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Humphreys, P and Simpson, S

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GLOBALIZATION, THE ‘COMPETITION’ STATE AND THE RISE OF THE ‘REGULATORY’ STATE IN EUROPEAN TELECOMMUNICATIONS*

Peter Humphreys and Seamus Simpson

Peter Humphreys

Main affiliation: University of Manchester

Tel: 0161 2754908

Fax: 0161 2754925

E-mail: peter.humphreys@manchester.ac.uk

Seamus Simpson

Main affiliation: Manchester Metropolitan University

Tel: 0161 2473013

E-mail: s.simpson@mmu.ac.uk

Introduction

Telecommunications is one of the most technology-intensive and internationalized sectors of Europe’s economy, presenting users with an unprecedented array of sophisticated, interactive, content-rich services with global-reach potential – a situation very different from the 1980s when European telecommunications was a highly state-centric, nationally balkanized sector. Explaining this remarkable transformation has stimulated considerable academic work, not least by political scientists. A number of studies have analyzed national regulatory changes in either single country (Garnham

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1985; Humphreys 1990, 1992) or cross-national comparative studies (Morgan and Webber 1986; Grande 1989; Hulsink 1999; Thatcher 1999; Bartle 2002a; Bartle et al. 2002; Coen et al. 2002). Equally important has been the emergence of telecommunications governance at the European level within the institutional context of the EU. Political scientists have debated the influence that institutional actors, notably the European Commission, have exerted on policy developments, some stressing the primacy of supranational institutional forces (Sandholtz, 1993, 1998; Schneider et al. 1994, Levi-Faur 1999), others downplaying their influence *vis a vis* Member States (Thatcher 2001b; 2004).¹

This article contributes to such work through employing the complementary conceptual lenses of the ‘competition’ state and the ‘regulatory’ state in an era of economic globalization (Humphreys and Simpson 2005). It pursues three lines of enquiry. First, the paper explores how, in response to globalization pressures, EU Member States simultaneously relinquished ownership of and created competition within their telecommunications sectors, behaviour explained by theoretical work on the ‘competition’ state. Second, it explores how, having assumed the role of ‘competition’ states, governments became involved necessarily in re-building the governance of telecommunications through re-regulation, to the extent that they have become ‘regulatory’ states. In its exploration of the complementarities of, but also the tensions between, the ‘competition’ and the ‘regulatory’ state, the article analyses how reform involved agreement to a process of ‘Europeanization’ of its governance at the EU level, the third line of enquiry. Here, the paper pays particular attention to the EU’s adoption of a new ‘Electronic Communications Regulatory Framework’ (ECRF).

The Context

Traditionally, telecommunications governance across Europe had been premised on the ‘state-centricity’ of the sector. The state was monopoly owner/operator of networks and services. This avoided duplication, assured technical compatibility, maintained network

integrity, exploited economies of scale, and guaranteed universal service. State monopoly structures served protectionist industrial policy goals. International cooperation was confined largely to technical matters and international tariffs and accounting rules, agreed in classic intergovernmental fashion through the International Telecommunications Union (ITU) and the European Conference of Postal and Telecommunications Administrations (CEPT). From the 1980s, this ‘ancient regime’ was undermined by new technologies and globalization (Humphreys and Simpson 2005: p. 21-8).

Transmission was revolutionized by high-bandwidth cable, satellite, microwave, mobile telephony, and (lately) Internet telephony; telephonic switching, by the transition from mechanical to digital switching and ‘packet switching’; terminal equipment, by the microprocessor (‘computerization’). The new technologies facilitated alternative networks and diverse new ‘value-added’ (network) services (VAS or VANS). Telecommunications (apart from the ‘local loop’ or ‘last mile’) came to be considered potentially competitive, rather than a natural monopoly. Moreover, the new technologies called for levels of investment requiring global market strategies. Their ‘distance shrinking’ character highlighted how telecommunications both exemplified a globalising economic sector and was an enabler of global economic activity, fuelling globalization (especially in the financial sector), stimulating demands from trans-national telecommunications users for liberalization. Further, national telecommunication systems could now be bypassed, for instance by international ‘call back’ services. Crucially, a modern telecommunications sector became a factor for economic investment and location decisions. Thus, the ‘first mover’ telecommunications liberalizers – the USA and the UK – unleashed a global dynamic of international ‘regulatory competition’ and ‘competitive emulation’ (Humphreys and Simpson, 1996 and 2005).

Under the pressure of globalization, technological change, the diffusion of neo-liberal ideas, and the competitive challenge from the USA and UK, the Continental Europeans became persuaded that liberalization was unavoidable if they were to retain the international competitiveness both of their domestic telecommunications sectors and of their economies at large. They now perceived European market balkanization and lack of

competitiveness as impediments to the realization of more diverse, sophisticated and affordable services. With the growing recognition that telecommunications was the nerve centre of a global 'information society', a new EU-wide consensus developed in the early 1990s in favour of full liberalization and a harmonized pro-competitive regulatory regime. Between 1987, when the Commission published its reform blueprint in a Green Paper, and 1998, when markets were fully opened, a series of EU liberalization and regulatory harmonization directives were enacted, the former directly by the Commission, while the latter were negotiated inter-governmentally, transposed and implemented by the Member States. The 'Europeanization' of telecoms regulation meant that Member State regulatory policy was increasingly determined through the complex interaction of supranational institutions, notably the Commission, and intergovernmental institutions, notably the Council of Ministers, and networks such as Council working groups and regulatory comitology, at the EU level. Across Europe, the state 'retreated' from the function of owner/operator, relinquishing the supply of services to commercial players and privatising the former incumbents.

