

SECOND ANNUAL CONFERENCE ON
COMPETITION AND REGULATION IN NETWORK INDUSTRIES

20 NOVEMBER 2009

CENTRE FOR EUROPEAN POLICY STUDIES, BRUSSELS, BELGIUM

**European organization of telecom regulators
and the impact on the pace of telecom innovations**

Is EU modesty hampering innovation in telecom? Think global, act local...

*Conference paper*¹

L.C.P. Broos², M.A. Heldeweg³ & R.A. Wessel⁴

Department of Legal and Economic Governance Studies (LEGS)
Centre for European Studies (CES)
University of Twente

L.C.P.Broos@utwente.nl

Abstract

In a recent political discussion about the optimal division of power and competence between national and European regulatory bodies for telecommunication markets, the European Commission, the Parliament and the Council fundamentally disagreed about the necessity and most suitable arrangement (if any) for a newly established regulatory body. In the end, a Body of European Regulators for Electronic Communications (BEREC) resulted as a compromise. This paper initially describes the decision making process from which BEREC resulted and subsequently critically assesses the expected contribution of BEREC to the innovativeness of the internal telecommunication markets by confronting BEREC with innovation theory and general principles for effective market authority. One result of this analysis is that a more centralized model of market authority (as initially considered by the Commission) might contribute more to the innovative potential of the internal telecommunication markets than BEREC is expected to.

Keywords

Telecommunications, innovation, regulation, competition law, European law

¹ draft v0.8 received 20-10-2009

² mr. drs. L.C.P. Broos is doing research in the field of regulation versus innovation, in the context of stimulating innovation in telecommunications by innovating legal regimes

³ prof. mr. dr. M.A. Heldeweg is Professor of Public Governance Law, Head of the department of Legal and Economic Governance Studies (LEGS)

⁴ prof. dr. R.A. Wessel is Professor of the Law of the European Union and other International Organizations, Director of European Studies, Co-director Centre for European Studies

Introduction

1. Recently, among policymakers and regulators focusing on telecommunication markets, an existential discussion emerged about the optimal division of power and competence between national and European regulatory bodies. Traditionally, national telecom regulators called the tune and at the European level there was an independent body for reflection, debate and advice. The latter is called the European Regulators Group (ERG) which was established in 2002. EU telecom rules are currently being reformed including the European arrangement of (cooperation between) national market authorities. As, according to the European Commission (hereinafter: Commission), until now the ERG did not produce sufficient results, a new independent Authority (“the European Electronic Communications Market Authority”, also known as EECMA or ‘the super-regulator’) was proposed by the Commission triggering a broad discussion between the Commission, the European Parliament (hereinafter: EP), the Council, national regulators, the ERG, telecom providers and their associations. In the end, a Body of European Regulators for Electronic Communications (BEREC) resulted as a compromise. One might say that BEREC is a weak extract of EECMA leaving more autonomy to the existing national authorities. This paper initially describes the decision making process from which BEREC resulted and subsequently critically assesses the expected contribution of BEREC to the innovativeness of the internal telecommunication markets by confronting BEREC with innovation theory and general principles for effective market authority.

PART I: BEREC, THE MAKING OF...

Emergence of the prevailing arrangement including the ERG

2. Infrastructural facilities, including telecommunication networks, are part of the institutional environment and as such - among other things - considered to be a “driving force” behind innovation (OECD 2005, sub 98-105). Despite the scientific uncertainty about what precisely are the driving forces behind innovation, in an extensive literature-based research paper about what economists know and surmise about the underlying determinants of innovation, Morck en Yeung (2001) referred to infrastructure in general as a “macro economic building block for innovation”.
3. From this point of view, combined with the innovation-oriented ambition of the European Union (European Commission 2003), it is not surprising at all that European telecom policy (the “regulatory framework”) aims to stimulate the telecommunications sector, in order to stimulate innovation in other markets. As the European Commission describes it: “Telecoms networks and services are the backbone of Europe’s developing information Society (...) To improve innovation and increase efficiency in the telecommunications sector, the European Union promotes increased competition through a series of regulatory rules.” (European

Commission 2009b). Apparently, the EC relies on a positive correlation between competition and innovation.

