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Supranationalism through institutionalization and its limits in European telecommunications

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<http://dx.doi.org/10.1080/13691180902866042>

Title	Supranationalism through institutionalization and its limits in European telecommunications
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Type	Article
URL	This version is available at: http://usir.salford.ac.uk/12515/
Published Date	2009

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SUPRANATIONALISM AND ITS LIMITS IN EUROPEAN
TELECOMMUNICATIONS GOVERNANCE: THE EUROPEAN ELECTRONIC
COMMUNICATIONS MARKETS AUTHORITY INITIATIVE

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ABSTRACT

The recent proposal of a European Electronic Communications Markets Authority (EECMA) by the European Commission has turned out to be the most high profile and controversial element of the latest review of the EU's telecommunications regulatory framework, begun in 2006. This article argues that creating EECMA would amount to a radical departure in the direction of supranationalism for a system which has developed over 20 years a predominantly 'intergovernmental' character. However, the political aftermath to, and likely rejection of, the proposal provide a candid illustration of the robustness of national level interests in what is widely viewed as one of the most Europeanised parts of the communications sector. This eventuality is, however, unlikely to speed progress towards the creation of the Single European Market in telecommunications, a communications policy goal of the EU since 1987.

INTRODUCTION

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

Twenty years on, the Commission's latest review of the state of the telecommunications sector illustrated that whilst a transformation has occurred in the governance of telecommunications across a now 27 member EU, the completion of the SEM is still a policy goal. At the national level, monopoly state ownership has been replaced by comprehensive and detailed independent public regulation of a complex, differentiated series of telecommunications markets (Thatcher 1999). At the EU level, a plethora of legislation – the Electronic Communications Regulatory Framework (ECRF) in its current incarnation – sets the broad conditions for competitive functioning of these telecommunications markets (Humphreys and Simpson 2005). However, the Commission has articulated the persistence of a number of core impediments to competition. As a solution, it initially proposed radical institutional expansion at the EU level in the form of the European Electronic Communications Market Authority (EECMA) (European Commission 2007).

The EECMA initiative provides an interesting example of the limits to supranational institution building in what is, ironically, perceived widely to be one of the most Europeanised parts of the electronic communications sector in terms of governance. EECMA was comprehensively opposed by a range of regulatory and governmental actors from the national level, as well as the European Parliament. The article contends that in its originally proposed form, the Authority represented a radical departure from the kind of telecommunications governance which has developed to date at EU level. Its paramount 'supranationality' would have tilted the politico-institutional balance too much in the direction of the EU and away from the national level. Telecommunications governance to date has been primarily – though far from exclusively – 'intergovernmental' in character. That is, decision making power is mostly in the hands of national level interests even in the regulatory-institutional forms created for it at the European level, the most notable of which is the European Regulators Group (ERG). The latter's status would have been to a considerable extent 'supra-nationalised' had the original Commission proposal been accepted. Instead, the new Authority will be a regulatory product reflective of a much more evolutionary and path dependent policy trajectory. In this process, national level actors and interests remain strongest, though

European level interests, most often articulated through the European Commission, will gain influential ground. Such a movement is inevitable, if the SEM project in telecommunications is to amount to something significantly more than a collection of largely separate national markets functioning along broadly similar liberalised lines.

The paper proceeds as follows. The next section provides a brief resume of the core politico-institutional features of the development of EU telecommunications policy to the point of the 2006 review. It highlights, in particular, the institutional character and evolutionary path of telecommunications policy development at EU level, which, it is argued, is crucial to an understanding of why the Commission's original proposal for EECMA mutated into the form likely to be accepted by Member States. The third section of the paper focuses on the politics of the EECMA process itself, highlighting the often fractious interaction between the European Commission on the one hand, and the European Regulators Group, on the other. From this, the main core structural and functional characteristics of the original and later forms of the EECMA proposal are explored. The final section of the paper draws some conclusions on the lessons which can be drawn from what has turned out to have been one of the most controversial aspects of EU telecommunications policy since the late 1980s.