Analytical Framework

The Competition State

Throughout, the state remained interventionist as a 'competition state', actively remodelling telecommunications structures to ensure national economic competitiveness in global markets (Levi-Faur 1998 and 2000; Humphreys and Simpson 2005). According to Cerny (2000a: 136), the 'main focus of the competition state ...is the proactive promotion of economic activities, at home or abroad, that will make firms and sectors located within the territory of the state competitive in international markets'. The spread of international, competitively ordered markets, underpinned by the neo-liberal reorientation of state behaviour, mandated by a comprehensive EU reform package, might suggest the likely emergence of a more homogenous pattern of governance and competition across the European and international political economy. However, research

into the adoption of neo-liberal policies by states has pointed to the persistence of national diversity (see e.g. Schmidt 2002; Weiss 2003). Nonetheless, this is consistent with competition state theory. In Cerny's (2000a: 130) words, 'the competition state...comes in myriad forms', these depending on factors such as a state's resource endowments and strategic capacities though this variety tends to be framed within the archetypal model of broad neo-liberal flexibility and openness to competition. In the 'Europeanized' context, diversity arises from two policy processes. First, in the EU negotiation process, the Member States, whose preferences varied considerably during the early stages of liberalization, 'up-loaded' (Börzel 2002) policy in-puts to minimize the adaptation costs they subsequently had to bear. Second, once EU rules were agreed, they exploited the scope provided by EU Directives to 'domesticate' (Wallace 2000) EU rules ('downloading'). We explore how this 'uploading' and 'downloading' reflected different 'competition state' orientations.

The Regulatory State

Our inquiry's other axis relates to the new 'regulatory state' in the European telecommunications sector. The paradigm change from 'positive state' to 'regulatory state' denotes the shift from the traditional 'European-style' direct provision of key public services by the state (and state-owned corporations) to the 'American-style' delivery of such services through regulating markets (Seidman and Gilmour 1986; Majone 1994, 1996, 1997). The regulatory state is intimately related to the concept of the competition state. Cerny (2000a: 117) has suggested that the regulatory state is a paradoxical feature of the competition state: '...the emergence of the competition state does not lead to a simple decline of the state but instead necessitates the expansion of de facto state intervention and regulation in the name of competitiveness and marketization.' In the context of globalization, 'the weight of state interventionism – the so-called "volume of government" – generally tends to *increase* as states undertake wider regulation and enforcement functions' (Cerny 2000b: 450). These new patterns of organization strongly evident in globalising economic sectors - such as

telecommunications - have led to a focus on the changing 'mechanics' of governance: regulation delivered through publicly funded independent regulatory authorities accompanied by degrees of market liberalization and privatization.

The establishment across the EU of National Regulatory Authorities (NRAs) in telecommunications exemplifies this shift to the 'regulatory state' (Siedman and Gilmour 1986; Majone 1994, 1996, 1997). NRAs were central to the implementation of the EU's re-regulatory package. They could be seen as the institutional embodiment of the new 'regulatory state', just as the PTT² administrations embodied the 'old' role of the state as owner/operator. In the EU re-regulatory process, the Member States, determined not to relinquish all their sovereignty in the telecommunications field, ensured that regulatory power remained located at national level, with the Commission's role confined to 'policing' national regulators to ensure adherence to EC regulatory policies. The 1998 regulatory package permitted a diversity of NRAs; it did not harmonise their institutional form, procedures and resources. Moreover, the directives allowed leeway in the detailed implementation of such key matters as access and interconnection, and licensing.

The 'regulatory state' was indispensable to the functioning of competition in telecommunications (Grande 1994). However, left to the Member States to implement, the 'regulatory state' plainly had a Janus-face. It might be deployed in the spirit of the neo-liberal 'competition state' to stimulate new economic activity and attract new investment through diligent market opening and pro-competitive regulation. Or it could be employed as a tool to moderate liberalization, more consistent with the continuation of less liberal 'competition state' practices. The imposition of burdensome rules on market entrants could serve as a means of deterring overseas competition and protecting domestic national champions. As will be seen, some Member States – in characteristic mercantilist 'competition state' fashion - have indeed exploited the scope for discretion in the EU directives to give a 'regulatory subsidy' (Vogel 1996) to their national champions.

This leads to the third element of our conceptual framework: the Commission's attempt to 'Europeanize' and 'harmonize' further the new regulatory state in telecommunications

through the development and negotiation of a new regulatory package, enacted in 2002. The '2002 regulatory package' was conceived in order to streamline regulation, lighten the regulatory burden and cater for the 'digital convergence' of telecommunications, broadcasting and newer systems of electronic communications such as the Internet. However, as will be seen, the framework was a compromise between the inter-governmentalism of the Member States and the supra-nationalism of the Commission. The Commission's quest to replace residual national-level 'parochial' competition state behaviour of the Member States with more 'cosmopolitan' (Majone 2000) Euro-level 'competition state' behaviour has produced a two-level, pluri-dimensional³, network based, European 'regulatory state' with the potential actually to increase the bureaucratic regulation of the sector, while the greater 'flexibility' of the new regulatory framework may increase 'domestication' by the Member States (Michalis 2004).

