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Executive MBA Mergers & Acquisitions
with a special emphasis on Regulation



How can a central European Regulatory Agency improve consistency of NRAs decisions?

A Master's Thesis submitted for the degree of
"Master of Business Administration"

supervised by
o. Univ. Prof. Dr. Heinrich Otruba

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Vienna, November 2009

Affidavit

I, **MAG. RUDOLF NORTH**, hereby declare

1. that I am the sole author of the present Master's Thesis, "How can a central European Regulatory Agency improve consistency of NRAs decisions?", 91 pages, bound, and that I have not used any source or tool other than those referenced or any other illicit aid or tool, and
2. that I have not prior to this date submitted this Master's Thesis as an examination paper in any form in Austria or abroad.

Vienna, November 2009

Signature

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Dedicated

to

Regina,
Marie-Marlen and Stefanie

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List of abbreviations

| | |
|-----------------|---|
| BERT | Body of European Regulators in Telecom |
| BEREC | Body of European Regulators for Electronic Communications |
| COD | Ordinary legislative procedure (ex-codecision) |
| COM | Document received for information |
| EC | European Community |
| E-Communication | Electronic Communications Networks and Services |
| EECMA | European Electronic Communications Market Authority |
| ENISA | European Network and Information Security Agency |
| EP | European Parliament |
| ERA | European Regulatory Agency |
| ERG | European Regulators Group for Electronic Communications Networks and Services |
| DG InfoSoc | Direction General Information Society and Media |
| FCC | Federal Communications Commission (US) |
| GERT | Group of European Regulators in Telecoms |
| IA | Impact Assessment |
| ICT | Information and Communication Technologies |
| IP | EC Press Release |
| MEMO | EC Memo |
| MS | Member States of the European Union |
| NRA | National Regulatory Authorities |
| SEC | Document received for information |
| SM | Single Market |
| SME | Small and Medium Enterprises |
| SMP | Significant Market Power |
| VDSL | Very High Speed Digital Subscriber Line |
| VoIP | Voice over Internet Protocol |

Abstract

Why should a central European regulatory agency (e.g. the European Electronic Communications Market Authority – “EECMA”¹) or a new European Telecom Office be established? Which objectives could be addressed by this new authority and which issues could be better handled by them than current authorities? Which tasks could be performed better centrally within the European Community than in regional offices? What are the advantages of centralisation versus decentralisation? How will National Regulatory Authorities (NRAs), who carry responsibility for applying EU rules² at national level, be affected by the creation of a European Regulatory Agency (“ERA”)? Can an ERA improve consistency of NRAs decisions? Can cooperation of the national regulatory authorities be reinforced at European level by establishing a new body, a “Body of European Telecoms Regulators”.³ Should an independent expert body (e.g. Group of European Regulators in Telecoms “GERT”) be established in order to assist the European Commission and NRA in implementing the EU regulatory framework?⁴

Or are Article 7 procedures (Community consultation mechanism⁵) sufficient in supporting the internal market for e-communication by guaranteeing steady and constant execution of the European Regulatory Framework throughout the EU?

“As with every area of the Single Market, the nature of the legal (law) reform process within the Community means that Member States (MS) retain considerable flexibility in the transposition of EU measures. An inevitable consequence of this is

¹ COM(2007) 699, 2007/0249 (COD); Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the European Electronic Communications Market Authority (13 November 2007)

² Directive 2002/21/EC establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community. (7 March 2002)

³ COM(2008) 720 final, Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the European Electronic Communications Market Authority (5 November 2008)

⁴ COM(2009) 78 final

⁵ Framework Directive 2002/21/EC

continued existence of divergent approaches in the application of certain Community measures.”⁶ Can a central communications market authority change this in the area of e-Communication market?

Divergences in remedies are not at all times justified by diverging market conditions or other noted specifics. Additionally, the most efficient remedy has not always been selected. In this area, there is still room for more efficient regulation to increase consistency of remedies across the EU and to work towards a truly internal market.⁷

Information Society and Media Directorate-General pointed out that more than 650 draft regulatory measures have been submitted to the Commission and as a consequence, some markets have become competitive in some EU MS, allowing existing regulation to be rolled back. Yet, several markets still suffer from lack of competition. Measures implemented thus far have been taken into account in the 2007-review of the Commission’s recommendation for relevant markets and the review of the Telecom Rules.

In a London Economics⁸ survey of companies across five EU MS, there have been indications that regulatory uncertainty is one important aspect of regulation effecting investment decisions. The overall objective of the study was to provide key contributions to the Commission’s planned 2006-review of the e-Communication’s regulatory framework.⁹

Thesis: Establishing an internal telecommunication/E-Communication market¹⁰ presents remarkable advantages for the whole continent of Europe and could be supported by creating a central European regulatory agency.

⁶ HOUSE OF LORDS, European Union Committee, 5th Report of Session 2007–08, cap. 6: TELECOMMUNICATIONS, p. 105 < www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldcom/36/3602.htm > (accessed on: 24.11.2009)

⁷ General Factsheet 52, Consolidating the EU single market for electronic communications **Article 7**, Information Society and Media Directorate-General, July 2007 <ec.europa.eu/information_society/doc/factsheets/052-art7-en.pdf> (24.11.2009)

⁸ www.londecon.co.uk

⁹ IP/06/1123, “EU telecoms reform: Commission continues debate with three studies” (2006) <europa.eu/rapid/pressReleasesAction>

¹⁰ Treaty establishing the European Community, Article 14, Official Journal C 115 of 9 May 2008

Is the European Electronic Communications Market Authority proposed in the 2006 review an “end in itself”, or could it perhaps help to achieve the goal of “regulatory consistency” by playing a supporting role in establishing the internal market and minimising actual obstacles to the internal market? Balancing accountability and autonomy is a main consideration for creating a new agency. This thesis analyses whether a central European regulatory agency (e.g. like the European Electronic Communications Market Authority or Group of European Regulators in Telecoms proposed by the Commission) can improve the consistency of NRA decisions and thereby facilitating the establishment and consolidation of the EU internal market and examines how these goals can best be reached.

Within this thesis the relevant EU and NRAs documents (e.g. Commissions public ‘call for input’; Commission Reports on Implementation of the Regulatory Package; external studies commissioned by DG InfoSoc and relevant EU directive-drafts and the current regulatory framework of communication, Directives concerning actual European agencies, et cetera) shall be analysed, national/ international and community regulatory instruments and process shall be compared.

The **result** of the thesis is that the option of a European regulator may offer the best prospects for creating a truly single market in e-communications and lead to a consistent market in communication within Europe.

1 Internal Market

The internal market is the central part of today's Union. Since 1985, European Union institutions and MS have done their utmost to create an internal market by adopting hundreds of legislations needed to sweep away the technical, regulatory, legal, and bureaucratic barriers that stifled free trade and free movement.¹¹

The mutual recognition principle¹² will guarantee free shipment of goods and services without harmonising MS' national legislations. Goods lawfully produced in one MS cannot be barred from trade on the territory of another MS. The same rules relate to services. The only exclusion is the case of relating general interest such as health, consumer or environment protection – which is subject to strict conditions.¹³

This free movement of goods and services (e.g. telecommunication services) is still suffering due to inconsistencies of NRA (e.g. cross border activities) decisions.

However the House Of Lords warn in its report “The Single Market: Wallflower or Dancing Partner?”¹⁴ that “Often referred to as one of the greatest achievements of the European Union, it must not be allowed to slip into decline by the failure of MS to live up to their commitments and make the Single Market a reality for all. Achieving the completion of the Single Market is fundamental to reviving support for the European Union: in order to create, as Commission President Barroso has said, “a Europe of results”, action needs to be taken now.”¹⁵

¹¹ Four freedoms which benefit us all <europa.eu/pol/singl/overview_en.htm> (23/11/2009)

¹² Internal market: general framework, <europa.eu/legislation_summaries/internal_market/internal_market_general_framework/l21001b_en.htm>

¹³ COM(1999) 299 final, Mutual recognition in the context of the follow-up of the action plan for the single market

¹⁴ HOUSE OF LORDS, 5th Report of Session 2007–08 “The Single Market: Wallflower or Dancing Partner?” published 8 February 2008 (Inquiry into the European Commission's Review of the Single Market) <www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/36/36.pdf>

¹⁵ Plenary session of the European Parliament: SPEECH/07/77, José Manuel Barroso, President of the European Commission, Strasbourg, 13 February 2007

1.1 General

The single (internal) European market stands – as briefly described above - for the “four freedoms”, these freedoms are specified in the EC Treaty and form the basis of the single market framework standing for free movement of people, goods, services and capital. The single market will bring down barriers and make simpler rules to enable everyone in the MS - individuals, consumers and businesses - to make the most of the opportunities offered to them by having shortest entrance to 27 countries and 480 million people.¹⁶

In a nutshell this means:

- for individuals: the right to live, work, study or retire in any EU country;
- for consumers: increased competition leading to lower prices, a wider selection of commodities and higher level of protection of consumer rights;
- and for businesses: much easier and cheaper to do business across borders.

A **major goal of the EU** regulatory framework of E-Communication is to create and support an internal market of e-communications in Europe, in particular through

- transparent,
- predictable and
- effective regulation.¹⁷

All involved parties are responsible to create a single market. “The single market is a shared endeavour between the European Institutions, the MS, the NRAs, and the European Court of Justice.”¹⁸

¹⁶ Internal Market and Services Directorate General (DG Market), http://www.deljpn.ec.europa.eu/union/showpage_en_union.internal_market.php (30.08.2009).

¹⁷ SEC (2007)1472 COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT*” Chapter “COMPLETING THE SINGLE MARKET IN ELECTRONIC COMMUNICATIONS“(64)

¹⁸ HOUSE OF LORDS, European Union Committee, 5th Report of Session 2007–08; cap. “Responsibility for the Single Market” (57)

1.2 Creating an internal market for electronic communications

The European Commission is empowered by the EU Telecom Framework, which went into effect in 2003, stating upon and requiring national regulatory authorities to remove a proposed measure concerning CHAPTER III of Framework Directive, 2002/21/EC¹⁹, (Article 7 “Ex ante Consolidating the internal market for electronic communications”) if necessary. The common goal of ex ante regulation is to guarantee effective competition on the market to the advantage of end-users and to tackle market failures by Commission and the NRAs including extreme pricing, rejection of access to networks, barriers to market entry and unfair treatment.

Objective legal power will enable the Commission to consolidate the EU single market - in accordance with its obligation. Under Article 8 of Council Directive 90/387/EEC²⁰, the Commission has already taken the necessary steps to establish an internal market for telecommunication services - and to guarantee a level playing field in E-Communications throughout the European Community. Direction General (DG) Information Society and Media (InfoSoc²¹) and the DG Competition²² are jointly in charge of Article 7 procedures. In this paper the focus will be on the obligations of DG Information Society and Media.

1.3 Effective competition on a relevant market

The current regulatory framework obliges NRAs to carry out analyses of relevant markets to determine whether there is effective competition within relevant markets or not. The procedures set out in Article 7 of the Framework Directive, NRAs must define boundaries of relevant markets in accordance with competition law principles, taking utmost account of the Significant Market Power (SMP) Guidelines and the Recommendation on Relevant Markets.

¹⁹ Directive 2002/21/EC

²⁰ Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (90/387/EEC)

²¹ <ec.europa.eu/dgs/information_society/index_en.htm> (24.11.2009)

²² <ec.europa.eu/dgs/competition/index_en.htm> (24.11.2009)

If an NRA finds that relevant markets are not effectively competitive, one or more players is dominant or has SMP in this market, it is bound to propose appropriate regulatory measures to correct market failures. Art 14 (2) of the Framework Directive states that an undertaking, either individually or jointly with others, will be deemed to have SMP if it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers²³. Two or more undertakings can be found to be in a joint dominant position within the scope of Article 14 if they operate in a market structure considered to be conducive to coordinated effects.

With no prejudice to the case law of the Court of Justice on joint dominance²⁴, the Commission pointed out in its working document²⁵ that joint dominance probably is the case where the market complies with a number of appropriate types, in particular in terms of market concentration, transparency and other characteristics mentioned below:

- mature market,
- stagnant or moderate growth on the demand side,
- low elasticity of demand,
- homogeneous product,
- similar cost structures,
- similar market shares,
- lack of technical innovation, mature technology,
- absence of excess capacity,
- high barriers to entry,
- lack of countervailing buying power,

²³ Art 14 (2) of the Framework Directive (2002/21/EC)

²⁴ ERG (03) 09rev2, (2003) ERG Working paper, on the SMP concept for the new regulatory framework, cap. 3 “Criteria for assessing joint dominance” (8)

²⁵ COM (2001) 175 final, Paragraph 86 COMMISSION WORKING DOCUMENT On Proposed New Regulatory Framework for Electronic Communications Networks and Services Draft Guidelines on market analysis and the calculation of significant market power under Article 14 of the proposed Directive on a common regulatory framework for electronic communications networks and services

- lack of potential competition,
- various kinds of informal or other links between the undertakings concerned,
- retaliatory mechanisms,
- lack or reduced scope of price competition.

The major purpose of these guidelines is to guarantee that NRAs take a reliable approach in applying the new regulatory framework, and in particular when identifying operators as having SMP.

Market analyses have to be considered as an overall forward looking approach of analyzing the economic characteristics of a given relevant market²⁶ and which criteria is of particular importance always has to be considered in the context of a certain market taking the specific facts of the individual case into account.

Therefore the main objectives of the legal framework support competition, investment and innovation within the single market in the interest of consumers and competitive capability. Under this so-called article-7-procedure, the NRAs are obligated to analyse their national e- communications markets while drafting measures and justifications addressing market failures. This analysis must be accessible to the Commission and national authorities in other MS. In accordance with competition law principles, the NRA, must describe the limits of the relevant market, assess whether any market player(s) has SMP in this market or is dominant, and propose remedies to guarantee effective competition in the said market.

1.3.1 Instruments and Process

The regulatory framework provides NRAs with a package of “legal instruments” which give them the flexibility to design suitable remedies to deal with any market failures noticed.

²⁶ COM (2001) 175 final, paragraph 78

- Legal remedies concerning wholesale markets include: transparency, non-discrimination, accounting separation (separation of accounts between various levels of business), access obligations (requirements to provide access to the SMP operator's network) and price control.
- Possible obligations relating to retail markets: requirements not to charge excessive prices, inhibit market entry or restrict competition by setting unsustainably low prices, or discriminate between end-users.²⁷

The relevant markets defined²⁸ by European Commission have been published in the Official Journal of the European Union “Commission Recommendation of the 23rd of July, 2003, on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services” and now include seven markets²⁹.

The Commission guidelines on market analysis and the assessment of SMP under the Community regulatory framework for e-communications networks and services³⁰ lay down the principles for use by NRAs in the analysis of markets and effective competition under the regulatory framework for e-communications networks / services and help to guide NRAs in the exercise of their responsibilities for defining markets and assessing SMP. But they do not limit the general rights of individuals or undertakings in any way.

1.3.2 Notification Process

For the purpose of ensuring that decisions at national level do not have a contrary impact on single markets, NRAs should also notify certain draft decisions to the

²⁷ Frame Directive, Access Directive and Universal Service Directive

²⁸ Article 15 Frame Directive (2002/21/EC)

²⁹ 2003/561/EC, COMMISSION RECOMMENDATION on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2003)

³⁰ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002/C 165/03, Official Journal of the European Communities(2002)

Commission and other national regulatory authorities to give them the chance to respond.³¹ Any proposal by a NRA to deviate from a market identified in the Commission Recommendation must be approved by the Commission. This construction aims to provide flexibility since a Commission recommendation can be changed relatively quickly to accommodate technological and market developments, while also allowing NRAs to specify markets which may be unique to a particular MS.