THE POLITICO-INSTITUTIONAL CHARACTER OF EU TELECOMMUNICATIONS

Any decision by Member States to create and develop a new area of policy at the EU level is always underpinned by consideration of the extent to which loss of sovereignty is likely and can be sanctioned. Intergovernmentalists view European integration as a series of outcomes from a process of bargaining between Member States (Morazcsik 1998). Integration, and its manifestation in institutions at the EU level, can only proceed as a function of Member States willingness to concur that such a process is sanctionable in the national interest. Supranationalists, by contrast, focus on the active role which institutions created at the EU level can subsequently play in further integration (Tselis and Garrett 2001). The creation of supranational policy apparatus at EU level has the potential to create scope for further development through a spiral of institutional development (Stone Sweet and Sandholtz 1997). Two important issues arise from an analysis of this kind: first, the requirement to characterise the precise nature of institutionalisation and, second, to explain how the process develops, if at all. A key feature of the emergence of the EU as an international actor over the last 20 years has been its development as a governance space for liberalising markets. In the process, the EU level has become an increasingly important context for regulatory action in a number of sectors of the economy, not least telecommunications.

By the mid 1980s a number of EU states, most notably the UK as a forerunner, had begun to cede direct control over telecommunications to new independent public national regulatory authorities (NRAs) (Thatcher 2002) whose role it was to manage the evolution of the sector along competitive lines. The emergence of this US-style approach to telecommunications vested great responsibility in, and thus give great power to, the regulatory authority to create and police the set of detailed rules required to deliver even a minimum level of competition. It also unleashed a growing number of large, increasingly commercially-oriented, telecommunications service providers which tended

to be the main subject of regulation given their status as incumbents in well established and newly emerging markets. On the demand side, the intensification of the most recent phase of economic globalisation through the 1980s prompted multinational enterprise telecommunications customers to exert pressure for telecommunications services to be made available to them to facilitate their international corporate function. The replacement of state ownership by independent regulation led to the argument that the 'regulatory state' (Seidman and Gilmour 1986) had emerged in telecommunications at the national level.

These important changes suggested to the European Commission – by the mid-1980s a well established and ambitious actor on the EU stage - that the coordination of telecommunications market regulation might be explored as a means of facilitating the future development of the sector (European Commission 1984). Given the nature of the EU, with 10 and, as the 1980s proceeded, 12 different telecommunications sectors, the Commission quickly came to the opinion that a legislative package was required to frame the internationalisation of telecommunications governance to the EU level. It was also clear that any movement towards the Europeanisation of telecommunications through the EU route needed to be conducted tentatively, to reflect national Member State preferences specifically. The Commission's Green Paper on creating the SEM in telecommunications (European Commission 1987), whilst bold in its overall goal, was more modest in its specific proposals. It argued for EU-wide competition in the markets for telecommunications terminal equipment and value-added services yet simultaneously declared the right of Member States to maintain on a monopoly basis so-called reserved services, principally voice telephony.

The tentativeness of the European Commission reflects the classic position of political fragility which any EU institution keen to effect supranationalisation in a policy area faces (Humphreys and Simpson 1996). It is also indicative of the power differential existent between the national and the European level. The especially deep national centrality of telecommunications added resonance to the situation. Yet within merely seven years of the Green Paper's publication, EU Member States had agreed to liberalise all their telecommunications markets and infrastructures facilitated through the passage and subsequent implementation of a battery of EU legislation (European Council of Ministers 1993; European Council of Ministers 1994). In order for this swift and remarkable transition to occur Member States needed to be assured of its benefits. Certain of the most powerful of them – the UK, Germany and France, bolstered subsequently by accessions from Scandinavia - became convinced that there were more opportunities than threats from the liberalisation of telecommunications domestically and internationally. Such views on the neo-liberal agenda in telecommunications were by no means identical (Hulsink 1999). Differences existed regarding the extent to which liberalisation should occur, as well as its timing (Humphreys and Simpson 2005). The EU policy arena provided an important and relatively secure and controllable context for this to take place initially. The EU also allowed Member States like France, which still valued the public service traditions of telecommunications even in an increasingly competitive environment (Humphreys 1990), to ensure that legislative provision was secured at EU level to protect universal service. Thus, the first important steps in the development of EU telecommunications policy were legislative with a key institutional role for the European Commission soon emerging. However, thereafter, the more complex the

legislative apparatus became, the greater was the need to broaden the institutional apparatus in service of its implementation and development.