The 1998 Package: Negotiation and Implementation.

EU telecommunications liberalization involved EU *harmonizing re-regulation*, the design of new EU-wide regulations and regulatory instruments needed to ensure a level playing field for the promotion of competition and to prevent the former monopoly operators from abusing the market dominance that they still enjoyed even after the formal removal of their monopoly rights. In short, it required transition from 'positive' to 'regulatory' state. Key areas requiring regulation were the licensing of new entrants, the setting of conditions and costs of network access and interconnection, and also the public service aspects of telecommunications. The design and EU-wide harmonization of new pro-competitive regulations therefore necessitated a process of intergovernmental negotiation. Inevitably, in the negotiation process, the Member States, whose *preferences* varied - particularly during the early stages - attempted to shape EU policies in ways that minimized the adaptation costs that they would subsequently have to bear in implementing the EU-agreed regime. In negotiating the EU rules, the Member States plainly behaved as 'competition states', 'up-loading' their preferences into the 1998 re-

regulatory package in ways that catered to their particular strategic capacities and different endowments in terms of perceived competitive advantages and disadvantages.

From the outset, the Member States' positions regarding liberalization varied according to a number of national institutional factors, including their market specificities (large or small, developed or under-developed), the ideological colour of their governments (free market-orientated or otherwise), the structure of domestic group politics (e.g. strong or weak telecoms unions, strong or weak business lobbies for reform), national 'regulatory styles' (legalistic, bureaucratic, light-touch), and their 'models' of capitalism (Anglo-Saxon, 'Rhineland', *étatiste*).⁴

Due to a coincidence of such factors highly favourable to liberalization, the UK had assumed the role of a 'liberalization leader' by the early 1980s, pushing for EU liberalization measures and heading a group of liberalization-minded northern European countries. According to Thatcher (1995) 'the [UK's] Conservative government sought to export the British approach to regulation to the EC. Thus it supported maximization of competition and provisions for "fair competition", opposing the establishment of norms and standards for equipment and services which might be stricter than in Britain.' The competition-state motivation was plainly evident. The UK's strong liberal orientation was clearly 'related to the position of British companies, in particular BT'. Freed from the constraints of public ownership and enjoying the competitive stimulus that flowed from the UK's first-mover liberalization, BT was 'very well placed to take advantage of EC markets being opened to competition'.

However, France headed a camp of liberalization laggard member states, encompassing southern Europe, together with Belgium and Luxembourg. These states had an interventionist state tradition and were concerned to protect *service public*. Also, consensual countries like Germany whose institutional structures presented oppositional actors with multiple veto points, were unable to move forward with reform as quickly as governments in centralized majoritarian countries like the UK.

Until 1993/94 most member states remained ill disposed to countenance liberalization of the core telecommunications monopolies, basic voice telephony and infrastructures. This made for a highly incremental EU reform process. Once the liberalization laggards accepted the new techno-economic realities and the principle of full liberalization, the Member States 'up-loaded' their preferences for its timing. Thus, France and Germany held out for a full liberalization deadline – 1 January 1998 – that was later than that desired by more enthusiastic liberalizers, the UK, Netherlands, Sweden and Finland (Bartle 2002b: 16). In true 'competition state' fashion, this allowed their 'national champion' incumbents to exploit their core monopolies for long enough to prepare for full competition. Similarly, some Member States (Greece, Ireland, Portugal and Spain, who could plead under-developed markets, and Luxembourg, whose market was very small) negotiated extensions of the 1998 market-opening deadline. France, Belgium, and others, 'up-loaded' measures allowing Member States to protect *service public*.

The need to cater to diverse national preferences was reflected in the considerable discretion that the 1998 regulatory package allowed the Member States for transposition and implementation ('downloading'). The EU regime provided a considerable amount of subsidiarity. The directives established a set of principles and minimum requirements that the Member States were obliged to implement (such as the principle that licence conditions or interconnection tariffs did not impede competition). However, they allowed considerable discretion about how they might be implemented. As noted, routine implementation and enforcement of the regulatory framework were the responsibility of NRAs in the Member States. The 1998 package specified only the need for regulation that was independent of the operators and sufficiently resourced; it allowed for a diversity of NRAs and did not attempt to harmonise their institutional form or operation.⁵ The NRAs' institutional powers, procedures and resources varied. They determined whether licenses, granted at the national level, should be administratively more burdensome individual licences or general authorizations and class licences. Similarly, the NRAs varied in exercising their responsibility to ensure that network operators complied with the principles of cost-orientation and transparency demanded by the ONP and Interconnection Directives. Further, Member States were able to exercise discretion in

imposing national universal service requirements⁶ on operators. France, for instance, established a universal service fund to compensate the universal service operator (in practice, the incumbent operator) for providing these services, which some saw as favouring the national champion.