If a NRA notifies the Commission of its proposed measure for a particular market, the case will be registered, and an ad hoc case team³² is fixed. The ad hoc team analyses the submitted notification and may ask for additional information or explanation. The NRA has three working days to answer to such a request. The Commission must complete its evaluation within the legally binding deadline of one month³³ and the Commission and the other NRAs may then decide to comment on the imposition of remedies. Afterwards, the NRA should take maximum account of Commissions comments before adopting the draft measure in question.

In the case that the Commission expresses proposed measures would create a barrier to the single market, or has serious doubts as to its compatibility with Community law; the investigation period is automatically extended by a further two months to start an in-depth examination of the case and invites third parties to make their views known. During this period, the NRA may not adopt its drafted measure. At the end of this second period, the Commission may withdraw its serious doubts, comment or require the NRA to withdraw its proposed measure. This last case can only be used in relation to the proposed market definition or SMP analysis; concerning proposed remedies, the Commission may only make comments. Before issuing its decision, the Commission submits its draft decision to the Communications Committee³⁴ for an

³¹ Recital Nr. 15, Framework Directive

³² Comprising officials from the Information Society and Media and Competition Directorates-General

³³ The Commission did the majority of cases within a one-month “phase one” procedure. MEMO/05/255, Electronic communications: the Article 7 procedure and the role of the Commission - Frequently Asked Questions. (2005)

³⁴ The committee assists the Commission in carrying out its executive powers under the new regulatory framework and exercises its function through advisory and regulatory procedures in accordance with the Council Comitology Decision. The committee furthermore provides a platform for an exchange of information on market developments and regulatory activities.
<ec.europa.eu/information_society/policy/ecomms/committees_working_groups/index_en.htm> (24.11.2009)

opinion. During the process the Commission may also inform an NRA to withdraw a draft measure if it is found not to be in line with Community law.

In 2008 Commission has issued five veto decisions covering seven cases and there have been 33 cases where NRAs have withdrawn their proposed measures to avoid a veto.³⁵ Cases closed by Veto Phase II are Case PO/2006/518 and 524 (Poland) concerning its analysis of retail access markets; case DE/2005/0144 (Germany) concerning wholesale call termination on fixed networks; case AT/2004/0090 (Austria) concerning transit services; case FI/2004/0082 (Finland) concerning the mobile access market and case FI/2003/0024 and 0027 (Finland) concerning international calls.³⁶

These cases show that regulatory decisions adopted by the NRAs using Article 7 review mechanisms at the EU level can protect internal market objectives. The role of the Commission is significant in helping to:

- (i) ensure consistent regulation across the MS;
- (ii) to limit regulation in markets lacking healthy market conditions to compete; and
- (iii) to bring more transparency into the regulatory process.

In its report COM(2007) 401 the Commission came to the conclusion that the consultation mechanism under Article 7 has contributed significantly to consistent implementation of the regulatory framework in the MS, in particular with regard to market definition and market analysis. At the same time, the Commission pointed out that in some areas, such as the adoption of remedies, a scope for rendering regulation more efficiently and for increasing the consistency of remedies across the EU still exists.

³⁵ MEMO/07/457, Brussels, 13 November 2007, "The Article 7 procedure, the role of the Commission and the impact of the EU Telecoms Reform - Frequently Asked Questions" <europa.eu/rapid/searchAction.do> (24.11.2009)

³⁶ Overview of notifications (by case, country, market, status) Issue Date 17/11/2008: http://circa.europa.eu/Public/irc/info/ecctf/library?l=/overview_commission/export_765_2008xls/_EN_3.831_&a=d

Summary:

The goal of the Article 7 process (Community consultation mechanism) is

- to foster competition, investment and innovation and
- to help reach objectives laid down in the "i2010 Agenda and the Lisbon Agenda on "Growth and Employment".

The Article 7 consultation mechanism has three main aims:

- i. ensuring consistent regulation across the EU;
- ii. limiting regulation to markets where there is a persistent market failure and
- iii. bringing more transparency in the regulatory process.

1.3.3 Public Consultation

Article 7 of the Frame Directive stipulates NRAs will ensure development of single markets by interacting with each other and with the EC in a visible manner to guarantee the consistent application of the provisions of regulatory framework of E-Communication. For that purpose, NRAs will seek to agree on the types of instruments and suitable remedies to deal with respective types of situations in the communication marketplace. Therefore among others NRAs have to give interested parties – e.g. market players, consumers, stakeholders, administrations as well as NRAs from other MS – the opportunity to comment on draft measures which have a significant impact on the relevant market by publication in a specified single information media/platform. Using this media platform will enable assessment of all current consultations and ensure public accessibility of the outcomes of these procedures except in case of confidential information.

The opportunity to voice commentary provided by this consultation process is embraced by many interested parties³⁷. Why this instrument, which can contribute to guaranteeing consistent application of provisions, isn't used by other NRAs by submitting a announcement with their experiences and opinions is remarkable, but not unexpected; since decisions without effects on the NRAs home-market may only

³⁷ <www.rtr.at/de/tk/KonsultationMTR_St (Konsultation zu M 15a-e/03, M 13a-e/06> Terminierung in individuellen öffentlichen Mobiltelefonnetzen)

mean additional “work” and interfere in other NRAs affairs contrary to the spirit of Article 7 process.

This differs dramatically if the draft measure, which is expected to have an effect on trade among MS, refers to market definition, market analysis, interconnection or obligations imposed pursuant to obligations of non-discrimination, obligation of transparency, accounting separation, access to network facilities and network functions, price control and cost accounting for access³⁸. Therefore the draft, together with a statement of the reasons, will be made available to the European Commission as well as the NRA of the MS of the European Community and these bodies have to be informed. The Commission as well as the NRAs of the Member States of the European Community may comment on the respective draft within one month and utmost consideration will be taken of these comments by the submitting NRA. With the exception of some special cases (see below), the resulting measure may be put into effect and will be communicated to the European Commission.

However if the Commission has pointed out that it considers the measure an obstacle to the single market or that there is serious doubt about compatibility with EU law, and the Commission requests withdrawal of the draft, stating objective and detailed reasons, the process has to be terminated.

“The process of notification and consultation of the Commission and other NRAs under Article 7 of the Framework Directive *is a key tool* for ensuring that the benefits of consistent regulatory policy feed through to all European users.”³⁹

1.4 Services outside the geographical frontiers

In recent years market developments have given rise to the opportunity of offering services outside the geographical frontiers of any given MS. Now there is a

³⁸ e.g. Article 129 of Federal Austrian Telecommunications Act 2003

³⁹ 12th REPORT, COM(2007) 155 chap. REGULATORY ENVIRONMENT / Deregulation (14)

commerce interest in providing satellite communication systems and mobile communication on aircraft and ferries across national borders.⁴⁰

For an all-comprehensive, competitive, driving force across economic fields, a single market for e-communications networks or services is still necessary. According to the Commission, execution of the current EU rules by separate NRAs has shown two main shortcomings:

- i) the artificial segmentation of markets on a national basis and
- ii) a fundamental lack of consistency in the way the EU rules are applied.

With the aim of addressing these inadequacies in the internal market, the Commission delineated proposals addressing efficiency and consistency of regulation by reinforcing the Commission's control function. As presented in its consultation documents, the commission's increased efficiency and consistency will be effected by controlling remedies imposed by NRAs; boosting efficiency and ramp-up execution mechanisms by strengthening NRA independence and effective powers ; setting up a simpler processes for operator selection method and cross-border service provisions s and improving collaboration between the Commission and NRAs.⁴¹

1.5 Binding principles

All decision and actions by the Commission (e.g. DG InfoSoc) will be set up on the five elementary principles of the current regulatory framework. Therefore, the review process and the creation of a new authority or body (e.g. BEREC) has to be adjusted according to the following principles:

- (1) Regulation should be kept to a minimum (principle of subsidiary.⁴²)

⁴⁰ COM(2007) 696 chap. THE SINGLE MARKET FOR ELECTRONIC COMMUNICATIONS / Background and objectives (8)

⁴¹ *ibidem*

⁴² Treaty establishing the European Community, article 3b

- (2) Regulation should be based on clearly defined policy objectives of (principle of legitimate expectations and legal certainty⁴³):
 - (a) fostering economic growth and competitiveness; and
 - (b) ensuring that objectives of general interest are met where they are not satisfied by market forces alone.
- (3) Regulation should strike the right balance between flexibility and legal certainty (principle of proportionality⁴⁴).
- (4) Regulation should be technologically neutral⁴⁵ or objectively justifiable if it is not neutral.
- (5) Regulation may be agreed globally, regionally or nationally, but should be enforced as closely as practicable to the activities being regulated.⁴⁶

A re-evaluation of the actual regulatory framework can only be successful if these guidelines are strictly met. Thus the following question must be examined in detail: “are the given “tools” the right tools to consolidate the internal market for electronic communications and how can they be brought to light?” Mrs. Viviane Reding thinks that “...new instruments are needed to achieve effective competition quicker.”⁴⁷

1.6 Barriers to a Single Market

There are still a number of obstacles to the success of a single market in e-communications. Awareness of these obstacles is the first step to finding which are the right tools for overcoming them.

- Consumer markets: the “national nature” means that trans-national operators cannot provide single products across a number of EU MS.

⁴³ Agreement on Rome II Regulation, <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+IM-PRESS+20070514IPR06644+0+DOC+PDF+V0//EN&language=EN> (24.11.2009)

⁴⁴ Treaty establishing the European Community article 5, third paragraph (*Official Journal C 115 of 9 May 2008*)

⁴⁵ e.g. Framework Directive 2002/21/EC

⁴⁶ “..decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.” Treaty on European Union, (European Parliament Fact Sheets), www.europarl.europa.eu/factsheets/1_3_12_en.htm (24.11.2009)

⁴⁷ Viviane Reding (2007): Speech/07/624 “Better Regulation for a Single Market in Telecoms” (2007)

- National incumbents: legacy position within national markets also seems to be a barrier to achieving a single market for telecommunications.
- MS go on to use significant discretion⁴⁸ over a number of areas that directly or indirectly impact the progress of national markets, which then oppose the single market task.⁴⁹

2 Bringing it to light

To define and evaluate the “tools” and essential factors it is important and a precondition to analyse the current legal basis. The regulatory framework for e-communications includes five directives and associated measures adopted by the European Parliament and the Council in 2002, applicable since 2003.

2.1 Current Framework⁵⁰

The aim of the Framework is to create an internal market for e-communications within the Community while ensuring a high level of investment, innovation and consumer protection through enhanced competition.⁵¹

The Commission took this task⁵² and surveyed the current telecommunication rules, whereupon the main essentials of the framework’s legal instruments are:

- **Framework Directive**⁵³ sets out the main principles, objectives and procedures for an EU regulatory policy
- **Access Directive**⁵⁴ stipulates procedures and principles for imposing pro-competitive obligations regarding access to and interconnection of networks on operators with SMP.

⁴⁸ Different approaches to the allocation of 3G spectrum.

⁴⁹ HOUSE OF LORDS, European Union Committee, 5th Report of Session 2007–08

⁵⁰ http://ec.europa.eu/information_society/policy/ecomm/current/index_en.htm (24.11.2009)

⁵¹ SEC(2007) 1472 chap. USERS' RIGHTS AND CONSUMER PROTECTION (86)

⁵² To analyse the current legal basis

⁵³ EP and Council Directive on Common regulatory framework for electronic communications networks and services.

- **Authorisation Directive**⁵⁵ introduces a system of general authorisation to facilitate entry in the market and reduce administrative burdens on operators.
- **Universal Service Directive**⁵⁶ requires a minimum level of availability and affordability and guarantees a set of basic user rights.
 - **Personal Data Directive**⁵⁷ sets out rules for the protection of privacy and of personal data processed.
- **Radio Spectrum Decision**⁵⁸ ensures availability and efficient use of spectrum.
- **Commission recommendation**⁵⁹ on relevant markets defines 18 sub-markets.
- **ERG**⁶⁰ should provide an interface for advising and assisting the Commission in the electronic communications field.
- **ENISA**⁶¹ should contribute to a high level of network and information **security** within the Community and of developing a culture of network and information security for the benefit of citizens, consumers, businesses and public sector organisations in the EU.

2.2 The Survey

The legal basis for the surveys to review the e-communication Framework, is in particular the “Treaty establishing the European Community” and the “Frame Directive” the need for a review also was accentuated by the “Public Consultation 28th June 2006 “ and the “Reports” commissioned by the EU-Commission.

⁵⁴ EP and Council Directive on Access to, and interconnection of, electronic communications networks and associated facilities.

⁵⁵ EP and Council Directive on the authorisation of electronic communications networks and services.

⁵⁶ EP and Council Directive on universal service and users' rights relating to electronic communications networks and services

⁵⁷ EP and Council Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector

⁵⁸ EP and Council Decision on a regulatory framework for radio spectrum policy in the European Community

⁵⁹ Commission recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation

⁶⁰ Commission decision establishing the European Regulators Group for Electronic Communications Networks and Services

⁶¹ Regulation of the European Parliament and of the Council establishing the European Network and Information Security Agency

The review was done by the Commission (implementation and enforcement of the current rules⁶²) and other parties involved via:

- public ‘call for input’ on the review e.g. “Public consultation on the future of the regulatory framework for electronic communications” in 2006⁶³;
- studies and surveys commissioned from the external consultants for the review e.g. “Hogan & Hartson’s” and “Analysys Consulting” “Preparing the next steps in regulation of electronic communications”⁶⁴;
- commission reports on implementation of the regulatory package e.g. 12th Report⁶⁵, 13th Report⁶⁶ and 14th Progress Report⁶⁷
- committees and working groups e.g. *ERG*⁶⁸,
- stakeholder consultations and workshops and
- other external studies (commissioned by DG InfoSoc) e.g. “Study on pan-European market for premium rate services (September 2005)”⁶⁹.

After “all the work” was completed, the Commission came to the conclusion that an adaptation of the current regulatory telecom framework is necessary and indispensable.

The Commissioner, Mrs. Reding, explained the need in the following way⁷⁰: “Today Europe has a strong telecoms sector thanks to the EU's current Telecoms Rules of 2002. But it has failed to reach its full potential and risks falling behind our competitors. True, 27 national markets have been progressively opened up to

⁶² <ec.europa.eu/information_society/policy/ecommm/implementation_enforcement/index_en.htm> (24.11.2009)

⁶³ COM(2006) 334, Review of the EU Regulatory Framework for electronic communications networks and services.

⁶⁴ <ec.europa.eu/information_society/policy/ecommm/doc/info_centre/studies_ext_consult/next_steps/regul_of_ecomm_july2006_final.pdf> (24.11.2009)

⁶⁵ COM(2007) 155

⁶⁶ COM(2008)153

⁶⁷ COM(2009)140Final

⁶⁸ <www.erg.eu.int/> (24.11.2009)

⁶⁹ This study provides a complete picture of the provision of premium rate services at the national level in Member States, and identifies/recommends the steps to be taken to establish a complementary European single market for these services so as to support the competitive supply of premium rate services at pan-European level.

⁷⁰ Factsheet #1 “The need for reform”, 2007 EU Telecoms Reform, <ec.europa.eu/information_society/doc/factsheets/tr1-generalstory.pdf> (24.11.2009)

competition and consumers have today more choice at lower prices than 10 years ago. Yet, Europe still faces significant obstacles in telecoms. Competition bottlenecks persist, in particular on the important broadband market.”⁷¹

Cross-border competition and pan-European services have been hampered by different regulatory systems. Development of EU telecoms rules is therefore very important if Europe wants to promote growth and jobs for its citizens, Commissioner Reding closed.⁷²

3 Current Regulatory Bodies

3.1 Overview

National Regulatory Authorities are in charge of applying EU rules implemented by MS. For the sectors energy, telecommunications and financial services NRAs have been established in every Member State. NRAs have to be independent of state administration, in particular where governments have participation in a market operator or the incumbent carrier.