Recent work by Thatcher and Coen (2008: 807-08) has analysed the features of what is described as the European regulatory space. A particular feature has been a 'thickening of organisations and rules concerning regulation. In short a process of 'institutionalisation' has taken place'. This has taken various forms and has proceeded to differing degrees across sectors. It ranges from EU supervision and monitoring of regulation undertaken by National Regulatory Authorities; through to European Networks of Regulators composed of NRAs and often the European Commission. More formally established institutions at the EU level are manifest as European Regulatory Agencies with varying degrees of power from recommendation making to adoption of legally binding decisions. Beyond this, nothing currently exists though the creation of Federal European Regulatory Agencies (FERAs) and Single European Regulators (SERs) are institutional possibilities. The former would make rules at the European level to be implemented by subordinate NRAs; the latter, a European level body, would be solely responsible for implementation and would be composed of members with a direct European remit. Control over FERAs and SERs would be conferred on national member states, the European Parliament and European Commission in a desired configuration.

Strong evidence exists, particularly in the network industries that existing institutional arrangements at EU level are key determinants of further developments. The latter proceed in a gradual, path-dependent and evolutionary manner. Here, institutional change is innovative rather than inventive, where institutional conversion (creating new organisational forms from existing ones) and institutional layering (addition of new organisations to existing arrangements) are in strong evidence. This can be accounted for by periodic revisions which take place from within existing arrangements advocating change. Importantly, '[e]xisting organisations often make proposals, which usually involve their development and enhancement' whilst, as a corollary, there is also resistance to any diminution of their authority (p829). Saliently for the case of EECMA, it is argued that in cases of institutional reorganisation, the European Commission can find itself in a relatively weak position, due to its limited resources, vis a vis other institutional bodies which exist at the European level but which are able to draw significant support from national level interests. However, evolutionary change has been significant and has created some considerable degree of centralisation through the creation and coordination of cross-EU regulatory networks (ibid: 810-15).

In telecommunications, a debate has arisen on the role which supranational forces played in the evolution of telecommunications governance at the EU level. Some emphasise the entrepreneurial role played by the European Commission in driving the EU telecommunications policy agenda forward (Sandholtz 1998). Others stress the essential intergovernmentalism of the process, Thatcher (2001) arguing that, whilst a significant player, the European Commission acted much more as a partner of EU Member States. There is no doubt that the Commission was prepared to 'take on' Member States, as evidenced in its use of the article 86 procedure of the EU Treaty to force through liberalisation directives in terminal equipment (European Commission 1988) and services (European Commission 1990). The legal challenges presented to the Commission's action were rejected by the European Court of Justice (European Court of Justice 1991;

1992) thus raising the possibility of significant supranational power to force through further telecommunications liberalisation being available to the Commission to exercise.

However, in practice, it has proven more anxious to pursue compromise and consensus among EU Member States, something suggests uncharacteristic elements to the original proposal of EECMA. Since 1990, liberalisation directives have only been passed using article 86 as a matter of procedure, as a consequence of the legal cases of the late 1980s. Equally, the different developmental phases of EU telecommunications policy, which can be viewed as movements through a successive series of policy equilibria (Simpson 2008), have been prefaced by major consultation exercises, these having taking place in 1992, 1999, and 2006 respectively. Such exercises have triggered significant reorganisation and development of EU telecommunications policy pursued through the legislative route. In July 1993 Member States agreed to liberalise all voice telephonic services across the EU by 1998 (European Council of Ministers 1993), proceeded a year later by similar agreement regarding telecommunications infrastructures (European Council of Ministers 1994). This required a battery of subsequent legislation, both liberalising and harmonising in scope, including legislation setting minimum standards for universal service (Natalicchi 2001). In 2003, as a result of the review launched in 1999, the EU undertook a legislative rationalisation telecommunications regulation where the by then expansive number of directives framing the functioning of the sector was reduced from 20 to 7 in a newly named Electronic Communications Regulatory Framework (ECRF). The current ECRF review aims to undertake further significant rationalisation, the aim being to remove as much sector specific ex-ante regulation from the system as possible, instead leaving the governance of most telecommunications markets to the general EU competition law framework, an area in which the EU's powers are particularly well-developed.