The decentralized character of regulation-in-practice soon revealed considerable variation between the Member States. Their implementation of the 1998 package was characterized by inconsistency between different national licensing regimes facing new entrants, which ranged from ‘very light’ to ‘onerous’. New entrants expressed concerns about some countries’ procedures for setting interconnection tariffs, held to favour the incumbents. The Commission noted concern, too, about inadequate mechanisms of dispute resolution and about the weakness of some national regulators in terms of resources, expertise and/or independence⁷. Interestingly, a survey of the NRAs showed up significant differences among their attitudes to, and policies for, promoting competition: ‘there were clear differences in perceptions of the extent to which competition had developed in telecommunications, the need for more competition and even of the desirability of the competition that had developed’ (Daßler and Parker 2004: 22). In looking at national regulatory practice under this decentralized EU regime, for heuristic purposes it is useful to categorise the Member States into *liberal*, *étatiste*, and *intermediate* regimes (Levi-Faur 1999; Roy 2000; Humphreys and Simpson 2005: 80-85). These regimes reflected the Member States’ different market specificities, legal systems, regulatory styles, and models of capitalism. A common thread, though, was that the Member States acted as ‘competition states’, domesticating the EU’s 1998 re-regulatory package in ways that catered to their particular strategic capacities and different endowments in terms of perceived competitive advantages and disadvantages.

A northern European group of countries comprising the UK, the Netherlands, Finland, Denmark and Sweden were clearly ‘liberal’ competition states (Roy 2000). Their implementation of the 1998 regulatory package resulted in the establishment of strong, independent NRAs, comparatively light licensing procedures and efficient management of regulatory issues, including interconnection. Competition was introduced earlier and

mostly developed faster than in the rest of the EU. These countries were receptive to liberalization from the start. They had a strong private sector of the economy; Sweden, Netherlands and Finland all had globally competitive companies in the electronics and telecommunications sectors. Although the Scandinavian countries – with their Social Democratic political cultures – had strong public service traditions, universal service provision was left to market actors, with a minimum of regulatory intervention. They had conspicuously light licensing regimes (class licences were the norm with zero to low fees and relatively few conditions); the UK's was actually somewhat less liberal.

In 1998, according to Roy (2000, p. 14) the *étatiste* category comprised of France, Belgium, Luxembourg, Portugal and Greece. These countries' regulatory regimes were characterized by a bureaucratic regulatory style and doubts about the independence of the regulators; in particular, ministries continued to exercise a supervisory role over – while the state retained a significant stake in – the incumbent operator. New entrants were burdened with relatively restrictive licensing regimes, with detailed requirements, and in some cases the regulator appeared reticent, tardy or unable to intervene in a pro-competitive manner. The model was characterised by a strong commitment to social and public service goals, which critics claimed was less conducive to competition and favoured the 'national champion' incumbent operator (Roy 2000). In France, licensing was subjected to a burdensome two-stage approval process, first by the NRA, then by the Ministry. New entrants were obliged by their licence conditions to commit 5 per cent of turnover to research and development. A requirement that market players pay into a universal service fund to compensate France Télécom's provision of 'service public'⁸ could be seen as a regulatory subsidy to the national champion incumbent and an anti-competitive burden on new entrants (Humphreys and Simpson 2005: 81-82). A key rationale for privatizing France Télécom and accepting EU-liberalization was to promote the national champion's expansion in international markets, yet the French version of the 'competition state' maintained some control, through a 54% stake in the company. Belgium was a notable transposition laggard, in order to gain time to adapt for the incumbent operator Belgacom, part-privatized in 1995 so that it could raise the external investment enabling it to compete in the new environment. New entrants faced onerous

licensing application procedures and requirements, including the need to submit a 15-year business plan, and upon full liberalization in 1998 they faced comparatively high interconnection charges (Humphreys and Simpson 2005: 82).

The *intermediate* regimes exhibited a mixture of *liberal* and *étatiste* features. This camp could be said to comprise of Germany, Spain, Italy, Austria, and Ireland (Roy 2000: 12). Most of these countries had been liberalization laggards. Spain was a good example. It negotiated a 5-year extension of the 1 January 1998 full liberalization deadline; however, in the event, it only availed itself of one year. The government had twin objectives: to stimulate competition across the sector; but also to promote a 'hard core' of competitive Spanish companies, to which end it retained influence over key aspects of the market (Jordana 2002: 99-100). Thus, the Spanish 'competition state' combined liberalization with traditional mercantilism (Arocena 2003; Jordana et al 2005). Although Germany was not a wilful 'laggard', in that its policy makers had strongly favoured liberalization, the country's consensual political system obstructed speedy reform. German implementation of the 1998 package was characterized by more complex licensing procedures than in *liberal* countries. Moreover, dispute settlement was slow. German legalism in particular was not conducive to quick remedies. Over time, these countries moved in the liberal direction. However, the state retained a stronger presence – for example in retaining a golden share in the incumbent operators post-privatization - than in the liberal countries.