“Traditional” agencies or “regulators” have a variety of specific roles and are set out in their own legal basis within the EU (e.g. European Network and Information Security Agency “ENISA”⁷³). They are independent bodies with their own legal personality. Till this day there are no general rules governing the creation and operation of these agencies therefore they are typified by their diversity. They have been set up in order to meet specific needs e.g. European Aviation Safety Agency EASA ⁷⁴ on a case-by-case basis.⁷⁵ Currently there are 29⁷⁶ decentralised agencies in duty and there are new proposals in the tube.

⁷¹ EU Commissioner Viviane Reding is responsible for Information Society and Media

⁷² EU Factsheet: “The need for reform”

⁷³ Regulation (EC) No 460/2004 of 10th March 2004

⁷⁴) Regulation (EC) No 1592/2002 of 15th July 2002 as last amended by Commission regulation (EC) No 334/2007 of 28th March 2007

⁷⁵ MEMO/08/159, Brussels, 11 March 2008 “European agencies – The way forward”

⁷⁶ SEC(2008) 323, European Transparency Initiative, A framework for relations with interest representatives (Register and Code of Conduct)

These agencies execute very diverse tasks. Some have to adopt individual decisions with direct effects, some provide additional technical expertise and some focus more on networking between NRAs⁷⁷; they can be classified according to their key functions⁷⁸:

- adopting individual decisions which are legally binding on third parties⁷⁹;
- providing direct assistance to the Commission and, where necessary, to the MS, in the form of technical or scientific advice and/or inspection reports:⁸⁰
- performing operational activities⁸¹;
- gathering, analysing and forwarding objective, reliable and easy-to-understand information / networking⁸²;

The 2002 regulatory framework⁸³ for e-communications establishes a system of regulation undertaken by NRA and provides co-operation for these particular authorities with each other and with the Commission in order to ensure the development of consistent regulatory practice and the consistent application across the Community of the regulatory framework.

To apply the relevant rules consistently in all MS, the Commission established the European Regulators Group (ERG)⁸⁴ to advise and assist the Commission in

⁷⁷ MEMO/08/159 “European agencies – The way forward” (2008)

⁷⁸ ibidem, “What are the activities of regulatory agencies?”

⁷⁹ CVPO (Community Plant Variety Office), OHIM (Office for Harmonisation in the Internal Market), EASA (European Aviation Safety Agency) and ECHA (European Chemicals Agency).

⁸⁰ EMSA (European Maritime Safety Agency), EFSA (European Food Safety Authority), ERA (European Railway Agency) and EMEA (European Medicines Agency).

⁸¹ EAR (European Agency for Reconstruction), GSA (European GNSS Supervisory Authority GALILEO), CFCA (Community Fisheries Control Agency), FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU), EUROJUST (European Body for the Enhancement of Judicial Co-operation), EUROPOL (European Police Office) and CEPOL (European Police College).

⁸² CEDEFOP ((European Centre for the Development of Vocational Training), EUROFOUND (European Foundation for the Improvement of Living and Working Conditions), EEA (European Environment Agency), ETF (European Environment Agency), EMCCDA (European Monitoring Centre for Drugs and Drug Addiction), EUOSHA (European Agency for Occupational Safety and Health), ENISA (European Network and Information Security Agency), ECDC (European Centre for Disease Prevention and Control), FRA (Fundamental Rights Agency) and European Institute for Gender Equality.

⁸³ see capt. 3.1 Current Framework

⁸⁴ COM(2007) 699 final, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the European Electronic Communications Market Authority

consolidating the internal market and, more generally, to provide an interface between national regulatory authorities and the Commission.

In 2004, the European Network and Information Security Agency (ENISA)⁸⁵ was established for a period of five years, with the objective of ensuring a high and effective level of network and information security within the Community, thus contributing to the smooth functioning of the internal market.

3.2 National Regulatory Authorities

National regulatory authorities have been set up in all MS⁸⁶ to carry out the regulatory tasks specified in these directives and to communicate with the Commission in accordance the Framework Directive⁸⁷. Therefore MS must guarantee the independence of NRAs by ensuring that they are legally distinct and functionally independent from all organizations providing electronic communications networks, equipment or services and exercise their powers impartially and transparently.

If MS own or are responsible for organizations providing e-communication, they also have to guarantee independence of the regulatory function from actions associated with ownership or control.⁸⁸ To fulfil their duties the NRAs have to be equipped with all the necessary resources, in terms of staffing, expertise, and financial means for the performance of their tasks.

The activities of NRA contribute to the fulfilment of broader policies in the areas of culture, employment, the environment, social cohesion and infrastructure planning. In carrying out the regulatory tasks, the NRAs have to take all reasonable measures aimed at achieving the following objectives:⁸⁹

- promote competition
- contribute to the development of the internal market

⁸⁵ Regulation (EC) No 460/2004

⁸⁶ Framework Directive, Article 3 “National regulatory authorities”

⁸⁷ Directive 2002/21/EC

⁸⁸ *ibidem*, Article 3, National regulatory authorities

⁸⁹ Framework Directive, Chapter III, Tasks of national regulatory authorities

- promote the interests of the EU-citizens.
- promoting competition by ensuring users derive maximum advantage in terms of choice, price, and quality; and that there are no distortions or restrictions on competition and efficient investment in infrastructure,
- promoting innovation, efficient use and ensuring effective management of radio frequencies and numbering resources.

The NRA will contribute to the development of the internal market by removing remaining obstacles to the provision of networks, associated facilities and services encouraging the establishment and development of trans-European networks, the interoperability of pan-European services, and end-to-end connectivity; ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings; and cooperation with each other and with the Commission in a transparent manner.

Furthermore, NRAs have to promote the interests of the EU-citizens by ensuring that all citizens have access to a universal service and a high level of protection for consumers and of personal data and privacy; promoting the provision of information and addressing the needs of specific social groups, in particular disabled users; and ensuring that the integrity and security of public communications networks are maintained.

Thus, the question to be asked is: have NRAs met the expectations and do they support the single market by their decisions or will a new European Telecom Market Authority replace the NRAs?

The Commission issued this statement: “The new authority will work closely with, and build upon the existing national telecoms regulators – which have a deep understanding of their national markets – and also with the European Commission.” This will also lead to a matching and harmonisation of telecoms rules and make sure that it is applied across all MS without fail.

The Commission will be able to trust the recommendation of the new authority. This can ensure a more successful partnership between NRA and the Commission, and create a regulatory environment that is beneficial to the provisioning of premium services. The goal is that this partnership will strengthen regulatory independence.⁹⁰

3.3 European Regulator Group⁹¹

On the 7th of March, 2002, the commission indicated in the preamble clause no. 36 of the Framework Directive⁹², its intention to set up a European regulator group for electronic communications networks and services. This group would constitute a suitable mechanism for encouraging cooperation and coordination of national regulatory authorities promoting development of the internal market for electronic communications networks and services, and achieving consistent application in all MS.

Four months later, an advisory group called the European Regulator Group for Electronic Communications Networks and Services (ERG) was established by Commission decisions of the 29th of July, 2002⁹³ in order to advise independent national regulatory authorities on electronic communications networks and services

The role of the group is to advise and assist the Commission in consolidating the internal market for electronic communications networks and services; it is composed of the heads of relevant national authorities; it acts as an interface between them and the European Commission. In its work the ERG takes the objectives given to NRAs in Article 8 of the Framework Directive (2002/21/EC) into account to promote competition, contribute to development of the internal market and promote interests of EU citizens⁹⁴. Among its main missions, the ERG aims at ensuring consistent application of the new regulatory framework. ERG advises and assists the

⁹⁰ MEMO/07/458 FAQ: “Will the new European Telecom Market Authority replace national telecoms regulators?”

⁹¹ <http://www.erg.eu.int/>

⁹² Directive 2002/21/EC

⁹³ 2002/627/EC, COMMISSION DECISION of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services.

⁹⁴ see above remarks concerning “NRA: REGULATORY TASKS”

Commission on any matter related to electronic communications networks and services either on its own initiative or at the Commission's request.

The ERG consists of the NRAs of 27 EU MS and the four EFTA States (Switzerland, Norway, Iceland and Liechtenstein). Three EU candidate states (Turkey, Croatia and Former Yugoslavian Republic of Macedonia) participate as observers.

ERG is composed of the heads (one member per MS) of the independent national regulatory authorities who have primary responsibility for overseeing the day-to-day operation of the market or their representatives. The Commission is represented at an appropriate level and provides the secretariat. The relevant national authorities are listed in the Annex of Decision 2007/804/EC.

The chairperson - elected by members - convenes the meetings of the group in agreement with the Commission. The work of the group is organized into subgroups and expert working groups. The group adopts its rules of procedure⁹⁵ by consensus or, in the absence of consensus, by a two-thirds majority vote, subject to the approval of the Commission. The Commission is represented at all ERG meetings and is able to attend all meetings of its subgroups and expert working groups. The group may invite other experts and observers to attend its meetings.

ERG seeks to act in a transparent manner so that the work is visible to stakeholders and are able to express their opinion appropriately. ERG submits an annual report of its activities to the Commission and the Commission transmits the report to the European Parliament and to the Council, with appropriate comments.

ERG publishes different types of documents, the ERG Common Position⁹⁶ states the group position and is published on the initiative of ERG itself; the ERG opinion expresses the opinion of the group upon request by the Commission or an external party and the ERG Report objectively describes any matter within the group's field.

⁹⁵ ERG Interim Rules of Procedure ERG (03) 07, These proposed Rules of Procedure were subject to the approval of the European Commission in accordance with Commission Decision 2002/627/EC.

⁹⁶ <www.erg.eu.int/documents/docs/index_en.htm> (24.11.2009)

Ms. Viviane Reding stated that the ERG itself has persisted and will continue to be the central knowledge base for the projected European Telecom Market Authority. ERG started to create a joint regulatory culture and many useful initiatives were introduced by their working groups.

“With its current institutional status, the ERG simply could not be given the tools, neither the procedures nor the staff, to make a sufficient contribution to harmonisation in the single market. This will be changed now by the reform which will put the ERG on a sound legislative footing, still to be approved by the European Parliament and by the Council.”⁹⁷

ERG has submitted proposals for changes of the EU e-communication framework to Commissioner Viviane Reding in advance of the announcement. The ERG embraced the proposals including but not limited to:

- greater protection for the independence of NRA ;
- NRAs will be enabled to pursue functional separation of telecommunication companies; and
- strengthened NRA enforcement powers.⁹⁸

Furthermore ERG pointed out its support of the EC aim “of improving the consistency and quality of regulation across MS and argues this can be best delivered by significantly strengthening the current model of a European network of independent regulators.”⁹⁹

The group is concerned that extended Commission supremacy to veto remedies and additional new layers of unnecessary centralism could result in a serious loss of independence for regulatory authorities which the Commission is aiming to protect at national levels.

⁹⁷ SPEECH/07/624 Viviane Reding, “Plenary meeting of the European Regulators Group” (2007)

⁹⁸ ERG (07) 70, ERG Press release 13 November 2007, “ERG READY FOR EXTENDED ROLE“

⁹⁹ ibidem

“In the short term the ERG urges the Commission to amend the decision that set up the ERG in order to formally reflect the ERG’s current and potential role in promoting the single market. The ERG is ready to act on the agenda being proposed today by the Commission. There is no need to wait until 2010. The ERG must get on with this essential work right away.”¹⁰⁰ ERG realized that the “position” of ERG will be changed.

“I value your expert advice and would like to continue to draw on it in the next two years.” Viviane Reding promised face to face with representatives of the ERG.¹⁰¹

3.4 European Network and Information Security (ENISA)

The European Parliament and the Council of the 10th March, 2004, established ENISA.¹⁰² The legal status of the agency is a body of the Community and has legal personality. In each of the MS the agency enjoys the most extensive legal capacity according to legal persons under their laws. It may, in particular, acquire and dispose of movable and immovable property and be a party to legal proceedings. The agency is represented by its executive director.

ENISA assists the accomplishment of MS, EU-institutions and business partners to obviate, address and respond to network and information security problems. To this end, ENISA activities are determined to:

- advising and assisting the Commission and the MS on information security ;
- collecting and analysing information on security events and emerging risks;
- promoting risk assessment and risk management methods;
- exchange of best practices in awareness-raising and co-operation between different actors in the information security field;
- Tracking the development of standards for products and services.¹⁰³

¹⁰⁰ Roberto Viola, Chairman of the ERG, said in a letter (6.11.2007) to Commissioner Viviane Reding

¹⁰¹ SPEECH/07/624, Plenary meeting of the European Regulators Group “Better Regulation for a Single Market in Telecoms”

¹⁰² Regulation (EC) No 460/2004, Official Journal L 077 , 13/03/2004 P. 0001 - 0011

¹⁰³ <europa.eu/agencies/community_agencies/enisa/index_en.htm> (24.11.2009)

The Experts Panel “IDC EMEA” pointed out that “ENISA, the European Network and Information Security (NIS) Agency was created in 2004, as a Community agency with its main targets set to improve the EU’s capability to prevent and manage NIS threats, to contribute to building multi-stakeholders’ dialogue within and outside the EU, and to provide assistance and advice to the Commission and the MS in these matters.”¹⁰⁴

These actions were expected to contribute to the smooth functioning of the internal market. These main goals were still shared by the majority of stakeholders and answered to existing needs in the EU security milieu. Their importance has not changed at all, but there has been general discomfort about how these objectives will be interpreted and implemented by agency management.¹⁰⁵

The agency was established on the 14th of March, 2004, for a period of five years¹⁰⁶. The current review of the e-communication Framework happens at the perfect time to review and change the role of ENISA;¹⁰⁷ whereby ENISA will be dismantled and incorporated into the European Electronic Communications Market Authority.

4 Reviewing the current regulatory framework

“Since the last regulatory package was adopted in 2002, new developments in the telecoms sector have left the current regulatory framework in need of updating.”¹⁰⁸ On 13th of November, 2007, the commission (Viviane Reding) presented proposals for a reform of the EU e-communication rules¹⁰⁹. Analysis and weighty consideration of the commission have been on the table since that day. Now necessary steps have to be taken and formal procedures laid down in Article 251 of the Treaty was started.

¹⁰⁴ http://ec.europa.eu/dgs/information_society/evaluation/studies/s2006_enisa/docs/final_report.pdf

¹⁰⁵ *ibidem*

¹⁰⁶ Regulation (EC) No 460/2004 Article 27

¹⁰⁷ see chapter “Legislative proposals of the Commission”

¹⁰⁸ <ec.europa.eu/information_society/policy/ecomms/index_en.htm> (24.11.2009)

¹⁰⁹ IP/07/1677, “Commission proposes a single European Telecoms Market for 500 million consumers”,

4.1 Treaty establishing the European Community

Before looking ahead, retrospection of the legal basis of establishing the internal market (Chapter 2.1) seems helpful.

The basis for the actual reform process is laid down in the treaty establishing the European Community (C 325/177 Official Journal of the European Communities - 97/C 340/03)¹¹⁰, especially chapter 3 (Approximation of Laws) bound the Community to act and to take the leading role of establishing the internal market. The Community therefore will adopt measures with the aim of progressively establishing the internal market as the treaty prescribed: “the internal market will comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this treaty”.¹¹¹ Cross-border competition or pan-European telecom services need an area without internal frontiers like different decisions of national authorities under nearly the same circumstances. Consistency of NRA decisions is an important pillar of the internal market.

“The Council will, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the MS as directly affect the establishment or functioning of the common market”.¹¹² As time and circumstances change and policy developments take place, the absence of insufficiently issuing directives, continued review and adoption Articles 94¹¹³ ; 95¹¹⁴ and 97¹¹⁵ will remain eminent.

¹¹⁰ <eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html> (24.11.2009)

¹¹¹ Treaty Article 14

¹¹² Treaty Article 94

¹¹³ “Approximation of laws”

¹¹⁴ The Council will, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

¹¹⁵ Where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 96, a Member State desiring to proceed therewith will consult the Commission. After consulting the Member States, the Commission will recommend to the States concerned such measures as may be appropriate to avoid the distortion in question.