Since the late 1980s, it is clear that a well established, developing system of legislation has couched the evolution of the telecommunications sector across the expanding EU. In this respect, EU telecommunications policy can be described as 'supranational' in nature. However, the vast majority of the legislative measures agreed by Member States are in the form of directives which give considerable scope to Member States for interpretation within the relevant national legal tradition. The more well established and detailed EU telecommunications policy has become, the more elaborate is the regulatory apparatus and more intensive the regulatory workload across the EU to deliver its various parameters, despite recent moves to legislative rationalisation. Here, it is possible to argue that telecommunications provides a clear example of the creation and functioning of a 'regulatory' state in Europe (Majone, 1996; Seidman and Gilmour 1986). A complex two-level, pluri-lateral governance network (Humphreys and Simpson, 2008) has developed across the EU in which a variety of public regulatory actors interact in the functioning of the sector. This network, operating at national and EU level, is predominantly intergovernmental in nature, even regarding policy deliberation which occurs in European level contexts.

In practice, the substance of the legislation comprising the ECRF is implemented on a 'day to day' basis by a series of National Regulatory Authorities (NRAs). A major development was the creation of the European Regulators Group as a consequence of the 1999 review of electronic communications. This independent (i.e. not established as part of the formal EU decision-making framework), advisory committee contains

representatives from the EU's telecommunications NRAs and is, importantly, resourced - and Chaired in a non-voting capacity - by the Commission. The ERG's modus-operandi is essentially intergovernmental in nature, though the presence of the Commission has afforded the latter a kind of supervisory perspective which has proved fundamentally important in influencing the proposal to create EECMA. In essence, the Commission has, by its own admission, aimed towards the creation of some kind of regulatory partnership with Member States' NRAs. By contrast, the relationship between the ERG and the European Commission has been recognised as difficult in the first instance, though improving (Reding, 2007) reflecting the tension that has existed between the national and the EU level for a considerable part of the history of EU telecommunications policy.

Thus, EU Member States and the European Commission though having resolved to pursue the common goal of liberalisation in telecommunications have often been uneasy co-participants in the enterprise and the development of EU telecommunications policy has frequently manifest itself as a tussle between supranational ambition and intergovernmental resolve. The Commission has been motivated by the functional goal of creating and administering the EU telecommunications regulatory framework, as well as cementing politically its institutional role in the European and global telecommunications policy landscape. National Member States - and to a lesser extent their NRAs - have struggled with a core dilemma of neo-liberalism: the pursuit of internationally competitive markets holds the attendant risk of damaging national commercial interests. As a consequence, often Member States have aimed to create only the degree and pattern of competition that is perceived to be in the national, not necessarily the European, interest. The consequence has been efforts by the Commission to see transferred to the European level (not necessarily its own institutional quarters) sufficient policy leverage to make the neo-liberal project in telecommunications across the EU a 'European' project. The corollary generated has been efforts by Member States at resisting this. In response to this dilemma, the 1994 Bangemann Report recommended the creation of a European level regulatory authority for telecommunications (Bangemann Report 1994). This idea was not pursued by Member States, yet it re-surfaced in two subsequent, related, reviews of the mid to late 1990s, the 1997 review of the regulatory consequences of ICT convergence (European Commission 1997) and the subsequent 1999 Review of Electronic Communications (European Commission 1999). As part of the negotiations leading to the ECRF which the latter review prefaced, the Commission proposed the creation of a High Level Communications Group, composed of members of NRAs, on which it would be granted have voting rights. This proposed injection of 'Commission supranationalism' was fiercely resisted by Member States, resulting in the creation of the ERG by way of compromise, a much more path dependent outcome in structure and function.

THE 2006 REVIEW OF THE ECRF AND PROPOSAL OF EECMA

The current EU telecommunications review illustrates two contrasting features of the evolving system. On the one hand, the extent to which the regulatory state in telecommunications has become embedded at the national and European levels is strikingly in evidence. Yet on the other, it is also clear that a comprehensive, efficiently functioning SEM in telecommunications has by no means been completed. In June 2006, the Commission launched a by now familiar (this time two phase) consultation process

