sector across Europe in the short to medium term. Beyond this, however, should the Commission's prediction of growth in pan-European services materialise and an increase in cross-national revenue streams for telecommunications service providers become more significant, then soft regulatory measures might not only be strong enough to deliver full regulatory harmonisation but may even be a 'bridgehead' to the creation of a more supranationalised regulatory institutional apparatus. By that stage, it is possible that most telecommunications markets currently of inter-national character will be subject to general European competition law and that any ex ante sector specific regulation in the main will be required for pan European services and associated markets.

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¹ The Commission also publishes annual reports on the state of implementation of the EU telecommunications package which is often openly critical of Member States compliance with agreements made at EU level.

² In fact, after the European Council's second reading the new organisation was given yet another putative name, the Group of European Regulators in Telecoms (GERT)

³ The other states are Austria, Estonia, Finland, Greece, Ireland, Latvia, Malta, Poland, Portugal, and Slovakia.