4.2 Public consultation

A general review of the current framework was under way at the end of 2005. The Commission started a public consultation on whether a reform of the EU Telecoms Rules was required and how an internal market in e-communication could be achieved. The communication COM(2006) 334¹¹⁶ and accompanying Staff Working Document SEC(2006) 816¹¹⁷ were launched to prepare for the future of the regulatory framework for electronic communications on the 29th of June, 2006, which ran until the 27th of October, 2006.

“The objective is to find the best model for delivering a single market in eCommunications, in the light of the prevailing political and institutional context.”¹¹⁸.

The Commission consequently reported the implementation of the five directives and explained the identified areas for change. The Commission marked the following discrepancies concerning regulatory models and the internal market:

- Regulation of markets was delegated to national regulatory authorities based on the argument that they are closest to their home markets and therefore best positioned to regulate them.
- In order to avoid the fragmentation that such decentralisation could bring, it gave the Commission power to ensure consistency of national regulatory authorities’ measures in certain well-defined areas.¹¹⁹

This means implementation of the framework and establishment of the internal market are significantly dependent on the work of the autonomous NRAs. At the same time, the processes formed by the framework aims to guarantee coordination

¹¹⁶ “Commission’s communication on the Review of the EU Regulatory Framework for electronic communications networks and services. ”, (2006)

¹¹⁷ <ec.europa.eu/information_society/policy/ecomms/doc/library/public_consult/review/staffworkingdocument_final.pdf> (24.11.2009)

¹¹⁸ Viviane Reding on the 20th Plenary Meeting of the European Regulators Group (Brussels, 15 February 2007)/ SPEECH/07/86

¹¹⁹ SEC(2006) 817, Capt. 5.3 “Regulatory models and the Internal market”

and consolidation of national efforts to create a consistent European market (internal market).

The Commission reported that differences in NRA approaches in various countries brought up complaints by many groups, who pointed out the increased cost for the industry of handling 25 different regulatory approaches. To stimulate the debate, the Commission proposed the following three options concerning the role of the regulatory authorities:

1. set up a single European regulatory body;
2. maintain the decentralised model but strengthen the Commission's role to achieve internal market objectives in selected areas; or
3. no change to the regulatory framework.

The purpose of the Impact Assessment SEC(2006) 817 examines, "How well the regulatory framework has achieved its objectives; and how the framework should be changed in the light of the aspects of technological and market developments."¹²⁰

The Commission decided in conformance with the principle of proportionality that this impact assessment did not present detailed and full quantitative analysis of the possible options at this stage. The Commission refined the analysis in the second report with a more detailed impact assessment on the Commission's legislative proposals on 13th of November, 2007 for amendment of the directives.

The European Regulator Group facilitates "consistent application of the regime throughout MS". The regulation concerning regulatory bodies was proposed to be changed in one of the following ways (see below). As these proposals build the starting point of the current discussion, they warrant a closer look.

¹²⁰ Communication on the Review of the EU Regulatory Framework for electronic communications networks and services. Chapter 2 „PURPOSE OF THE REVIEW AND THE IMPACT ASSESSMENT“

One of the key points of the review was to identify the most suitable form to guarantee a single market in e-communications, in the light of the established political and institutional background.

Responsibility of the regulatory bodies was proposed by the Commission to be changed in one of the following ways:

- a single European regulatory body,
- maintain the decentralised model, but strengthen the Commission's role to achieve internal market objective in selected areas, or
- no change to the Regulatory Framework¹²¹

Option 1 - A single European regulatory body

The European regulator will act beyond the domestic political views of all MS and vanquish or at least diminish national influence over diverse NRA decisions. This leads to a greater consistency of regulation within the internal market. Operators providing services in a number of MS do not have to interact with several NRA and different statutes of regulation implementation.¹²²

A number of different versions of a European regulator were identified:

- central authority substituting the NRAs;
- centrally managed authority, however geographically distributed in the MS and existing NRAs should be subsumed into a European Regulatory authority, and in effect becoming the local offices of the European regulator;
- ‘European Central Bank’ form, whereas the NRAs would remain self-governing entities, but would be forced to operate in line with the European regulator guidelines and instructions; and
- European regulators work as an entity for appeal of decisions made by NRAs.

A single European regulator¹²³ could, from the Commission's perspective, achieve a high level of harmonisation in the internal market. However, a central European

¹²¹ SEC(2006) 817, chap. Regulatory models and the Internal market

¹²² *ibidem*

¹²³ SEC(2006) 817, chap. Comparison of options and impacts

authority replacing NRAs or centrally-managed European authority would represent a dramatic change of the current regulatory system, resulting in a total centralisation of electronic communications regulation at the EU level.

Accordingly, from a political point of view, it is a sensitive topic because it would bring about a shift of powers over e-communication's regulation to a supra-national authority. Given that a trans-national body might regulate domestic issues, it could cause strong national resistance. "Depending on the precise institutional structure, a European regulator could in some cases represent another layer of regulation which would increase the overall administrative burden."¹²⁴

As the regulator for e-communications has discussed on earlier occasions and was rejected by MS, there are no grounds to expect the political atmosphere is in favour of this concept since it was not in favour of it in earlier periods.

"The option of a European regulator may offer the best prospects for creating a truly single market in e-communications, however, knowing that Europe lacks a legitimate pan-European electronic services, it is unlikely that a pan-European regulator would be justified."¹²⁵

Hogan & Hartson LLP and Analysis Consulting Ltd. asked¹²⁶ participants whether there should be a European Regulatory Authority (ERA); this authority would be charge with activities on a Community level for which NRAs are presently responsible. Their findings indicating the main reasons for creating a European regulator and changing the regulatory framework in a nutshell are:

- provide more consistency
- able to stand-up to incumbents
- alleviate negative effects of tensions between NRAs and a government
- prevents or at least reduces political interference
- widen scope for correction of a national regulatory failing

¹²⁴ SEC(2006) 817, Chapter 5.3.4. Comparison of options and impacts

¹²⁵ *ibidem* 5.3.4. Comparison of options and impacts

¹²⁶ Final Report for the European Commission "Preparing the next steps in regulation of Electronic communications" by Hogan & Hartson LLP and Analysis Consulting Ltd. (July 2006)

- deal with trans-national problems
- avoid divergent, inconsistent administrative practices in the various MS
- reduce costs of doing business across the EU
- help create regulatory harmony
- facilitate the completion of the Internal Market
- support autonomy and independence from political authorities

Option 2 - Maintain the decentralised model but strengthen Commission’s role to achieve internal market objectives in selected areas

In the Commission’s view maintaining the current decentralised model and strengthening the function for the Commission to reach internal market objectives means , “a step back from the idea of a centrally managed European regulatory authority and instead it would focus on strengthening harmonisation measures in a number of areas.”¹²⁷

- *Commission veto on remedies:* The Article 7 frame directive process foresees the Commission “vetoing” market definition and assessment of significant market power notified by the NRAs. Despite this fact the Commission has no veto power of remedies, instead only the right to comment on them. Yet NRAs are required to take Commission’s comments to the “utmost” consideration. Still a power to veto projected remedies could be conducive to more aligned approach across MS.
- *Commission approval of actions taken by NRAs with regard to access and interconnection:* Access Directive¹²⁸ enables NRAs to burden obligations, under certain circumstances, on non-SMP undertakings for the purpose of ensuring adequate access and interconnection and interoperability of services. In order to avoid over-regulation and a disintegration of the internal market by the burden of inconsistent obligations under the Access Directive, the Commission would be given the option of vetoing NRA measures.

¹²⁷ SEC(2006) 817, Chapter Regulatory models and the Internal market

¹²⁸ DIRECTIVE 2002/19/EC, article 5(1)

The Commission pointed out some of the other proposals scheduled in the draft would indeed give the Commission the authority to implement technical measures under a committee procedure. As inevitably anticipated the proposals serving as legal framework, they don't imply any basic modification to the authority model.

“i2010 is the EU policy framework for the information society and media. It promotes the positive contribution that information and communication technologies (ICT) can contribute to the economy, society and personal quality of life.”¹²⁹

The i2010 strategy¹³⁰ has three objectives:

- to build a single European information space, which supports an open and competitive internal market for information society and media services,
- to build up innovation and investment in ICT research,
- to promote inclusion, better public services and quality of life through the use of ICT.

The main focal point of the i2010 policy of creating a single European information space is to build up the role of the Commission to achieve internal market objectives.

i2010 policy would guide further steady regulations set inside the EU, and would improve circumstances for entities acting in several MS. However it would engage some shift of liability from authorities to the Commission, e.g. by allowing the Commission to veto resolutions on remedies.¹³¹

Hogan & Hartson LLP and Analysis Consulting reported their inquiry encouraged alternative approaches:

- identification the rights and obligations of the Commission and of market players;
- regulatory framework is currently not clear on this point;

¹²⁹ <ec.europa.eu/information_society/eeurope/i2010/index_en.htm> “i2010 A European Information Society for growth and employment” (24.11.2009)

¹³⁰ COM(2005) 229 final, “i2010 – A European Information Society for growth and employment”

¹³¹ SEC(2006) 817, chap. Comparison of options and impacts

- stronger coordination would certainly contribute to a harmonised application of the regulatory framework
- extension of Article 7 powers -centralised Article 7 process;
- difference to the draft in “important” ways, which denied operators any opportunity to comment on final drafts
- strengthen ERG’s role

Option 3 – No Change to the Regulatory Framework

This represents the status quo. Whether the NRAs are in the position and willing to strengthen their collaboration in the European Regulators Group is uncertain and therefore the development of a common EU-wide approach to common problems remains capricious.¹³²

Option 3 avoids any renegotiation of the balance of liability among the Commission and MS. However, it is not certain that NRAs would bring the consistency of national decisions and regulatory practices requested by involved market participants.

According to “analysis” the main reasons not to support the establishment of a European regulator - no change to the Regulatory Framework - in a nutshell are:¹³³

- regulation subjects’ individual characteristics and issues;
- EU body should not seek to cover all issues;
- experience of institutions currently in place show a clear picture;
- too distant from those (local) markets it should regulate;
- higher level of information is needed;
- insufficient understanding of local issues;
- lack of accuracy;
- tendency to become bureaucratic and legalistic;
- difficult for smaller operators to deal with “Brussels”;
- only brings more complexities.

¹³² SEC(2006) 817, chap. Regulatory models and the Internal market

¹³³ Hogan & Hartson LLP. and Analysis Consulting Ltd (2006) Cap. “Reasons not to support the establishment of an ERA” (92)

In an announcement the Commission considered the decentralised model as the most suitable one. At the same time, the Commission stressed in its paper on strengthening the Commission's role to achieve internal market objective in selected areas. The Commission statements sound contradictory.

On the 28th of June, 2006, the Commission concluded the following after public consultation:

The recent legal framework has created significant benefits, but it needs notice in a number of parts for the purpose of lingering efficiency for the next decade. "The two main proposals are to implement the Commission's policy approach on spectrum management, and to reduce the resources associated with the reviews of relevant markets by streamlining the procedures." Other planned modifications should support the internal market, strengthen consumers' interests and in general update the framework.¹³⁴

5 Reports

5.1 General

Several single paragraphs of specific directives (e.g. Article 25 of the frame directive) rule in addition to the general "duty" of the treaty its own review procedures and foresee special investigation procedures. "The Commission shall periodically review the functioning of this Directive and report to the European Parliament and to the Council on the first occasion not later than three years after the date of application [25 July 2003]. For this purpose, the Commission may request information from the MS, which shall be supplied without undue delay"¹³⁵.

The Commission reports (communication) based on Article 25 highlights market regulatory and consumer developments in the European e-communication sector and

¹³⁴ COM(2006) 334 final, Chapter 6, Conclusion

¹³⁵ Directives 2002/21/EC, Article 25

identifies main implementation issues requiring attention. The reviews' output gives a good position-fixing of attainment grade for internal market and fulfilment of the principles of treaty Article 14.

The Commission's report disclosed regulatory issues which are still resolved:

- absence of really self-governing national regulators
- political influence over the day-to-day work of the national regulator
- default in inflicting remedies to competition problems.
- dissimilar remedies for similar regulation problems.
- inefficient and differentiated administration of radio spectrum
- unfinished coordination of emergency numbers¹³⁶

The EU Commission's Progress Report on the Single Telecoms Market gives a snapshot of the telecom market and main regulatory developments that took place in a certain period (year). Facts and figures from NRA and market players checked by the Commission services remain essential. The EC monitors developments in each MS on a daily basis and assesses implementation of the EU telecoms rules, among other things. Additionally, specialists are sent to MS each year on fact finding missions where they examine advances taking place with NRA, ministries, telecom operators, consumer organisations and any other relevant players.

5.2 Implementation Report (12th Report)

On the 29th of March, 2007, Mrs. Reding presented her proposal concerning the "current" regulatory framework of e-communication at a press conference, "inconsistencies" was the catch phrase.

Inconsistencies in remedies

- There are often different regulatory remedies – e.g. for broadband access.
- Sometimes similar regulatory remedies but different methodologies are employed – e.g. cost-modelling vs. use of simple benchmarks.

¹³⁶ IP/07/435, (2007), Telecoms: Consumers have more choice but full potential of EU's internal market remains unexploited. "Lack of a level-playing field for operators"

Inconsistencies in sticking to EU telecom rules

- More than 140 infringement proceedings have been filed since 2003 – e.g. 112 emergency number, lack or delay of market analysis or “regulatory holidays” for the German VDSL network
- Delays have been caused by national appeal systems.
- Uncertainty about political independence of national regulators hinders market development.

Inconsistencies in allocation of scarce resources

- diverging and inefficient approaches to radio spectrum
- diverging approaches to the allocation of numbers - such as to new VoIP players

These inconsistencies lead to a lack of a true internal market in telecoms and will be tackled according to Mrs. Reding in the reform by consolidating the internal market, managing spectrum and scarce resources and strengthening consumer protection by the creation of a “European FCC”.

In this 12th Report¹³⁷, the Commission pointed out strengthening and realising the full potential of the internal market requires more consistent application of remedies across the EU and a strengthening of its framework.

5.2.1 Cross-border activity

Concerning cross-border activity the report disclosed that an average of one-third of revenues result from acting in a MS other than the operator's residence country.

This trend may change the business focus and corporate-policy views of the communication operators involved, especially the mobile sector.

¹³⁷ COM(2007) 155 final, Chapter Introduction,(2007), Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions concerning the European electronic communications regulation and markets

“The average European fixed incumbent in 2006 remained predominantly wedded to its home turf; the European businesses of the Swedish, Spanish and French incumbents were most diversified by this measure (approximately 41% or more EU activities abroad).”¹³⁸

Although the communication sector in the EU compares positively with other sectors, the Commission sees a significant band width for reinforcing the SM. Economic success of mobile services depends significantly on international availability, as shown by the report. Going abroad and using familiar services are demanded by private and business customers. When cross-border activities are hindered by different national rules and authority “behaviours”, the internal market is not accessible and further cross-border growth would be enhanced if greater consistency were achieved.

A sector where technology crosses national border regulation should not hinder operators, but will support pan-European economies of scale, in the interests of both operators and users.¹³⁹ “We must now promote the development of pan-European operators,” Commissioner Reding accentuated.¹⁴⁰

5.2.2 Deregulation and independence

The status of deregulation in different MS shows a wide bandwidth of implementation and the Commission stated that in some MS, optional engagements by dominant entities have been adopted by the NRA as an option to full regulation, or legislation adopted to enable enforcement of similar engagements.¹⁴¹ NRA independence of the was quoted by the Commission so that authorities have generally strengthened their power and independence¹⁴²

Most NRAs finished the first round of market analysis and their results were notified to the Commission and other NRAs. On one hand it is noteworthy that no NRA

¹³⁸COM(2007) 155 final, Chapter “Cross-border activity”

¹³⁹ IP/07/435, Brussels, 29 March 2007, Telecoms: Consumers have more choice but full potential of EU's internal market remains unexploited

¹⁴⁰ <ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=3509> (24.11.2009)

¹⁴¹ COM(2007) 155 final, Chapter “REGULATORY ENVIRONMENT”

¹⁴² *ibidem*

submitted any material comment to such a notification and on the other hand there were delays in implementing remedies in a number of MS. Reasons range from procedural considerations to the fact that remedies were imposed only some time after finding SMPs (e.g. in Germany), or remedies were not adequately expatiated to produce an instant result in the market.