on further possible modification of the ECRF, through laying out a series of proposals for interested parties to reflect upon. These modifications had six main dimensions: the creation of a new approach to regulation of the radio spectrum; action to rationalise and make more efficient the well-established system of telecommunications market reviews undertaken by NRAs in conjunction with the Commission; a series of measures with the goal of consolidating the SEM in telecommunications, prominent among which was the proposal of a right of veto for the Commission over market remedies; a series of measures focused on improving the public service dimension of telecommunications provision; a proposed new set of regulatory requirements on NRAs and communications services providers to improve security; and four measures of what were described as a modernisation and updating kind, the most substantive of which was the repeal of the 2000 Regulation on local loop unbundling (European Parliament and Council 2000) such as the degree of competition now deemed in existence in Member States' local loops (European Commission 2006a; European Commission 2006b). Very importantly, at this juncture any proposal to create EECMA was highly conspicuous by its absence.

However, a year later, in November 2007, after the consultation phase had concluded, the Commission released a report to Member States in which its proposed changes were re-presented under three broad categories, the proposal of EECMA assuming centre stage in one of these. Under the heading of so-called 'better regulation' came a radical and what has turned out to be unpopular proposal to reduce, from 18 to 7, the number of telecommunications markets subject to ex-ante regulation, as well as ones to simplify the market review procedure and radio spectrum regulation. A second category, 'connecting with citizens' grouped the initial proposals for universal service and security. Thirdly, 'completing the single market in electronic communications' now contained the proposal to create EECMA based on the persistence of 'regulatory inconsistency and distortions of competition' (European Commission 2007a: 4). EECMA would also be accompanied by a strengthening of the independence and regulatory enforcement powers of NRAs. The formerly most controversial element of the initial proposals, the proposed right of veto on remedies for the Commission, was now described as an oversight role to be undertaken in cooperation with the new authority, which had by now eclipsed it as the most controversial element of the proposed alterations to the ECRF. The revised proposals were accompanied by two new draft directives and a draft regulation related to the establishment of EECMA.

In its summary review document, the justification for EECMA was couched in terms of strong signals sent to the Commission as a result of the second phase of the consultation on the ECRF review. Here, the Commission reported criticism of the ERG's performance which it was argued delivered 'only loose coordination among regulators' and a "lowest common denominator" approach'. Despite this, it was acknowledged explicitly that 'Member States had reservations about "ceding powers" to the Commission' (European Commission 2007a: 9). The industry support which the Commission so often in the past drew on to justify its action was also present now, though far from overwhelming in nature. The Commission claimed that new telecommunications players along with 'some' (ibid) incumbents were in favour of either institutional reform of the ERG or a stronger role for the Commission, though neither of these preferences suggest automatically the creation of an entirely new organisation like EECMA.

THE EUROPEAN COMMISSION, THE ERG AND THE POLITICS OF EECMA

The proposal by the European Commission of EECMA was not included in either phases of the consultation on the review of the ECRF. However, in June 2006, Viviane Reding announced the Commission's intention to create a European level regulatory authority for telecommunications in order to deliver a more effectively functioning EU telecommunications market (Financial Times, 28.6.06; European Voice 16.11.06; Sutherland 2008). It appears that the Commission's ongoing conflict with the German government over proposed legislation to afford a regulatory holiday to the German incumbent Deutsche Telekom to allow it to invest in broadband infrastructure free from competition, was a significant factor in strengthening the Commission's resolve to propose EECMA (European Voice, 16.11.06). However, Reding's individual motivation for seeing EECMA placed on the ECRF regulatory agenda is abundantly clear in her declaration that she had 'personally insisted that the idea of creating a European telecom regulator...[was]...included as a policy option' (Reding 2006, cited in Sutherland 2008: 14).

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

This bargaining position was re-emphasised by Fabio Colasanti, deputy to Reding, in a follow-up communication to the ERG which took place after a meeting between both parties in January 2007. The political carrot for the ERG presented here was the possibility of taking over regulatory control for the enforcement of the 'article 7' procedure (relating to the Commission's limited veto powers in the ECRF decisions on the existence of Significant Market Power in designated telecommunications markets) or, more specifically, a proposed modified form to include remedies. This would also

clearly have dissolved the brewing discontent over the Commission's desire to extend involvement here. The less politically involved alternative was also presented, namely that the ERG undertake such work in an advisory capacity only (Colasanti 2007) leaving the consequent regulatory enforcement duties to the Commission, something more akin to the current role of the ERG. Somewhat boldly, the Commission, in this communication, also raised the possibility of the new regulatory body assuming some responsibility for communications content regulation, this justified on the basis of the move in this direction made by some NRAs (ibid), giving a strong flavour of the ambitious mood the it appeared to be in.