In implementing the 1998 package, 'domestication' by the Member States was rife. It could hardly be termed, as some have claimed, a triumph of supranationalism. Plainly, Europeanization had not resulted in anything approaching uniformity of regulatory regimes across the EU. The inconsistencies in licensing and interconnection tariff procedures meant that businesses wanting to operate across Member State borders had to learn about national regulatory differences. Dispute resolution and enforcement procedures varied. The Commission's seventh implementation report noted the lengthy and cumbersome procedures for enforcement of NRA decisions on incumbents in France, Italy, Austria and Portugal. In Ireland and Germany enforcement was hampered by low

penalties. New entrants expressed concern about lengthy appeals procedures in Belgium, Germany, the Netherlands, Austria and Finland (European Commission 2001a, p. 15). It was the case also that the implementation of the 1998 regulatory package exhibited differences in Member States' willingness to make lighter the degree of regulation applied to different telecommunications markets as competition set in (Humphreys and Simpson 2005: 90-91). This was illustrated by the contrast between the UK, where licence regulations became less detailed and the scope for retail price regulation was reduced, and France, where no explicit framework for regulating competition emerged and new entrants remained very dependent on detailed decisions of the NRA (Thatcher 1999: 225). Having established the varieties of competition/regulatory state behaviour among the Member States surrounding the 1998 regulatory package, the paper now turns to the EU's subsequent attempt both to achieve a greater degree of regulatory harmonization and to take account of increased competition and technological change, notably the 'convergence' of electronic communications systems.

Convergence in Communications and the EU

Application of computer technology to telecommunications switching to create digital switches and technological innovations facilitating computer-to-computer network communications spawned service efficiencies and innovations from the 1970s. Increasingly convergent IT and communications led, in the 1990s, to the adoption of the hybrid term, Information and Communications Technologies (ICT). Fixed-link, microwave and satellite communication infrastructure innovation expanded capacity in limited networks of telecommunications and broadcasting and were 'turbo-charged' by the digitalization of transmission. Popularization and commercialization of the Internet - a decentred, multimedia platform with huge economic and social potential - added to the convergence phenomenon (Simpson 2004). It was now possible to carry telecommunications and audiovisual services across similar networks though regulatory restrictions prevented companies from doing so. Consequently, there ensued a debate on

the regulatory impediments to convergence's seemingly inexorable march (Mueller 2004).

The EU's consideration of convergence was catalysed by a Green Paper (European Commission 1997) exploring the extent to which States might homogenise regulation of broadcasting, the Internet, IT and telecommunications. This spurred a particular debate on the nature of regulatory distinction between telecommunications and broadcasting. Though superficially equivocal, the Paper contained strong undercurrents favouring radical regulatory overhaul creating 'horizontal' regulation (Humphreys 1999). This was unsurprising since its key policy architect was the Information Society Directorate-General of the European Commission (Tongue 1997), very much telecommunications policy oriented and drawing support from the telecommunications and the IT sectors (Levy 1997). Conversely, broadcasting interests were largely against comprehensive regulatory convergence. Whilst not ignored, they certainly 'punched below their weight' in making input to the Paper though subsequently made their influence felt in the consultation following its publication. The upshot was the proposal, and subsequent acceptance, of a limited common ICT regulatory framework secured through the 1999 Communications Review (European Commission 1999). The EU created, in 2002, the spuriously named Electronic Communications Regulatory Framework (ECRF), which was anything but fully comprehensive in its coverage. Under the aegis of the ECRF would come all communications infrastructures and related services. Absent were services embodying content over and above voice telephonic signals. Conspicuously, broadcasting content and Internet services were excluded.

The EU's deliberations illustrate the limited, though significant, extent to which States were willing to develop the 'regulatory' and 'competition' states in electronic communications through the EU. The narrow, telecoms-focused, scope of the ECRF provides evidence of reluctance to Europeanise further the 'competition' and 'regulatory' states in broadcasting. The national(istic) cultural and linguistic character strong in the EU's broadcasting markets meant governments were not prepared to extend an only limited degree of Europeanization of broadcasting policy (see Levy 1999; Harcourt

2005). However, the ECRF proved significant for further embedding the ‘competition’ and ‘regulatory’ state at EU level in telecommunications.

Negotiation of the ECRF

The 1998 telecommunications liberalization framework was a key moment in the emergence of the European ‘regulatory’ and ‘competition’ state and the reinforcement of the state in both these guises at the national level. However, the extensive nature of the framework was indicative of the degree to which competition in telecommunications had to be engineered and managed subsequently. Pursuing this, actors in telecommunications policy at national and EU levels became convinced that further refinement of EU regulation was necessary. The ensuing process involved further migration towards a liberalised market environment simultaneously increasing the level of involvement of the EU in telecommunications.

Such action was motivated and justified by global developments. In the 1990s, the EU made a policy priority of securing the creation of the much-hyped, though rarely clearly specified (Garnham 2000), ‘Information Society’. The launchpad was the Bangemann Report (European Commission 1994) which, *inter alia*, stressed that a completely liberalized telecommunications sector was essential for the Information Society. The EU also became aware of the importance of the Internet as a vector for enhancing social and economic welfare promised by Information Society advocates: this soon became central to its eEurope programme (European Commission 2002). One concern was how to secure a stake in the potentially global Internet economy (Christou and Simpson 2004). Another was that competition bottlenecks in the ‘local loop’ – the key access point for users to the Internet – were impeding growth in take-up rates which were lower than in the US. Finally, in 2000, at their famous Lisbon Summit, EU Heads of State set themselves the ambitious goal of making the EU the world’s most competitive and dynamic knowledge economy acknowledging that high-technology, liberalized telecommunications were essential.