Additionally, the Commission detected a number of inconsistencies among remedies forced in a given market situation by diverse NRAs although the NRAs were bound to the same process. For instance, in the year 2006, bit stream access offers were not available on an equal basis across the MS, and call termination rates continued to deviate.

The Commission concluded that a review is necessary: “However, a number of areas remain where a single market for e-communications services is *not attainable under the current framework*. The full range of tools for ensuring consistent regulation across the *single market* is not currently available, and the Commission will examine institutional, numbering and spectrum issues in particular in its proposals for a revised framework.”¹⁴³

5.3 Implementation report (13th Report)

The Commission once again pointed out that telecoms regulation has led to market liberalisation and competition in recent years, with significant progress leading to a reduction of rules in areas where competition is functioning. However, the report came to the conclusion that there are still problem areas where regulation remains necessary. Furthermore, there were areas where inconsistent application of EU directives in the MS has led to discrepancies which hinder the proper functioning of the single market.

¹⁴³ COM(2007) 155 , Chapter “Conclusion”

The Communication Report¹⁴⁴ on developments in the electronic communications sector during 2007 brings out that “...a lot is still to do” and identified areas which are incomplete concerning the single telecoms market.

Furthermore, there have been scopes where inconsistent application of EU directives in MS had led to inconsistencies which obstruct suitable functioning of the internal market, e.g. divergences in mobile termination rates and number portability.¹⁴⁵

By means of the following areas, development of internal market will be analysed by the Commission:

- Independence of national regulators

Concerning independence of national regulators, the report recapitulated and the Commission stated that NRAs were still the backbone of the regulatory framework. “The independence shown in pursuing their tasks such as promoting competition, contributing to the internal market or defending consumer interests is critical for the credibility and effectiveness of regulation at national level.”¹⁴⁶ From the Commission statement, one can see that there are still problems in certain MS e.g. in Bulgaria, Poland, and Luxembourg, where independence (fundamental principle of the regulatory framework) has still not been strengthened.

Despite hard work in many MS to modernize the process, national appeal mechanisms against NRA decisions carry on to hinder effective implementation, particularly in regards to their length and taxonomy. “The Commission’s reform proposals in this area should diminish the incentives for systematic appeals as a means of delaying the implementation of regulatory decisions.”¹⁴⁷

- Implementation of regulatory measures

The first step of market reviews was significantly carried out in nearly all MS (exceptions are Bulgaria and Romania). Aside from eleven MS, post closure of

¹⁴⁴ COM(2008) 153, Communication Report on developments in the electronic communications sector during 2007

¹⁴⁵ MEMO/08/167, headline “The Single Telecoms Market: ...a lot still to do”

¹⁴⁶ MEMO/08/167, FAQ: “Why is the independence of national regulators so important?”

¹⁴⁷ COM(2008) 153, Chapter 3. REGULATORY ENVIRONMENT

infringement proceedings by the Commission found economies in these countries have evidently not benefited from the regulation transferred in MS, where investigations were carried out.

In MS where the market analysis was performed duly and suitable regulations were in force at wholesale level, local regulatory authorities have been able to deregulate all retail markets. Future comparable steps by NRAs, considering recommendation on relevant markets¹⁴⁸, are possible to go ahead to the next deregulation of retail markets. It was still unclear whether a central European agency would speed up the process or balance the different national approaches.

- Implementation of remedies

Concerning the imposition and enforcement of regulatory remedies, national situations were diverse. In Hungary or Poland for instance, the latest measures have been adopted, where as in Germany, Estonia, Ireland and Luxembourg the difference between completing market analyses and imposition of special obligations was a subject of particular concern.

Even where clear remedies have been implemented, in many cases the level of certainty was not enough to guarantee a solid basis for investment and market entrance. Establishment of business operations was often hindered until key details were decided through appeal or individual dispute resolution procedures.¹⁴⁹

A lack of consistency in implementation most visible remedies, was in the area of cost-orientation and cost-accounting methodologies.¹⁵⁰

These differences impose an additional burden on operators seeking to offer pan-European services, and impede the completion of an internal market for electronic communications services.

¹⁴⁸ 2003/311/EC, Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

¹⁴⁹ COM(2008) 153, 13th Report on the Implementation of the Telecommunications Regulatory Package - 2007, chap. "Implementation of regulatory measures/Implementation of remedies"

¹⁵⁰ *ibidem*

Lack of NRA enforcement power or unwillingness to exercise it could be another reason why remedies were not put into practice.

These shortcomings convinced the Commission that there was a hurry of entitlement concerning remedies and a need for enhanced enforcement power for NRAs, both of which have been included in the commission's reform proposals.

The difficulties experienced by NRAs ensuring timely and effective application of non-discrimination across regulated markets has led a number of MS (e.g. Italy, Poland, Sweden) to consider introduction of functional separation for fixed incumbent's local network access services. This would separate this service from its other retail and wholesale business units in order to ensure equality of access to wholesale inputs for the incumbent's retail arm. It will additionally provide for alternative operators in a similar manner. These developments highlight the need to find a mechanism to ensure consistency of approach across MS.

There are many causes why sector specific regulation has been particularly effective.

These include:

- i) timely market analyses
- ii) precise and detailed remedies
- iii) reasonable appeals processes and judicial proceedings and,
- iv) active policy on regulators' part for non-price related market regulation issues.¹⁵¹

5.4 Implementation report (14th report)

However, these days the Commission argues that there are still difficulty areas in the e-communication sector where regulation is still needed. In the fixed line sector, for example, "in office" operators still have considerable reach and other providers' market shares of telecommunication services are still very low. The same is valid for the broadband sector. Furthermore, there are areas where inconsistent application of EU directives in the MS has led to discrepancies which hinder

¹⁵¹ SEC(208)356 (COMMISSION STAFF WORKING DOCUMENT, VOLUME 1 of "13th REPORT") chap. "Competition and regulation"

appropriate implementation of the single market. This includes for example inconsistencies in the area of mobile termination rates and number portability¹⁵².

Independent NRAs are a precondition for guaranteeing fair and efficient regulation of the e-communication sector. The Commission launched infringement proceedings against some MS, e.g. Lithuania, Latvia and Luxembourg to ensure effectual disconnection between regulatory tasks and ownership/control functions. Systematic appeals and the length of procedures go on to weaken legal certainty and successful implementation of the framework in a number of MS (e.g. Belgium, Hungary, Portugal and Romania).

Inconsistent stipulation of remedies still ongoing and are a problem, and in many MS efficient implementation and enforcement of remedies was bad, with failure to apply remedies appropriately or in time¹⁵³

The Commission pointed out an exercise in which, although market definitions were changed to meet the concerns, the remedies imposed in that market, where the Commission's influence is restricted. This practise leads to the fact that the same result is given as if the market definition had not been altered.

Inconsistency in the approach to remedies continues to be a problem. as indicated in the actual report, problems such as:

- “the lack of, or delay in, implementation of the remedies imposed,
- inappropriate technical or economic conditions for the available access products, or
- inconsistency between the conditions for different access products led to low take-up of these products and made it difficult for alternative operators to compete.”¹⁵⁴

The Commission noted a practice whereby, while the market definition was changed to meet the Commission's concerns, the remedies imposed in that market, where the

¹⁵² MEMO/09/132, The 14th Progress Report on the Single European Telecoms Market 2008. FAQ: “Why is telecoms regulation necessary?”

¹⁵³ SEC(2009) 376, COMMISSION STAFF WORKING DOCUMENT Volume 2 of “14th REPORT”, Chapter “IMPLEMENTATION OF REGULATORY MEASURES”

¹⁵⁴ *ibidem*

Commission's powers are more limited, produced the same outcome as if the market definition had not been changed. The Commission's proposals to reform the EU's regulatory framework would avoid such a situation by allowing it to act also when remedies proposed by a national regulator threaten to hamper the efficient functioning of the single market.

Commission comes to the conclusion that “Even though the state of competition is improving and new technologies are being taken up, there is evidence of a lack of consistency in regulatory approaches to the removal of persistent bottlenecks and to the roll-out of fibre. In an increasingly challenging environment it is crucial to ensure effective implementation and consistent regulatory approaches, which are key aims of the reform of the regulatory framework started by the Commission in November 2007.”¹⁵⁵ The report shows once again how necessary it is to finalize the actual review process as soon as possible to bring the single market nearer to its finishing point, give legal confidence to market participators and bring bigger consumer advantages.

6 Report on outcome of the 2006 review of the EU regulatory framework

Under the slogan “Better Regulation for a Single Market in Telecoms”¹⁵⁶ the EU-Commission, particularly Mrs. Viviane Reding is on a “crusade”. In reviewing the Framework Directive, the report addressed the assertion that, “despite the experience gained so far and other expected improvements, serious delays in the market analysis process that NRAs carry out under the Regulatory Framework are expected to persist in the future.”¹⁵⁷

¹⁵⁵ *ibidem*

¹⁵⁶ SPEECH/07/624, “Better Regulation for a Single Market in Telecoms”

¹⁵⁷ Hogan & Hartson LLP and Analysys Consulting Ltd (2006): “Preparing the next steps in regulation of electronic communications” “0.2.1 Regulatory Mechanisms of the Framework Directive”

6.1 Presentation on the 13th November, 2007

With the EU Telecoms Reform of the 13th November, 2007, the Commission approaches the problem on a fundamental basis: “fragmentation of Europe's telecoms market into 27 regulatory systems!”

Viviane Reding highlighted in her press conference after the presentation, “to shape up Europe's telecoms sector, the reform focuses on four main objectives”:¹⁵⁸

- i) reducing regulation where competition has already delivered results,
- ii) reinforcing the independence of national telecoms watchdogs,
- iii) preserving and enhancing consumer protection and user rights,
- iv) improving the security and reliability of communications networks and
- v) creating the right conditions so that we can move to a single market.

The Telecom sector fails to reach its full potential if Europe does not get rid of the barriers to the single European telecoms market. Today significant difficulties still exist, one of the competition bottlenecks concerning “cross border competition” and “pan-European services” are 27 different, partly inconsistent, regulatory systems.¹⁵⁹

“Very few small and medium enterprises (SMEs) are engaged in cross-border activity and this is largely due to the regulatory barriers which remain in place, and the lack of reliable information to assist businesses. The Commission has made the objective of engaging small business in the single market the centre-piece of its review and we welcome and support this aim.”¹⁶⁰

A reform of the legal framework is therefore vital if Europe wants to support growth for its people. The reform should ensure that about 500 million EU citizens get

¹⁵⁸ Factsheet #1: “2007 EU Telecoms Reform”, <ec.europa.eu/information_society/doc/factsheets/tr1-generalstory.pdf> (24.11.2009)

¹⁵⁹ MEMO/08/167 “Why has the European Commission proposed, in November 2007, a reform of the EU Telecoms Rules?”

¹⁶⁰ HOUSE OF LORDS, European Union Committee, 5th Report of Session 2007–08

simple and low priced access to a diversity of innovative services and will have, as a result of more efficient competition, more options between different operators.¹⁶¹

6.2 Report COM(2007) 696

The Report COM(2007) 696 describes the outcome of the review of the EU regulatory framework for electronic communications networks and services in accordance with Directive 2002/21/EC and the summary of the 2007 reform proposals.¹⁶²

The objectives of the actual review and consultation process are:

- i) better regulation for competitive electronic communications,
- ii) completing the single market in electronic communications and
- iii) connecting with citizens.

This communication reports the results of the Commission's review of the regulatory framework for electronic communications under Article 25 of Frame Directive¹⁶³, and explains the main policy changes proposed by the Commission. Further details were published in the Commission's legislative proposals and associated Impact Assessment¹⁶⁴.

The regulatory model under the 2002 framework essentially relies on implementation of a common set of EU rules by different NRAs to which responsibility for overseeing markets has been entrusted.

The Commission has reviewed performance of the EU framework¹⁶⁵ comparing this performance to its main objectives, which are

- i) promoting competition,
- ii) consolidating the internal market and

¹⁶¹ IP/07/1677 "Commission proposes a single European Telecoms Market for 500 million consumers"

¹⁶² announced on 13.11.2007

¹⁶³ Directive 2002/21/EC

¹⁶⁴ SEC(2007) 1472

¹⁶⁵ see above "Public Consultation 28th June 2006"

iii) promoting the interests of citizens.

This report focused on technological and market developments and determined a constant predominance by one or a small number of providers in a number of key markets. In addition, a constant deficiency of a single market for e-communications and growing deviation of regulatory approaches in the MS was detected.

Consequently a significant reform of the regulatory framework was demanded by the Commission.¹⁶⁶

Results of the public consultation¹⁶⁷

Major concerns have been expressed by stakeholders about existing differences in the way the current framework is implemented at national level. These prevent the achievement of full benefits in the internal markets. There was a call for more regulation at EU level, in particular by the industry. Consumer associations have deplored the continued lack of a single market and a level playing field for businesses and users in the e-communications sector as well.

Furthermore, limitations of the ERG (see 4.3) were mentioned by stakeholders. While MS had reservations about “ceding power” to the Commission, several industry groups (new entrants, but also some incumbents) either favoured an institutional reform of the ERG and/or asked for a stronger role for the Commission in order to avoid a “lowest common denominator”, an approach, which has been seen by some as inherent in a regulatory mechanism that essentially relies on consensus among the 27 NRAs.

In addition, a number of views reflected the fact that the current approach for selecting and authorising operators was not compatible with utilization of economies of scale needed for development of new services. In particular, for cross-Community services and those with the potential to become such, there was a case for establishing a single unified system for authorisation of usage rights for spectra and numbers.

¹⁶⁶ Report COM(2007) 696 “Background and objectives of the Review”

¹⁶⁷ Report COM(2007) 696, Chapter 4. “The single Market for electronic communications”

With respect to enforcement mechanisms, the vast majority of MS agreed to the proposal to strengthen enforcement powers of NRA, while incumbents and the mobile operators association disagreed with this proposal.

7 Legislative proposals of the Commission

First Step: the question is if the Commission's current competencies in conjunction with Article 7 process are adequate to ensure a common market, or do we need a new legislations? The result of Commissions' reviews of the e-communication framework was presented by Commissioner Viviane Reding mid November, 2007, in Brussels, and the first legislative Commission proposals were published on the 13th of November, 2007, and submitted to the European Council on the 19th of November, 2007 (compare Cap. 7.1).

It contained the following documents:

- report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services and summary of the 2007 reform proposals (15371/07);
- proposal for a directive amending Directives 2002/21/EC (Framework Directive), 2002/19/EC (Access Directive), and 2002/20/EC (Authorisation Directive) (15379/07);
- proposal for a directive amending Directive 2002/22/EC (Universal Service Directive), Directive 2002/58/EC (Personal Data Directive) and Regulation (EC) No 2006/2004 on consumer protection cooperation (15378/07);
- proposal for a regulation establishing the European Electronic Communications Market Authority (15408/07),
- a communication on the use of the spectra released by the digital switchover (15365/07).

Mrs. Reding published the documents on the 13th of November, 2007. "A new European Telecom Market Authority will support the Commission and national telecoms regulators in ensuring that market rules and consumer regulation are

applied consistently, independently and without protectionism in all 27 EU MS.”¹⁶⁸, so Reding.

José Manuel Barroso¹⁶⁹, President of the European Commission, declared, "From today onwards, a single market without borders for Europe's telecoms operators and consumers is no longer only a dream." But the EP saw the draft in a different light.