In late February 2007, the ERG provided a detailed position on the Commission's proposals expressing outright opposition to the use of a 'veto as a formal oversight mechanism' (Viola 2007: annex 2, p1) contained in both of the institutional options presented to it by the Commission. Instead, it put forward a much more limited - though unrealistic - development of the Article 7 provisions into a 'more streamlined and targeted approach' (Viola 2007: annex 2, p2). Here, after 2010, NRAs could provide market reviews to the ERG which it would scrutinise, though only at the request of an NRA or the Commission, or its own self-initiative. In fact, consideration of Article 7 issues, it argued, would become the exception rather than the rule. This was justified on the rather dubious assumption that by then "consistency" will become less and less of an issue' (ibid). The ERG was more amenable to extending its powers in respect of 'a regulatory "coordination" function, rather than on article 7' (Viola 2007: annex 2, p3). It appeared not to be averse to the enhancement of its remit, though it did not want its institutional status changed in the process from fundamentally 'intergovernmental' to 'supranational'.

Two weeks prior to the Commission's mid-November 2007 publication of its proposals for the modification of the ECRF, the ERG put forward a final position statement with a view to influencing the outcome of the Commission's deliberations. Essentially reiterating its previous position, the document again tried at length to demonstrate how the ERG had made significant achievements already, going beyond what might reasonably be expected from a consultation body. It made detailed reference to the series of reform measures (enunciated in the Madeira Declaration) enacted at the end of 2006, amounting to what it described as 'a major step-change'. Notable among these is an agreement with the pan-European institutionally overlapping International Regulators Group (established in 1997) to ensure that the ERG's Secretariat would be in the future better resourced financially to undertake its business. The ERG also introduced majority voting. The performance of the ERG has not been helped by its closed method of functioning with only minimal reportage of its business released into the public domain (Sutherland 2008). These moves can be seen as an attempt to align further the ERG away from the EU and the Commission - it certainly appeared to be interpreted as such by the latter. The ERG Chair argued that 'amendment to the ERG Decision could reflect the proposals outlined...with minimum delay, and at minimum cost and bureaucratic impact, and in particular without the need for a complex and lengthy legislative process' (Viola 2007: 4).

EECMA: INSTITUTIONAL FEATURES AND POLICY IMPLICATIONS

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

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

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

The clear supranational nature of EECMA is evident in the Commission's claim that it would reinforce the powers of NRAs 'by taking over the functions of the ERG and giving them a robust and transparent foundation in Community law' (*ibid*). EECMA was also necessary to deal with a growing number of regulatory issues of a transnational nature which were not within the remit, by definition, of NRAs. Here, mobile and IP

based services were specifically mentioned. In its bid to create EECMA, it is clear that the Commission anticipated a comprehensive attitudinal transformation among NRA members that would make it up, itself a classic element of supranationalisation. EECMA's proposed Board of Regulators would 'comprise the heads of NRAs and will work in the Community interest' (European Commission 2007: 9) which is something rather different from the operational philosophy of the ERG. It has also been reported that the Commission intended EECMA to be much less consultative than the ERG has been (European Voice, 30.8.07). Very importantly, the draft regulation to establish EECMA stipulated that its Board would take action on the basis of a simple majority vote (European Commission 2007: 37). It would be responsible for undertaking the main bulk of EECMA's work, referred to in articles 4-23 of the draft regulation, including approval of its programme of work for a forthcoming year. The Administrative Board of EECMA would be responsible for the formal appointment of the Board of Regulators and the Board of Appeal. It would adopt annually the EECMA workplan (after consultation with the Commission) and annual report on EECMA's activities, both of which it would be required to send to the European Parliament, the Council of Ministers and the Commission itself (European Commission 2007: 36).