These concerns, along with experience of diverse implementation of the 1998 telecommunications regulatory framework, convinced EU policy makers of the need to re-evaluate the nature and extent of telecommunications regulation, a further indication of the desire to embed and deepen the European 'regulatory' state – and thereby increase EU involvement – in an increasingly liberalised sector. In its 1999 Communications Review, the Commission focused on three core issues: the extent to which the 1998 Framework was functioning effectively; the extent to which regulation might be made lighter in view of satisfactory development of competition; and areas where communications might be dealt with convergently at EU level. The upshot of the convergence debate made the latter largely a politically rhetorical re-statement of ground already covered rather than a genuine attempt to secure more far-reaching convergence.

Subsequent proposals advocated radical reduction in the number of directives covering telecommunications from 20 to six, theoretically reducing the regulatory burden on both telecommunications operators and NRAs. The new Electronic Communications Regulatory Framework would have a 'convergence dimension', its provisions covering all communications networks, fixed and mobile, including those transmitting broadcasting and Internet traffic. The Commission proposed a Regulation requiring Member States to unbundle immediately their local loop (European Parliament and Council 2000), deemed essential to facilitate rapid uptake of the Internet. Henceforth the regulatory framework would consist of merely two liberalising measures, on local loop unbundling (LLU) and general competition (European Commission 2002), replacing numerous Commission liberalization directives (covering specific telecoms markets). The re-regulatory package consisted of five negotiated European Parliament and Council harmonization directives – a framework directive (European Parliament and Council 2002a) plus four others covering access and interconnection (European Parliament and Council 2002b), authorization (European Parliament and Council 2002c), universal service (European Parliament and Council 2002d) and data protection and privacy (European Parliament and Council 2002e).

ECRF negotiations provided evidence of the growth of the European ‘competition’ state and ‘regulatory’ state in telecommunications and proved controversial in two areas. The first was the Commission’s goal to engineer competition and promote European competitiveness through reducing regulatory ‘red tape’. The specific issue was the extent liberalized telecommunications markets required stricter sector-specific regulation (in the 1998 regulatory framework) than prescribed by EU competition law: how far had telecommunications markets matured competitively since liberalization? A 1999 Commission consultation paper argued that only telecommunications operators with 50% market share or greater held significant market power (SMP) and therefore should be subject to ex ante regulatory intervention requiring them to offer interconnection facilities according to a cost-based formula. All other operators could negotiate interconnection competitively. This represented a considerable loosening of the 25% threshold figure for SMP triggering ex-ante regulation in the 1998 Framework. The proposal implied steady withdrawal of state regulation and, unsurprisingly, precipitated a debate between the Commission, Member States, NRAs and commercial operators. Some States and new entrants expressed concern that pro-competitive regulation might be withdrawn too early. The UK was particularly concerned that the Commission’s proposals did not cater adequately for cases of possible ‘collective dominance’, such as in mobile telephony markets. The issue was resolved through a compromise engineered by the EU Commissioner for Competition, the UK Trade and Industry Secretary, and the French Economics Minister (authors’ interview 2001). A detailed list of criteria for the consideration of market dominance, including collective dominance, beyond merely market share data, was produced. The Commission’s proposal to increase the threshold market share for automatic sector-specific regulation to be triggered to 50% was agreed. Forthwith also, the ECRF would aim to eradicate instances of market players behaving independently of either competitors or consumers, or leveraging dominance in one market across to another (Telecom Markets 10.04.2001: 7). The episode illustrates how, paradoxically, the UK as *the* exemplar of a pro-liberalisation competition state, in this case, was keen to see a tightening of EU regulation necessitating more intervention than would be the case had the Commission’s lighter touch recommendation been accepted. Whilst in favour, ultimately, of minimalist regulatory intervention in telecommunications,

the UK was keen to upload its managed competition approach to liberalisation even if this meant more EU involvement in market regulation.

The other controversial issue in the negotiation of the ECRF was clearly related to the development of a European 'regulatory state'. It centred on a proposal from the Commission to increase its regulatory authority over telecommunications through institution-building on the one hand and, on the other, through establishment of a right of veto for itself on regulatory decisions of the NRAs. Regarding the former, the 1999 Communications Review proposed creating a High Level Communications Group to bring together the EU's NRAs. This was an indication of the Commission's attempt to create for itself the kind of detached monitoring role played by Member States in respect of their regulatory authorities. The proposal's implications for subsidiarity meant the move was strongly resisted. EU Member States had already shown themselves averse to creating a European regulatory authority for telecommunications (Bartle 2001) and viewed the HLCG in a similar light (see Michalis 2004). Consequently, as part of the ECRF, a new European forum, the European Regulators Group, was established. Much more intergovernmental than the proposed HLCG, the ERG was composed of NRAs and the Commission, which chaired and provided administrative support for the Group, but has no voting rights. The ERG is another EU telecommunications policy compromise outcome maintaining decision-making authority firmly at the national level yet affording the Commission more subtle information seeking and persuasion opportunities for the influence or 'subterfuge' (Heritier 1999) on which it thrives.