7.1 Target of the proposals

A major aim of the EU framework was to create a single market of e-communications, in particular through transparent, predictable and effective regulation.¹⁷⁰ The "reform package" will change and advance the EU Telecoms Rules of 2003. The Commission expects the package to become law by the end of 2009 addressing the following main topics:¹⁷¹

- new consumer rights and more consumer choice through more competition,
- more safety in using communication networks,
- a "new deal" for radio spectra,
- Better regulation in e-communication by deregulating those markets where competition is already established
- more independent watchdogs¹⁷²

Growth of an effective internal telecommunications market was determined to be a matter of leading political priority in the EU and the resulting consultation should reach this aim by re-forming today's rules.

¹⁶⁸ IP/07/1677 "Commission proposes a single European Telecoms Market for 500 million consumers"

¹⁶⁹ *ibidem*

¹⁷⁰ SEC(2007) 1472, Chapter "COMPLETING THE SINGLE MARKET IN ELECTRONIC COMMUNICATIONS"

¹⁷¹ *ibidem* chap. "Results of the public consultation"

¹⁷² IP/07/1677

7.2 Impact Assessment

The accompanying document “Impact Assessment Summary”¹⁷³ to the “Proposal 15408/07” digests the Commission’s impact assessment (IA) and investigates the Impact Assessment of June 2006¹⁷⁴ more deeply and in a more refined manner.

The Commission proposes within the Staff Working Document¹⁷⁵ amendments to the e-communication framework that should take account of knowledge gained to-date and forecasted market and technological developments, with an outlook to enhancing the capability of the framework to achieve its goals.

The IA was divided into three wide major themes, one of which was “completing the single market in e-Communications”. This goal should be reached by regulatory consistency and effectiveness as well as institutional and procedural issues as proposed.

“The EU e-communications framework has established a system of 27 national markets that are coordinated through a common set of rules. However, despite good progress in some areas, there are persistent problems of inconsistent implementation of these rules,”¹⁷⁶ the IA pointed out.

Three main alternatives were investigated in order to tackle institutional and procedural dilemma to achieve regulatory consistency and effectiveness:

Option 1: single European regulatory authority;

Option 2: European regulatory authority without discretionary decision-making powers assisting in the implementation of reinforced Community procedures; and

Option 3: better co-ordination between the MS.”¹⁷⁷

¹⁷³ SEC(2007) 1473

¹⁷⁴ COM(2006) 334

¹⁷⁵ SEC(2007) 1473

¹⁷⁶ SEC(2007) 1473 chap. Regulatory consistency and effectiveness: institutional and procedural issues

¹⁷⁷ *ibidem*

From the Commission's point of view, Option 2 guarantees regulatory consistency while protecting the actual decentralised regulation system and was the most suitable in the institutional, legal framework and political background. It unites Community authority with a consultative function for a new European authority, which should enable a move towards selection, authorisation and harmonisation of pan-European services using limited resources, like frequencies and/or numbers.

Option 2 would envisage the following in concrete terms:

- Commission oversight of remedies and advisory role of the European authority in Article 7 procedures;
- improved procedures for analysis of trans-national markets with advisory role of the European authority;
- stronger powers for the Commission to act when a NRA does not carry out a market analysis within a given time limit;
- involvement of the European authority in new EU-level procedures for authorization and regulation of services with pan-European potential; and
- more consistency in criteria justifying suspension of NRA decisions by national appeal bodies.¹⁷⁸

A simplification of the actual regulatory obligations would build up businesses, make citizens' rights stronger and create value for consumers. The main elements to be eased are “reducing the number of relevant markets in the Commission recommendation, simplified market review procedures and the reform of spectrum management, leading to a net reduction of administrative costs”.¹⁷⁹

Option 1, to create a single European regulatory authority was no longer supported by the Commission and the decentralization still exists in a many areas. The current system of Article 7 has been in force since 2003, and the single market is still suffering as the tools of Article 7 are not fully used by the NRA. For example, NRAs do not comment on the decisions of different NRAs and therefore do not influence each other in order to create a common point of view concerning the daily business of national and EU e-communication regulation.

¹⁷⁸ SEC(2007) 1472 Chapter “Policy options”

¹⁷⁹ *ibidem*

8 Proposed “European Electronic Communications Market Authority”

The Commission presented a proposal for a “Regulation of the European Parliament and of the Council” on the 13th of November, 2007, establishing the European Electronic Communications Market Authority.¹⁸⁰ The main question is what will the role of the new authority be? The proposal’s objectives should be to guarantee that where regulation remains essential, it is more efficient and simpler both for operators and for NRAs, and to make a decisive step towards more consistency in the application of EU rules in order to complete the internal market for electronic communications.¹⁸¹

Therefore the proposed market authority should support the Commission to ensure consumers and companies alike can profit from a European single market for communications services. The authority should be setup as an independent centre of excellence for regulatory matters connected to market analysis, remedies and EU-wide service provisions. Thus, it will set up the playing field for a competitive pan-European telecoms industry and enable stronger cross-border competition.¹⁸²

The national authority’s role was still foreseen as significant since the Commission believed in the importance of national telecom regulators. This is because NRAs are close to their domestic markets, know market participants and consumer needs in their countries. “This means that every system that we create for better, more efficient telecom regulation in Europe must and will be built on the national telecom regulators, on your knowledge and on your expertise.”¹⁸³ Vivian Reding made clear that centralism has no place in Europe and that the reform package should strike the right balance between decentralisation and harmonisation, between effectiveness and speed and the need for flexibility. The US FCC¹⁸⁴ uses different strategies and seems to be successful in homogeneous interstate regulation. Is the area of communication in the US (FCC) and the EU (Commission) so different that they need to regulate

¹⁸⁰ COM(2007) 699 final

¹⁸¹ COM(2007) 697, Chapter “Grounds for and objectives of the proposal”

¹⁸² MEMO/07/458 FQA: “How will citizens benefit from the proposed EU Telecoms Reform?”

¹⁸³ SPEECH/07/624, “Better Regulation for a Single Market in Telecoms”

¹⁸⁴ “Performance and Accountability Report 2008” Federal Communication Commission (FCC), (2008-11-17)”

telecommunication sector differently? The Federal Communications Commission (FCC) is an independent United States' government agency, was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. The FCC's jurisdiction covers the 50 states, the District of Columbia, and U.S. possessions.¹⁸⁵

The Commission may have seen that one key factor of the proposals should be to improve co-ordination among NRAs through the establishment of an independent European e-communications market authority.

8.1 Proposed duties and responsibilities

The proposed authority should encourage Article 8 objectives¹⁸⁶, by promoting competition in the provision of e-communications networks / services, contributing to the growth of the internal market, encouraging the interests of the society of the EU and these should be without prejudice to actions concerning public security, defense, activities of the State in areas of criminal law and State security.¹⁸⁷

- The proposed authority should, through its focus on consistency of NRA decisions, further tasks putting duties supporting NRAs into effect and strengthen the internal market:¹⁸⁸ issue opinions support the Commission by providing it with further technical support in all matters regarding e-communications
- can either be required by the Commission or directly implemented by the Commission acting on its own initiative, ;
- assist Community, its MS and NRAs in relations, debates and interactions with third parties;
- provide recommendations for market players and NRA on regulatory issues;
- exchange, distribute and assemble information as well as carry out studies in areas related to its activities;
- provide a framework in which NRA cooperate

¹⁸⁵ "About the FCC" <www.fcc.gov/aboutus.html> (24.11.2009)

¹⁸⁶ Article 8 Objectives (2002/21/EC - Frame Directive)

¹⁸⁷ 2007/0249 (COD) Article 1

¹⁸⁸ 2007/0249 (COD) Article 3

- issue commendation to NRAs on cross-border disagreements and on e-accessibility matters.
- consult authorities on the definition and analysis of national markets, and remedies¹⁸⁹
- review national markets by authority¹⁹⁰
- define and analysis of trans-national markets¹⁹¹
- harmonisation of conditions and procedures relating to general authorisations and rights of use

Complementary tasks of the authority¹⁹² should solve cross-border disputes¹⁹³, foster the exchange, dissemination and collection of information¹⁹⁴ and set off European-wide regulatory responsibilities carried out at national levels by regulatory authorities¹⁹⁵ :

The new authority may deliver an opinion to the Commission on the following matters on its own initiative.¹⁹⁶

- The authority may support the Commission in the formulation of recommendations or decisions to be adopted by the Commission.
- The authority may submit an opinion to the Commission on the suitable definition of trans-national markets.
- The authority may provide advice to the Commission and conduct studies and reviews, in particular on technical and economic aspects, regarding the use of radio frequencies for e-communications in the community.

¹⁸⁹ COM(2007) 699 Article 5

¹⁹⁰ ibidem Article 6

¹⁹¹ ibidem Article 7

¹⁹² ibidem Article 16

¹⁹³ ibidem Article 18

¹⁹⁴ ibidem Article 19

¹⁹⁵ 15408/07, Council of the European Union: Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, chap. "Main tasks of the new Authority"

¹⁹⁶ COM(2007) 699 Article 15, Own initiative,

The proposed authority in a nutshell:

- make effective contributions to furthering the completion of the internal market through the assistance it provides to the Commission and the national regulatory authorities.
- operate as a point of reference and establish confidence by virtue of its independence, the quality of the advice it delivers and the information it disseminates, the transparency of its procedures and methods of operation, and its diligence in performing the tasks assigned to it.
- to replace the ERG and serve as the exclusive forum for cooperation between national regulatory authorities in the exercise of the full range of their responsibilities under the regulatory framework.

8.2 The organizational structure of the proposed authority

Based on past experience with similar Community authorities, some guidance in this respect was provided, but the structure should be adapted to meet the specific needs of the regulation of e-communications.

The organisational structure¹⁹⁷ of the authority should include six bodies:¹⁹⁸

- Administrative Board, Board of Regulators and Director
- Chief Network Security Officer,
- Permanent Stakeholders' Group and Board of Appeal.

The Administrative Board should be in charge of the appointment of the Director and Chief Network Security Officer, adoption of the authority's annual work programme and budget, the appreciation of the general report on the authority's activities, and the adoption of the financial rules applicable to the authority. The authority should regularly give an account of its activities to the European Parliament.¹⁹⁹

¹⁹⁷ COM(2007) 699, Chapter IV, Organisation of the Authority

¹⁹⁸ *ibidem*, Article 24, Bodies of the Authority

¹⁹⁹ COM(2007) 699, Articles 25 and 26

The Board of Regulators should comprise one member per Member State who would be the head of the independent national regulatory authority with responsibility for the day-to-day application of the regulatory framework in the Member State, and the director. The Commission may participate, but without voting right, in board meetings. The Board of Regulators should be responsible for technical decision-making of the authority in areas such as the identification of potential rights holders, the opinions under Article 7 cases, etc. Opinions and decisions should be determined by simple majority.²⁰⁰

The director should be fully responsible for tasks assigned to the authority and be the authority's legal representative. The director should also be responsible for the preparation and implementation of the budget, the preparation of the draft work programme, and for personnel matters.²⁰¹

The Chief Network Security Officer should be responsible for the coordination of the authority's tasks and the preparation of an annual work programme in the area of network and information security. He/she will report to the director and be supported by a permanent stakeholders' Group.²⁰²

Set out the Board of Appeal to ensure that parties affected by decisions of the authority in the field of numbering enjoy the necessary remedies.²⁰³

9 Co-decision procedure

9.1 Co-decision procedure in general

Co-decision²⁰⁴ - provides for up to three readings: first reading, second reading and third reading with conciliation - is the most important of the legislative procedures of the EU. It is based on the principle of parity between the directly-elected European

²⁰⁰ *ibidem* Articles 27 and 28

²⁰¹ *ibidem* Articles 29 and 30

²⁰² *ibidem* Article 31 and 32

²⁰³ *ibidem* Articles 33 and 34

²⁰⁴ laid down in Article 251 of the EC Treaty

Parliament and the Council. The two institutions, acting on a proposal from the European Commission, adopt legislation jointly, having equal rights and obligations - neither of them can adopt legislation without the agreement of the other.

Co-decision usually is valid when the Council decides by qualified majority and is the normal procedure for all EU legislation. Co-decision does not apply to acts adopted under the second (common foreign and security policy) and third pillars (justice and internal affairs) of the EU. The procedure can be finished at any of these stages if the two branches of the legislative authority reach an overall agreement. If the Council cannot accept all EP second reading amendments, the conciliation procedure has to be opened. Conciliation consists of direct negotiations between the Parliament and Council to reaching agreement in the form of a 'joint text'.

9.2 First reading - Body of European Regulators in Telecom (BERT)

The Commission adopted its proposals²⁰⁵ on the 13th of November, 2007, (see Cap. 9) and submitted them to the EP and to the Council. The proposal was widely studied and discussed by the EP and the Council²⁰⁶. The EP adopted 164 amendments at the 1st reading²⁰⁷, and was also approved by the Committee on Industry²⁰⁸. The main amendments were as follows.

- A Body of European Regulators in Telecom (BERT) is to be composed out of the 27 national regulatory authorities; as an alternative to the EECMA, and the European Commission will consult BERT in carrying out its functions, advise the Commission and assist the NRAs²⁰⁹,
- BERT shall carry out its tasks in collaboration with NRAs and the Commission and shall exchange information and adopt consistent decisions by NRAs.
- BERT may issue opinions at the request of the EP, the Commission, or on its own initiative. It shall develop common positions, guidelines and best practices for the imposition of regulatory remedies at national levels and monitor their

²⁰⁵ COM (2007) 699

²⁰⁶ Council of Telecoms Ministers

²⁰⁷ 24 September 2008

²⁰⁸ COD/2007/0249 "Creation of the European Electronic Communications Market Authority ('Telecoms Package')"

²⁰⁹ *ibidem*

implementation across MS. The Commission and NRAs will take the utmost account of BERT's opinion.

- BERT will consist of a board of regulators representing 27 national regulatory authorities and a managing director. When carrying out its tasks, the board of regulators shall act independently, and the EP will have the right to invite the managing director to answer questions put by its members.
- Commission shall publish an evaluation report on the experience acquired as a result of the operation of BERT within three years of operation.

9.3 Adopted proposal – “Group of European Regulators in Telecoms”

On the 5th of November, 2008, the Commission published its adopted original proposals for a regulation establishing the EECMA and presented a new legislative text incorporating a number of points as suggested by the EP (compare Cap 10.2)²¹⁰ and forwarded it to the Council. 75 of the 164 EP's amendments were accepted in their entirety and 32 in part or subject to rewording; the Commission rejected 57 amendments.

In particular, the Commission accepts the establishment of a new body called "Body of European Telecoms Regulators" and inserts some new drafting underlying the importance of reinforcing the cooperation between national regulatory authorities. The modified proposal redesigned the considered European Telecoms Authority. Following requests expressed by EP and Council, it should be significantly smaller in size and competences than was predicted in November, 2007.

It should be a “lean and efficient office that will focus on telecoms regulation”²¹¹ and should have no competences concerning spectra or network security. ENISA will not be combined with the new “authority”, but it shall continue to exist separately.

The new, small, specialised and independent office, an expert body for Europe's telecoms regulators, should help the Commission to bring about more consistency to regulatory measures on Europe's telecoms markets and to assist the Commission and

²¹⁰ COM(2008) 724, 723 and 720 final

²¹¹ IP/08/1661, Commission presents new legislative texts to pave the way for compromise between Parliament and Council

the NRA in the furthermore necessary implementation process of the EU regulatory framework for e-communications.²¹²

The expert body should complete regulatory duties executed at national level by the NRA at EU level, in particular by providing:

- a framework in which NRAs can cooperate;
- regulatory oversight of market definitions;
- analysis and implementation of remedies;
- definition of transnational markets;
- advice on network and information security issues
- and general informational and consultant functions on issues related to the e-communications sector.²¹³

The modified proposal should reaffirm the power of NRA to impose, and where required overcome, persistent competition bottlenecks - the remedy of functional separation. This remedy would require a dominant operator to separate its network infrastructure from its service branch (without changing the ownership structure) to improve competition in the market. This remedy can only be imposed by a national regulator with the approval of the Commission which, as "guardian of the Treaty", needs to ensure that it is used in a way consistent with the principles of the EU's telecoms rules.