Reaction to the proposal of EECMA beyond the confines of the ERG was on the whole equally negative. The EU was considered not to be in a 'political mood...to set up more supra-national bodies' (Financial Times, 29.6.06). Rather, the EECMA initiative had 'irked almost everyone. Member states, big industry operators, fellow commissioners and even the watchdogs themselves have problems with it' (Financial Times 16.11.07; see also O'Brien 2007). The UK regulator, Ofcom, maintained that the current regulatory power balance between the Commission and NRAs was appropriate and argued that the 'proposal for a central regulator received little support during the creation of the existing rules [1999-2002] and we see no reason why it might be appropriate now' (Laitner, 2006: 1). It praised the political independence of the ERG as a particularly attractive quality, arguing that EECMA would be subject to political interference by both the Commission and Member States (Financial Times, 30.10.07). The European Parliament's view of the EECMA proposal was equally hostile, suggesting that the Commission had misjudged the likely reaction of the other EU institution with most supranational predilections alongside itself. Its Rapporteur on the initiative even countered with a proposal to create the so-called Body of European Regulators in Telecoms (BERT), which amounted to little more than a re-named version of the ERG (Humphreys 2008). In the initial consideration of the proposal in the Council of Ministers, the EU has unsurprisingly reported significant opposition from Member States (European Council of Ministers 2007: 10). Given this level of negativity, it has even been suggested that the proposal of EECMA is a political tactic of the European Commission, where Viviane Reding 'outlines outlandish ideas, then waits for the air to clear before returning to the table to get the deal she really wants', in this case, possibly, some form of greater power for the EU over telecommunications regulation (Laitner 2007: 1).

CONCLUSION

Despite its role as champion, on the one hand, and 'honest broker', on the other, of neo-liberal competition in telecommunications, the European Commission's 'policy entrepreneurial' activities aimed at enhancing the EU's institutional remit in

telecommunications has never been far from the surface of the policy debate. The EECMA initiative is, in part, simply the latest incarnation of this. On the one hand, Commissioner Reding has argued that 'Centralism has no place in Europe. Instead, decentralisation is a guiding principle of European law' (Reding 2007: 4), yet on the other she has claimed that EECMA 'needs to bring out the best of the national regulators, but it needs – and this is crucial – it needs to be more than just the sum of all its national parts. It needs... to have a European approach, a European vision' (Reding 2007: 4).

The EECMA proposal also provides an interesting case of the persistent reticence of Member States to cede authority to the EU level in the communications sector despite more than two decades of relatively successful Europeanisation in telecommunications policy. However, through this period, the EU route has been used for the purposes of liberalisation and harmonisation of national market structures and procedures and little more than this. What exists at present is a series of liberalised markets, largely unintegrated at EU level. The Single European Market in telecommunications, frustratingly for the European Commission, is akin to a political banner underpinned by an unevenly held policy aspiration between national and European level interests.

What steps then, if any, are likely to be taken to address the institutional problems highlighted by the Commission in its proposal of EECMA? The European Regulators' Group, an important protagonist in the EECMA debate, is likely to be the focus of attention. Its modus operandi is likely to be made more visible to the public domain. Its decision making procedures have already moved away from the unanimity model, something likely to be reinforced, and providing an interesting parallel with the historical development of the EU's own decision-making apparatus. The ERG will most likely be required to develop a closer relationship with the European Commission, though this has been to some extent occurring anyway, albeit at a slower pace than the latter would wish. However, it is highly unlikely than in the foreseeable future the ERG will develop along supranational lines. Like the broader system for telecommunications regulation that has developed in the EU, it will remain predominantly 'intergovernmental' in outlook and practices. There is little evidence of any appetite among Member States for further telecommunications market integration. More likely will be fine tuning measures in the direction of harmonisation, and, where necessary, liberalisation of national markets. The Single European Market in telecommunications looks set to continue to be a policy aspiration held primarily by the European Commission and a relatively small band of corporate business interests with the wherewithal to establish a cross-EU market presence.

The paper contends that a move in this direction would strengthen significantly the European 'regulatory' state (Majone 1996) in telecommunications along supranational lines, a major qualitative shift of approach to that developed thus far. However, the rejection of EECMA by EU Member States did still result in a rise in the ERG's and the European Commission's regulatory powers, constituting a much more path-dependent development of EU telecommunications policy. Though the idea of creating a European regulatory authority for telecommunications has been floated in the past by the Commission (Bartle 2001), its creation has been quite firmly resisted by Member States.

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WORD COUNT: 7414 (including references);