Whilst it was unclear how much the proposed HLCG and its compromise successor, the ERG, might in future contribute to the establishment of the European 'regulatory' state in telecommunications, the proposal of a right of veto for the Commission over certain NRA decisions was much more clear-cut. Consequently, it was resisted strongly by Member States. There were two aspects to the issue. First, the Commission proposed that it be given authority to establish a list of markets within telecommunications to be subject to ex ante regulation and would thereafter have a right of veto on any attempt to add to this list. The strong opposition which this generated, particularly from the French,

ensured the proposed veto was watered down such that the Commission could recommend a list of markets only. This appeared to reflect a more *dirigiste* and mercantilistic ‘competition state’ approach on the part of France and others favouring firm national control over regulation.

Second and by contrast, the Commission focused on the withdrawal of ex ante regulation by NRAs in telecommunications markets, claiming a right to require amendment or reversal of such decisions, which, as part of the new draft competition directive, generated fierce opposition from NRAs. However, unusually, both incumbent and new telecommunications operators, sceptical of the decision-making ability of NRAs, were in favour of the Commission’s claim. The denouement was a very significant development of the European ‘regulatory’ state in telecommunications where, as part of the ECRF’s Framework Directive, the Commission was given the right to veto NRA decisions in two key areas: designation of operators as having SMP and the designation of new telecommunications markets requiring ex ante sector specific regulation.

Nonetheless, the Member States denied the Commission a veto over the remedies for competition shortfalls applied by the different NRAs. Remedies thus continued to vary considerably across the EU, leading the Commission to propose – yet again – in the current Review of the ECRF, initiated in 2006, that its authority be extended to this crucial aspect of regulatory implementation by the NRAs (European Commission 2006a). This initiative should not be interpreted purely as a self-interested Commission bid to extend its competencies (not least in view of the increased regulatory burden involved); rather it could be seen as a rational policy response to persistent variation in the *quality* of regulation provided by NRAs across the Union, reflected in the Commission’s implementation reports and in ‘regulatory scorecards’ of the new entrants’ organisation, ECTA (see <http://www.ectaportal.com/en/basic276.html>.)

The ECRF and the European ‘Regulatory State’ in Telecommunications

The ECRF entails an increase in the work of regulators and regulatory networks nationally and at EU level. NRAs must undertake reviews of more differentiated markets to scrutinise and monitor SMP. In 2003, the Commission produced a Recommendation outlining 18 markets requiring ex ante regulation (European Commission 2003a), illustrating the degree to which the ‘regulatory’ state was deemed necessary to deliver competition and how moves towards greater liberalisation led to increased EU involvement. The ECRF mandated increasingly pressurized NRAs to resolve disputes within four months. The degree of complexity of the European ‘regulatory’ state in telecommunications is exemplified in another Commission Recommendation specifying procedures which NRAs should employ in dispute resolution and notification activities regarding SMP (European Commission 2003a). This area has an important EU dimension due to consultation and transparency stipulations of the ECRF’s Framework directive: NRAs must notify decisions on disputes to the Commission which has only one month to review them to exercise the right of veto. The former were required to continue to produce annual reports on the implementation of the ECRF- a practice established by the 1998 Framework – and undertake research into issues related to competition in telecommunications, notably benchmark pricing, fixed network ownership, the cost of mobile communications and provision of business leased lines. This is a considerable workload unlikely to contract given the likely emergence of new technologies and services.

The ECRF increased the number of regulatory committees at EU level. Whilst rationalization occurred through replacement of the ONP and Licensing Committees by the Communications Committee, strengthening and proliferation of the European ‘regulatory’ state occurred elsewhere. The ERG, bringing the Commission closer to NRAs, provided the latter a firmer handle on development of regulatory thinking nationally. The Commission created an internal task force of members of DGs Information Society and Competition to address SMP and market definition issues. A Radio Spectrum Committee was created similar in composition and remit to the

Communications Committee, as well as an advisory Radio Spectrum Policy Group, with composition identical to the ERG. An advisory Working Party on the Protection of Individuals with Regard to the Processing of Personal Data was also created composed of members from national authorities and the Commission, which supplied its secretariat.

The post-ECRF 'regulatory' state continued to exhibit variety in implementation at the national level where there clearly remained considerable scope for 'domestication' within a complex regulatory structure holding the potential for conflicts between the European and national 'regulatory' states. Therefore, having given Member States some time to transpose the ECRF, the Commission, reverted in 2004 to its well established strategy of providing detailed country-by-country accounts of transposition and implementation. It noted problems in transposing legislation germane to the ECRF in Belgium, Greece and Luxembourg - against whom there were pending proceedings in the European Court of Justice - as well as in the Czech Republic, and Estonia, two new Member States. Necessary legislation was not in place in Cyprus, France, Latvia, Lithuania, Poland, Slovenia, Slovakia and Spain (European Commission 2004). The Commission also focused on a number of implementation problems. Concern was expressed over the independence of NRAs in Belgium, France and Germany; the length of time it took appeals procedures against NRA decisions to be heard; and the fact that similar problems seemed to be emerging in the new Member States as had to be overcome in the pre-existing EU-15, notably in areas such as interconnection charges, carrier selection and number portability (European Commission 2004: 10-13).