NRAs shall form the kernel of the new office, which will be called "Body of the European Telecoms Regulators" and the heads of the NRA will be given a strong position in the management of "body" and in the appointment of its managing director, and the personal and financial independence of the "Body of the European Telecoms Regulators" will be fully ensured. The existing rules under which NRAs support the Commission and their peers in other MS on drafted measures will be strengthened to guarantee shortest and professional participation of the new "body". Particularly, NRAs may be requested to modify or remove draft measures which the

²¹² IP/08/1661

²¹³ 2007/0249(COD); cap. "2. OBJECTIVE OF THE PROPOSAL"

Commission and the “body” think about to create a barrier to the SM or to be otherwise contrary with Community law.

The Commission argued in its communication on the 17th of February, 2009, to the EP²¹⁴ that the Council’s opinion departs significantly from those of the Commission and the European Parliament; especially concerning the internal market mechanisms, in particular for ensuring consistent regulatory remedies and the establishment of a regulatory body²¹⁵. However, the Commission endorsed its certainty that its new proposals can contribute to an agreement between the involved institutions and wished to reaffirm its position.

9.4 Second reading - Body of European Regulators for Electronic Communications (BEREC)

The EP approved adopting a joint EP and Council regulation establishing GERT²¹⁶ with amendments of the co-decision procedure on the second reading on the 6th of May, 2009, thus establishing the Council’s common position.²¹⁷

As part of the compromise, BEREC would be established together with the office to provide BEREC with professional and administrative support. BEREC should draw upon expertise available from the NRAs and carry out its tasks in cooperation with NRAs and the Commission. It should promote cooperation between NRAs and the Commission, as well as advise the Commission, and upon request, the European Parliament and Council.

The main tasks of BEREC should be²¹⁸:

- to deliver opinions on NRA draft measures concerning market definition, designation of undertakings with significant market power and imposition of remedies, and to cooperate and work together with NRAs;
- to deliver opinions on draft recommendations and/or guidelines on the form, content and level of details to be given in notifications;

²¹⁴ COM(2009) 78 final

²¹⁵ *ibidem*; Chapter “COMMENTS ON THE COUNCIL’S COMMON POSITION”

²¹⁶ 16498/1/2008 – C6-0067/2009 – 2007/0249(COD)

²¹⁷ COD/2007/0249

²¹⁸ COD/2007/0249

- to deliver opinions on draft decisions on the identification of transnational markets and to be consulted and to deliver opinions on cross-border disputes;
- to deliver opinions on draft decisions and recommendations on harmonisation;
- to deliver opinions aiming to ensure development of common rules and requirements for providers of cross-border business services;
- to monitor and report on the e-communications sector, including publishing an annual report on developments in the sector.

NRAs and the Commission should take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC. BEREC may, where appropriate, consult the relevant national competition authorities before issuing its opinion to the Commission.

BEREC should act independently and should be composed of the Board of Regulators by one member per MS and will neither seek nor accept any instruction from any government, from the Commission, or from any other public or private group. The Commission should attend as observer and will be represented at an appropriate level. The board should act by two-thirds majority of all its members (each member or alternate shall have one vote) unless otherwise provided by law. To provide BEREC with professional and administrative support, the office should be established as a Community body with legal personality and should exercise the tasks conferred on it by this regulation.

Within three years after operations, the Commission should publish an evaluation report, it should cover the results achieved by BEREC and the office and their respective working methods, in relation to their respective objectives, mandates and tasks defined in this regulation and in their respective annual work programmes.

10 Summary and status quo (June, 2009) of the Co-decision procedure

The new framework was approved by the EP at first reading September, 2008. But the EU Council of Ministers took divergent positions on many issues, triggering a range of inter-institutional negotiations which ended up with apparent compromises in March, and April, 2009. The most controversial issue has been the protection of internet users. In a spectacular move, the EP blocked the reform in May, 2009, by rejecting an earlier compromise with MS over the protection of internet users' rights. This current proposal is, from Commissions point of view, part of the “telecom package”²¹⁹ The rejection came in response to a draft French anti-piracy bill, which had caused uproar among EP and consumer groups. Ministers and diplomats were almost unanimous in opting for a hard line against the Parliament, which stands accused of breaching an earlier compromise reached with the Council on the telecoms package as a whole.

This current proposal is, from Commissions point of view, part of the “telecom package” and given that EP could not reach a compromise with the Council on the Framework Directive and that all three proposals are interlinked, it is likely that the whole package will go to conciliation in the next legislature. Telecoms ministers met in Luxembourg on the 11th of June, agreed to keep fighting with the European Parliament over internet users' rights and proposed a new round of negotiations to settle this open issue, thus is now blocking the entire telecoms package²²⁰.

The next step is a conciliation procedure with Parliament dedicated solely to the controversial issue of copyright protection and users' rights. "We agreed that splitting the package is not a good idea. The package has to be adopted as a whole," explained Vladimir Tosovsky, the Czech minister in charge of the dossier and current president of the EU Council. The duration of the process is unpredictable. The two strands of the process are in fact completely opposed, and have been further radicalised by the

²¹⁹ Including the revision of the e-communications framework and the citizens' rights directive

²²⁰ MEMO/08/384, “Telecom Council, Luxembourg, 12 June 2008”,

recent partial blockage of a controversial French anti-piracy law²²¹, which triggered the controversy. After the decision of the French Constitutional Council to ban pre-judicial actions against online pirates, the EP is indeed set to insist on a pro-Web user stance. By end of year 2009 the conciliation procedure should start.

11 European agencies

12.1 General²²²

The EU treaties allow some responsibilities to be granted directly to agencies created at the EU level²²³. In the White Paper on European Governance²²⁴, the Commission affirmed that one possibility envisaged for improving the way rules and policy are applied across the Union was to use regulatory agencies. Within the EU's legal system, there is a range of decentralised organisations which can be clustered together under the common umbrella of European agencies (EA). “The concept of European Regulatory Agency (ERA) designates agencies required to be actively involved in exercising the executive function by enacting instruments which contribute to regulating a specific sector.”²²⁵ Professor Geradin²²⁶ stated that “The creation of a growing number of agencies at the EU level is one of the most significant developments in the administrative structure of the EU. These agencies play a useful role as they allow the Commission to decentralize a number of scientific, technical, or observatory functions to specialized bodies.”²²⁷

²²¹“France ignores EU and passes antipiracy law” <news.cnet.com/8301-1023_3-10238912-93.html>
“France ignores EU and passes antipiracy law” (24.11.2009)

²²² <europa.eu/agencies/index_en.htm>

²²³ e.g. European Aviation Safety Agency (Regulation (EC) No 1592/2002 of 15.07.02); Community Fisheries Control Agency (Regulation (EC) 768/2005 of 26.04.05)

²²⁴ COM(2001) 428, EUROPEAN GOVERNANCE „A WHITE PAPER“, chap. “Better application of EU rules through regulatory agencies”

²²⁵ COM(2002) 718 chap. CONCEPT – REGULATORY AGENCY

²²⁶ Professor of Law and Director, Institute for European Legal Studies, University of Liège. Professor at the College of Europe and Director of the Global Competition Law Centre (GCLC), Bruges.

²²⁷ Geradin Damien (2004), „THE DEVELOPMENT OF EUROPEAN REGULATORY AGENCIES: WHAT THE EU SHOULD LEARN FROM AMERICAN EXPERIENCE”,
<jeanmonnetprogram.org/papers/04/040101.html>

In general, there are two broad types of agency, each with different characteristics and raising different issues: “executive” and “regulatory” ones²²⁸.

Executive agencies are just responsible for managerial tasks²²⁹. It is mandatory that **regulatory agencies** are actively involved in the executive function by implementing instruments helping to regulate a specific sector²³⁰.

These two types of agencies are very different. They have different roles in terms of the tasks they are given, their independence and their governance; they also have their own basic sectoral regulation. The roles of the regulatory agencies vary greatly. Some can adopt individual decisions with direct effect, applying established EU standards; some provide additional technical expertise to the Commission and some centre more on networking among national authorities.

"Regulatory" or "traditional" agencies have a variety of specific roles, set out in their own legal basis, case-by-case²³¹. Executive agencies are set up under Council regulation²³² with the more narrowly defined task of helping to manage Community programmes. At the EU level, 36 independent agencies²³³ have been setup. The greater part of these bodies has either an information assembling task²³⁴ or they support the EU Commission by putting into practice programs and policies²³⁵. In four cases EU agencies have a regulatory role²³⁶.

There is a difference between “regulatory” activities and the adoption of legal rules or binding legal norms. Regulatory activities do not necessarily involve adoption of legal acts, they can also include co-regulation, self-regulation, recommendations,

²²⁸ It should be stressed that a number of the European agencies do not fall into either of these categories.

²²⁹ i.e. assisting the Commission in implementing the Community’s financial support programmes and are subject to strict supervision by it.

²³⁰ COM(2002) 718, chapter “Concept – Regulatory agency”

²³¹ There are now 29 agencies of this type, with proposals having been made for a further 2 agencies (e.g. BERT)

²³² Council Regulation (EC) No 58/2003 of 19 December 2002

²³³ <europa.eu/agencies/inyourcountry/index_de.htm> (24.11.2009)

²³⁴ Such as the European Environment Agency in Copenhagen

²³⁵ Such as the European Training Foundation in Turin,

<www.etf.europa.eu/web.nsf/pages/AboutETF_EN?Opendocument> (24.11.2009)

²³⁶ Such as the Office of Harmonisation in the Internal Market (Alicante) or the Community Plant Variety Office (Angers) take individual decisions on the grant of European trademarks and plant variety rights.

referral to scientific authorities, networking and pooling good practice, evaluating the application and implementation of rules, etc²³⁷. That means that a European “regulatory” agency does not automatically have the power to enact binding legal norms. The agencies which adopt individual decisions will be given the power to implement laws. In accordance with the institutional system and the case law of the Court of Justice,²³⁸ this power will be limited to applying the rules of secondary legislation to specific cases.

There are also differences in the inner structures of ERA, such as the composition and method of appointing governing bodies in their relations with the institutions, in their responsibilities and powers. Therefore agencies can be categorized in different ways; one characteristic may be the key functions they perform. EC argues that concerning the regulatory concept – as defined in the representational Interinstitutional Agreement - an ERA may be assigned one or more of the following tasks²³⁹:

- adopting individual decisions which are legally binding for third parties (Office for Harmonisation in the Internal Market, Community Plant Variety Office and the European Aviation Safety Agency);
- providing direct technical or scientific advice or inspection reports to the Commission and to the MS in Community interests (European Maritime Safety Agency);
- creating a network of national, competent authorities and organising cooperation between them in the interests of the Community (European Agency for the Evaluation of Medicinal Products and the European Food Safety Authority).

Though agencies regularly carry out a numeral of diverse tasks, an EC analysis of the centre of gravity of agencies’ activities proposes the following categories²⁴⁰:

237 COM(2005)59 final; Interinstitutional Agreement on the operating framework for the European regulatory agencies 7.1 The “Regulatory concept”

238 Judgment of 13.06.58, in case 9/58, Meroni, ECR 1958, p. 11; judgment of 14.05.81, in case 98/80, Romano, ECR 1981, p. 1241.

239 COM(2005)59; 7.2 “Tasks devolved on the agencies”

240 COM(2008) 135 final, “Different types of regulatory agencies”

- CVPO, OHIM, EASA²⁴¹ and ECHA²⁴² are adopting individual decisions which are legally binding on third parties:
- EMSA²⁴³, EFSA, ERA and EMEA are providing direct assistance to the Commission and, where necessary, to the member states, in the form of technical or scientific advice and/or inspection reports
- EAR, GSA, CFCA, FRONTEX, EUROJUST, EUROPOL and CEPOL are in charge of operational activities
- CEDEFOP, EUROFOUND, EEA, ETF, EMCCDA, EU-OSHA, ENISA, ECDC, FRA and European Institute for Gender Equality are responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information / networking:
- CDT offers services to other agencies and institutions

Most agencies are proposed to make regulation more consistent and effective by combining and networking at EU-level activities which have initially been matters for MS. The EC therefore defines a ERA “as an independent, legal entity created by the legislator in order to help regulate a particular sector at the European-level and help implement a particular Community policy”²⁴⁴. As a result, the agency will play an active role in putting executive powers at Community level into effect and will assist improving implementation of EU rules and apply them throughout the EU.

At present, the EC is in charge for proposing the establishment of new ERA’s on a case-by-case basis, with the EP and/or the Council of Ministers taking the final decision. The explicit roles of each agency are laid down in its own founding legal act.²⁴⁵ The first regulatory agencies²⁴⁶ were set up in 1975. In last years, implementing key tasks by agencies has become an established part of the way the EU handles its business. Agencies have become part of the administrative landscape

²⁴¹ EASA also provides direct assistance to the Commission and, where necessary, to the MS, in the form of technical or scientific advice and/or inspection reports.

²⁴² ECHA also provides assistance to the Commission and, where necessary, to the Member States, in the form of technical and scientific advice and/or opinions.

²⁴³ EMSA has also in its mandate important operational activities (in particular maritime anti-pollution activities).

²⁴⁴ COM(2005)59 chap. Conclusion

²⁴⁵ <europa.eu/legislation_summaries/institutional_affairs> (24.11.2009)

²⁴⁶ CEDEFOP (Vocational training) and EUROFOUND (Improvement of living and working conditions),

of the EU by supporting the decision-making process via pooling the technical or specialist expertise available at European and national levels²⁴⁷.

There are clear and severe restrictions to the independent power of agencies in the EU legal order in progress. They are restricted to taking individual decisions in explicit areas where a defined technical expertise is requested, under clearly and exactly defined conditions and with no real discretionary power²⁴⁸. Therefore EA are not furnished to adopt general regulatory measures.

12.2 European E-Communications Authority

The Framework Directive, the Specific Directives²⁴⁹ and the Regulation (EC) No 717/2007 aim to create an internal market for e-communications within the EU. The need for the regulatory framework to be consistently applied in all MS and the development of consistent regulatory practice within the EU is vital for the successful development of an internal market for e-communications.

The EC established ERG²⁵⁰ to advise and support the EC in the development of the internal e-communication market and to make available an interface between NRAs and the Commission. In retrospect the EC pointed out that, “the ERG has made a positive contribution towards consistent regulatory practice by facilitating cooperation between NRAs, and between NRAs and the Commission,”²⁵¹

Latest Implementation Report²⁵² showed that the NRA and the MS still act “autonomously” and EC has very clearly brought open points and inconsistencies to the surface and has identified the continuing lack of an internal market for e-communications. Under the headline “Still problems for a single European telecoms market”²⁵³ EC stated that inconsistent regulation of similar competition problems hinder the growth of the telecoms sector and create additional problems for telecoms

²⁴⁷ COM(2008) 135; Commission Communication: “European agencies – The way forward”

²⁴⁸ SEC(2008) 323, REGULATORY AGENCIES TODAY

²⁴⁹ See Chapter 3.1; “Current regulatory framework“

²⁵⁰ See Chapter 4, “Current Regulatory Bodies”

²⁵¹ COM(2007)699 rev, 2 Motive Nr. 6

²⁵² See Chapter 6.4 “Implementation Report (14th Report)“

²⁵³ IP/09/473 “Mobile use up, consumer prices down”

operators, in particular the rising number of companies acting in a number of countries or contributing cross-border services.

Differences arise in regulating new fibre networks which could affect competition between rival in business in the single market and lead to cutbacks in capital spending. Furthermore, there are areas where inconsistent application of EU directives in the MS has led to divergences which hinder the appropriate performance of the internal market. This contains, for instance, “discrepancies in Mobile Termination Rates and number portability”.²⁵⁴

“The Commission has opened some 160 infringement proceedings under Article 226 of the treaty from the date of application of the new regulatory framework until the end of the reporting year. In more than 100 cases this was due to failures to implementing the regulatory framework correctly.”²⁵⁵ Overall during 2008, the EC opened six new infringement proceedings and resolved to refer six cases to the Court of Justice. New proceedings were opened focused on the autonomy and efficiency of the NRAs in Luxembourg, Latvia, Lithuania and Sweden.