Notwithstanding the implementation shortfalls, the radical transformation of the telecommunications sector yields evidence of the emerging shape of governance which can develop where the competition and regulatory states assume prominence both nationally and within the EU. A two-level, pluri-dimensional governance order is developing where a network of mostly technocratically focused actors has assumed responsibility for governance of a once heavily state-centric, nationally inward-looking sector. The 'classic' hollowing out of the direct executive responsibility of the national state that inevitably follows, over time, the operationalisation of the competition and the

regulatory state is clearly illustrated in telecommunications. Issues related to the social policy cornerstone of telecommunications, now articulated in terms such as the ‘digital divide’, as well as regulatory issues of a techno-economic nature, are tendered to the remit of regulatory authorities at arm’s length from the state. The recent controversy over the possible creation of a ‘regulatory holiday’ for the German operator Deutsche Telekom, in terms of providing access to competitors in the broadband services provision market, is illuminating. Whilst the German government lent strong support to its former incumbent (BBC 2006), in the process clearly behaving as a competition state, both the German regulator, BNetzA, and the European Commission strongly opposed such a measure, an alliance which eventually prevailed (European Commission 2006b). This provides a clear indication of how significant the practice of both the regulatory state at the national level and the EU-level competition state have taken hold.

The pan-EU picture is one of a developing network-like governance constellation (Kohler-Koch 1999; Majone 2000) dominated by quasi-state actors in the shape of the national level NRAs and the European Commission, as well as aforementioned regulatory committees (and working groups). These actors contribute to a system akin to Eberlein and Grande’s (2005) ‘informalization of governance’, where ‘important differences between institutions, interest groups, and firms shape regulatory webs’ (Radaelli, 2004: 19). The Commissioner for Information Society and Media recently commented that there is a ‘common approach emerging in Europe’s internal market which is increasingly built on close cooperation between the Commission and national regulators’ (European Commission, 2006b: 1). Aside from interacting on a case-by case basis, these actors come together at the European level in the cluster of regulatory groups and committees with highly technocratic remits highlighted earlier. Less directly involved are key players in telecommunications service provision, both well-established and newer entrant, which individually and collectively influence regulatory policy agendas in telecommunications at the EU level, and in a more limited way nationally due to persistent parochial competition state behaviour.

Conclusions

Paradigmatic change in telecommunications governance provides an important example of the emergence and development, at national and European levels, of the competition and the regulatory state. Both have been regarded as key features of the neo-liberal turn in political economy, of which telecommunications provides ample evidence. Nonetheless, this article has highlighted two important caveats. First, telecommunications provides evidence of tensions, as well as complementarities, between the two. Second, both the competition state and the regulatory state can pull in a different direction to that suggested by neo-liberalism. Here, the competition state, at the national level, illustrates the enduring presence of more traditionally interventionist - even mercantilistic - state activity, albeit in a new governance guise. Equally, the pursuit of economic liberalism through the regulatory state paradoxically requires an increase in regulatory coverage, complexity and weight.

This article also shows how Europeanization of the competition and regulatory state, in the attempt to render the EU more internationally competitive and to change parochial into cosmopolitan behaviour, adds a further twist to the analysis. The European Commission pursued a neo-liberal competition state approach in the telecommunications sector, leading to tensions with more parochially preoccupied Member States. One of the mainstays of the ECRF – to govern telecommunications markets as much as possible through EU competition law – is the embodiment of the EU competition state, vesting responsibility in the most ‘supranational’ dimension of the EU. The ECRF addresses a paradox of the competition state in telecommunications - governments’ continued protection of domestic firms under the earlier 1998 regulatory framework. The European regulatory state also reflects this tension and complexity. It is necessarily constituted as a multi-dimensional governance structure: the Commission sits at the centre of a devolved and diversely constituted regulatory network, yet – even after the enactment of the ECRF – it is unclear whether equilibrium of influence between the European and national levels has been attained. In view of persistent regulatory shortfalls, there may be a case for

extending the Commission's veto powers to remedies, as suggested in the current Review (2006a).

Finally, the ECRF highlights the intimate connection between the European competition state and European regulatory state where the competition state paradox of freer markets requiring more, not fewer, regulations and regulatory activity is evident at both national and EU levels. As things stand, the development of the regulatory state at the European level through the ECRF highlights persistent tensions between the Member States and the Commission where even compromise outcomes have created a regulatory system that still provides Member States with scope to domesticate the constituent measures of the ECRF.

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Notes.

¹ For a discussion of competing perspectives on the impact of the EU see Bartle 2002b.

² Postal, telegraph and telephony.

³ By pluri-dimensional we mean the involvement of diverse interests and institutions, including sectoral 'stakeholders', regulatory committees, working groups, national regulators, national government officials and EC officials.

⁴ Vivien Schmidt (2002) points to the continuing distinctiveness, even under the impact of strong exogenous forces for convergence, of the UK's 'market capitalism', France's 'state capitalism', and Germany's 'managed capitalism'. See also Hall and Soskice 2001; and Linda Weiss 1998 and 2003.

⁵ The ONP framework directive (90/387/EC) stated merely that there should be a separation of ownership and regulation in the case of state-owned incumbents.

⁶ To ensure a minimum level of service at an affordable price for all users

⁷ For a powerful critique see Majone (2000: 283), who cites telecoms as an example of the ‘credibility crisis of community regulation.’

⁸ To cover the cost to FT of, for example, providing lines to everyone who wants one at the same cost regardless of geographical location, and covering loss-making services such as the ‘social tariffs’ (reduced rates for certain social categories).