EC stated that within the current legal framework sustained and intensified cooperation and coordination between NRAs will be necessary to further build up the internal market.²⁵⁶ Regulation has led to competition and market liberalisation in areas where competition is functioning well. However, there are still problem areas where regulation remains necessary and were the continuing “regulatory fragmentation and inconsistencies resulting from the loosely coordinated activities”²⁵⁷ of the NRA jeopardize competitiveness of the communication sector as well as significant consumer benefits following cross-border, transnational and even cross-Community services.

This calls for the establishment of a new EC body, a powerful ERA. It should “operate as a point of reference and would establish confidence by virtue of its independence, the quality of the advice it delivers, the information it disseminates,

²⁵⁴ MEMO/09/132 “Why is telecoms regulation necessary?”

²⁵⁵ SEC(2009) 376; Chapter “Monitoring and Enforcement”

²⁵⁶ *ibidem*

²⁵⁷ COM(2007)699, Motive 8

the transparency of its procedures and methods of operation, and its diligence in performing the tasks assigned to it.”²⁵⁸ The ERA should have a significant role to play in the mechanisms for consolidating the internal market for e-communications and for market analyses in certain circumstances.²⁵⁸

However the EP and Council’s answer to strengthen only the ERG’s position and its recognition in the EU regulatory framework as the Body of European Regulators for Electronic Communications (BEREC), may be the wrong way. BEREC should neither be a Community agency nor have legal personality²⁵⁹ and should replace the ERG acting as an exclusive forum for cooperation among NRAs and between NRAs and the EC, in the exercise of the full range of their liability under the EU regulatory framework²⁶⁰.

The EU strategy “better regulation”²⁶¹ aimed at ensuring regulation is used only when necessary, i.e. simplifying existing legislation or improving new Commission proposals, with the help of impact assessments and public consultations. The EP and Council proposal come to the conclusion that regulation by creation an ERA is still not necessary. Although the current Implementation Report still showed open inconsistencies. The objectives of a better-functioning internal market for e-communication and development of cross-Community e-communications cannot be sufficiently achieved by the MS on a European-wide scope. This regulation can therefore can be better accomplished at Community level.²⁶²

The major benefits of the set up of decentralised entities at EU level lie in the provision of impartial and highly specialised know-how to a general organization like the Commission. “Regulatory agencies provide the Commission with the expertise it needs to exercise its competencies as policy initiator, Community’s executive and/or as guardian of the Treaties.”²⁶³

²⁵⁸ COM(2007)699; Motive 17

²⁵⁹ P6_TC2-COD(2007)0249, Motive 5

²⁶⁰ COM(2007)699, Article 51 Liability of the Authority

²⁶¹ COM(2002) 275

²⁶² COM(2007)699, Motivation 49

²⁶³ Manuel SZAPIRO: (2005) “THE FRAMEWORK FOR EUROPEAN REGULATORY AGENCIES”

It is clear that a regulatory agency is not automatically gifted with decision-making or enforcement powers. As mentioned before, “regulatory” actions generally do not only include the adoption of legally binding tools. Its actions may cover a wide breadth of other “regulatory” activities, reaching from decision making to networking and the provision of scientific or technical expertise.

Generally, regional situations can make establishing one set of rules or setting up a central authority that covers the whole of the Union complex tasks. There can be more flexibility in decentralised regulatory agencies with strong regional impacts provided the internal market is not influenced. The question is if transnational business-like e-communication (e.g. cross-border business) can be governed by national authorities. This is probably not really successful as showed in the current Implementation Reports.

The creation of autonomous EU e-communication regulatory agencies could improve the way EU rules are applied and enforced similarly across the Union. This agency should be granted the power to take individual decisions in application of regulatory measures and should work with a certain level of sovereignty. The legal act of their creation will determine the limits of their actions, responsibilities and authority. “The advantage of agencies is often their ability to draw on highly technical, sectoral know-how, the increased visibility they give for the sectors concerned (and sometimes the public) and the cost-savings that they offer to business.”²⁶⁴

Five principles underlie good governance; they are important for establishing more democratic governance and rule of law in MS and thereby underpin establishment of a new e-communication market authority: openness, participation, accountability, effectiveness and coherence²⁶⁵. Each principle is significant by itself, but can not be achieved alone.

Coherence: By adopting a horizontal approach, the aim is to ensure fulfilment using the lowest common multiple to form the core principles and rules on the creation,

²⁶⁴ COM(2001) 428, cap. “*Better application of EU rules through regulatory agencies*”

²⁶⁵ COM(2001) 428, cap. II. Principles of good Governance

operation and control of these agencies. Their involvement in executive powers must be structured in a coherent and balanced way.

Effectiveness: The code of effectiveness essentially involves simplifying the decision-making process, shrinking costs and giving these agencies a substantive degree of organisational, legal and monetary autonomy.

Accountability: In order to strengthen the legitimacy of Community action, it is imperative to establish and draft the responsibilities of the institutions and agencies. Furthermore, the principle of accountability requires that a clear system of control be foreseen.

Participation and openness: The internal organisation of agencies has to guarantee the interests of participating parties and assure a high level of transparency is given. The establishing acts must lay down that the agencies will be subject to the requirements of good administration.

The importance of checking whether the establishing action is truly necessary, is a matter of course. Is the current national Article 7 process in-line with EC guidelines and is its sporadic exercise of influence²⁶⁶ sufficient to guarantee a successful single market? If the EU level is a best fit, are NRAs best suited as executors, or does the implementation report indicate that interstate business in the communication market is not well governed? If chosen measures are in proportion to those objectives, can the single market be attained by national rules implemented, or are national interests are too dominant? Often “Brussels” is too easily blamed by MS for difficult decisions to which they themselves have agreed or even requested.).

The EC monitors developments in each MS on a daily basis and assesses, among other things, the implementation of the EU telecoms rules. Experts were sent to MS on a fact-finding mission where they discussed developments taking place with NRAs, ministries, telecoms operators, consumer organisations and other relevant players. History shows that the NRA’s are – according to the nearly completed 14.

²⁶⁶ See cap. „Article 7 process

Implementation Reports – not willing and able to guarantee a single European communication market.

The full possibility of a competitive telecoms market is still impeded by ineffective and inconsistent implementation of regulation. For instance, “approaches to next generation access (NGA) are fragmented, and regulatory methods for setting mobile termination rates remain diverse.”²⁶⁷

The philosophy of proportionality and subsidiarity forms the basis for the decision upon which level²⁶⁸ e-communication authority will be set up, equipped and which power will be assigned to it. So from the theory of the policy to its execution, the selection level at which action is taken and the range of tools used must be in proportion to the objectives²⁶⁹ pursued. Even the EC proposal concerning the guarantee of a single European market in the communication sector by establishing the agency “BEREC”²⁷⁰ has not fulfilled the above principles, because history shows it is crucial to ensure effective implementation and consistent regulatory approaches²⁷¹ via national authorities with strong national interests. Could “BEREC” improve the quality and enforcement of EU policies? If rules are not supported or are only inadequately enforced, institutions as a whole are called into question. Can BEREC support better implementation and enforcement of communication/single market? It is correct that expertise however is usually organised at a national level, but success also depends on implementing EU policies in a proportional manner and on consistency of Community wide decisions.

It is certainly true MS of the EU are in charge of ensuring EU rules are put in place. When they fail to do so today, it is the role of the EC²⁷² to launch an infringement proceeding, but as long as NRAs partly act independently²⁷³ and do not actively exchange commentary on other NRA’s decisions, the single market is remains

²⁶⁷ COM(2009) 140 final 14.th Implementation reports “INTRODUCTION“

²⁶⁸ National or EU level

²⁶⁹ E.g. Internal Market (Single Market)

²⁷⁰ COM(2008)720

²⁷¹ COM(2009) 140 final, Implementation report “Conclusion”

²⁷² EC is guardian of the EU treaties

²⁷³ DE/2009/0947-0948; 17 August 2009

illusory. Furthermore, EC stated that it has still identified inconsistencies across Europe in an evaluation of about 120 NRA regulatory proposals relating to termination rates over the past 6 years²⁷⁴.

The EC has therefore set out clear guidelines for NRAs “on the cost-based method to be used when calculating termination rates – the wholesale fees charged by operators to connect calls from another operator's network which are part of everyone's phone bill.”²⁷⁵ If a powerful ERA would be created, it could act directly in a binding way to improve consistency of NRA decisions. The current Article 7 process seems not to be the right type of instrument to achieve the Union’s objectives in a timely manner. Discrepancies in the approach to remedies continue to be a problem in the Community, therefore many MS are still failing to implement and enforce remedies properly or in a timely manner.

12 Conclusion

The inconsistencies in approaches to remedies across the EU are an issue in many areas. In addition, the Commission has noted that there seem to be inclinations by NRAs “to deal with problematic issues in the context of the remedies where there are no binding oversight powers of the Commission.”²⁷⁶ In some cases NRAs have continued to regulate some of the markets which were removed from the recommendation in relevant markets. In some MS, effective implementation and enforcement continued to be delayed by many and long-lasting disputed resolution or appeal procedures which cause significant uncertainty in the markets (e.g. Belgium, Sweden and Austria). To speed up these processes is vital for economic development in the e-communication market in Europe. Just as much speed, NRA independence is also a precondition for guaranteeing fair and effective regulation of the sector. Independence is essential in particular where MS²⁷⁷ still have control over operators. A central independent agency is better protected from national influences and

²⁷⁴ IP/09/710 “Commission acts on termination rates to boost competition”

²⁷⁵ *ibidem*

²⁷⁶ SEC(2009) 376/2 - Volume 1 (Part 2), “IMPLEMENTATION OF REGULATORY MEASURES”

²⁷⁷ The Commission had to launch infringement proceedings against Lithuania, Latvia and Luxembourg to ensure effective separation between regulatory functions and ownership/control functions.

instructions and will be equipped with the appropriate legal power ultimately leading to consistent actions.

Thus use of a powerful agency should be considered in cases where there is a need for uniform application and legal certainty across the Union, like the completion of the e-communication single market in an increasingly challenging environment. ERA has the advantage of avoiding the delays associated with national processes via NRAs. In these highly specific sectors, the creation of a powerful ERA will also lead to a more homogeneous application of rules all throughout the EU and would avoid inconsistency by acting when remedies proposed by a NRA threaten to hinder the capable functioning of the single market.

The Commissions' proposed ERA (European Electronic Communications Market Authority²⁷⁸) could help to complement the regulatory tasks at European levels performed at national level by the regulatory authorities to support the internal market. The latest developments²⁷⁹ in this case show that it is still doubtful and it is to be feared that it will take several years for "Europe" to become willing to bring the defragmentation of e-communication market to an end, to stimulate investments and to create a efficient mechanisms for the coordination of selecting and authorising services that have an inherent cross-border character²⁸⁰.

An ERA operating outside national politics of all MS could eliminate the national pressures that "colour" many NRA decisions, and greater consistency of regulation inside the internal market could be expected. Companies acting in a number of MS would not have to make separate arrangements with the different national authorities concerning divergences in execution.

E-communication ERA should be established as an independent legal entity in order to help regulate the e-communication sector at the European level and help implement the single market and should be authorized to adopt individual decisions which are legally binding for third parties. This European regulator should be

²⁷⁸ COM(2007)699

²⁷⁹ Proposal of EP (GERT; A6-0271/2009) and result of the 14.th Implementation reports

²⁸⁰ E.g. Mobile services and IP based services

established in the form of a centrally-managed but local authority, integrating existing NRAs, which could have some restricted power for local decision making and support in national cases (e.g. in parts such as rights of way or supporting in the market review procedures Article 7, to guarantee that Commission gets oversight and “control” powers over national markets) would improve consistency of “NRAs” decisions.

NRAs are part of the whole and join the orchestra of European regulation; this would lead to a high level of harmonisation in the internal market. By establishing the regulator, the “code of effectiveness”²⁸¹ should not be left out, because it will essentially involve simplifying the decision-making process, shrinking costs and give the agency a convinced degree of organisational, legal and monetary autonomy.

The entailed transfer of powers over e-communications regulation to a Community body would, of course, cause strong national resistance, but as a result the internal e-communication market would be fully completed and EU competitiveness in the global market will be strengthened (e.g. lower compliance cost for pan-European operators).

The single European regulator for e-communications has been discussed in many times and has always been rejected by MS. MS fear to loose control and therefore risk “loosing” the internal competitive market, but it seems that they do not take really take the internal market into consideration; political national power still precede over common interests

The option of a European regulator may offer the best prospects for creating a truly single market in e-communications and lead to a consistent market in communication within Europe.

²⁸¹ Compare Chapter 9 “EECMA”

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- Communications Committee
- Radio Spectrum Committee
- Radio Spectrum Policy Group
- European Regulators Group
- Working Party on the Protection of Individuals with regard to the Processing of Personal Data (‘Article 29 Working Party’)
- eEurope Advisory Group

Stakeholder consultations and workshops organised in 2004-2006

- Workshop on Wireless Access Policy for Electronic Communications Services (WAPECS) (February 2006)

- Workshop on mobile broadcasting - Technological developments, market opportunities regulations and policy (23 February 2006)
- Workshop on Spectrum Requirements for Road Safety (February, 2006)
- Conference on 112 single European emergency number (October 2005)
- Open Workshop on Public Policy treatment of digital terrestrial television (DTTV) in communication markets (September 2005)
- Workshop on Location-based Services and the e-Privacy Directive (July, 2005)
- Open Workshop Identifying policy and regulatory issues of Next Generation Networks

(June 2005)

- Scope of Universal Service in eCommunications: public consultation on the Commission's preliminary review assessment and longer-term issues on universal service provision (May 2005)

- Premium Rate Services in Europe: Presentation of findings of study (by Cullen

International and WIK Consult) with opportunity to comment (June 2005)

- Freephone Services in Europe: dedicated to cross-border access and access to "00800" (June 2005)

- Public consultation and workshop on combating 'spam' (November, 2004)

- Public consultation and workshop on traffic data retention (September 2004)

- Public consultation on the regulatory treatment of VoIP under the EU regulatory framework (June, 2004)

- Public consultation and public hearing on interoperability of digital interactive TV services (March 2004)

Other Commission Reports

- Horizontal evaluation of the performance of network industries providing services of general economic interest, Commission Staff Working Paper (SEC(2005) 1781)

Other external studies (commissioned by DG Information Society and Media)

- Study on pan-European market for premium rate services (September 2005)

- Report on the public policy treatment of digital terrestrial television (DTT) in communications markets (September 2005)

- Supply of services in monitoring of South East Europe – telecommunications services and related aspects; Report 1- Country Comparative Report (August 2005)

- Report on Telecoms Price Developments from 1998 to 2004 (October 2004)

- Telecoms services indicators 2004 (September 2004)
- Study on spectrum management in the field of broadcasting (June 2004)
- Study on conditions and options in introducing secondary trading of radio spectrum in the European Community (May 2004)
- Study on Internet protocol (IP) voice and associated convergent services (February 2004)
- Study on Internet Access Costs Via a Standard Telephone Line, ADSL, and Cable Modem (January 2004)
- Economic Expert Group on Remedies (November 2003)
- Study on Barriers to Competition in the Supply of Electronic Communications Networks and Services (November 2003)
- Study on the policy implications of convergence in the field of naming, numbering and addressing (September 2003)
- Study on regulatory implications of the introduction of Next Generation Networks and other new developments in electronic communications (June 2003)
- Study on the assessment of the Member States measures aimed at fulfilling certain general interest objectives linked to broadcasting, imposed on providers of electronic communications networks and services, in the context of the new regulatory framework (March 2003)
- Study on Interoperability, Service Diversity and Business Models in Digital Broadcasting Markets (March 2003)