4. To stimulate competition on national telecommunication markets, every Member State has a national regulatory authority established, like OPTA in the Netherlands, Ofcom in the UK, BNetzA in Germany and BIPT in Belgium (European Commission 2007b). As the nature of telecommunication services implies international potential (phone calls don't stop at the border⁵), organization of and cooperation between regulatory authorities is an important element in the European regulatory framework. Hereto, in 2002 the "European Regulators Group" (ERG) for electronic communications networks and services was created to provide a suitable mechanism to encourage co-operation and coordination between national regulatory authorities and the Commission. "By bringing together national regulators and the Commission, the ERG aims to promote the development of the EU's internal market for electronic communications networks and services, and to achieve consistent application in all Member States of the provisions set out under the regulatory framework. (...) The ERG is an independent body for reflection, debate and advice in the electronic communications regulatory field. Composed of the heads of the relevant national authorities, it acts as an interface between them and the Commission in order to advise and assist the Commission in consolidating the internal market for electronic communications networks and services." (European Commission 2009a).

Current regulatory reform

5. In 2007 the European Commission stated that "the inconsistent regulatory approaches by 27 national regulatory authorities – which vary significantly in terms of competences, independence and financial and human resources – stand in the way of technological developments and are increasingly felt by businesses as obstacles to the delivery of trans-national or pan-European services." In reaction, EU telecom rules are currently being reformed including the European arrangement of (cooperation between) national market authorities. According to the Commission, until now the ERG did not produce sufficient results; "(...) all ERG common approaches are factually based on consensus, making such common approaches difficult and slow to achieve. They are indeed impossible to achieve where there are substantial differences of opinion or interest between different regulators. The loose cooperation that results has not allowed its documents to go beyond rather general statements in a number of important and controversial issues." (European Commission 2007a, §3.1).

Single European Regulatory Authority (SERA)

6. As one of the options (European Commission 2007c, p. 65), the Commission shortly considered establishing a Single European Regulatory Authority (hereinafter: SERA) with centralized decision-making involving discretionary powers on trans-boundary matters as

⁵ According to the 12th report "EUROPEAN ELECTRONIC COMMUNICATIONS REGULATION AND MARKETS 2006" on cross-border activity (p.4), on average, one third of revenues accrue from activity in a Member State other than the operator's home country.

well as on national matters and which would be in charge of both the market review process and spectrum management. It would have strong implications for the current institutional balance in the sense that it effectively transfers most regulatory powers from NRA's to the centralized level. In this scenario NRAs would either cease to exist or would become national offices of SERA responsible for data collection and implementation of the centralized decisions. Markets would be analyzed directly by SERA which would also impose regulatory remedies. Public consultation on this option showed the potential economic benefits of the single market; "A European regulator acting outside the domestic politics of all Member States would remove national influences that color decisions of NRAs, and would promote consistent regulation across the EU. It represents a significant change in the institutional arrangements and would undoubtedly have a significant impact on the European electronic communications markets. Centralized regulation may contribute to encouraging faster deployment of services with pan European potential and international competition among operators, rather than fragmented competition in local/national markets. Operators active in several Member States would have a one-stop regulator system instead of having to deal with each different national authority and differences in implementation. This would significantly lower their administrative burden and compliance costs. Mobile and wireless markets would also undergo a significant transformation towards a European spectrum market with a greater emphasis on international competition. Nevertheless, it can be expected that regulatory consistency and market consolidation would be the key features of this model." However, subsidiarity, proportionality and legal considerations (The Commission mentioned "institutional concerns" without explaining much further) rendered this option unrealistic. Also, some stakeholders feared that a European regulator would be too far from the markets and would not be as effective as a national level authority which has the specialized expertise and all the detailed information about local market developments.

European Electronic Communications Market Authority (EECMA)

7. Thus, instead of proposing SERA, the Commission proposed (European Commission 2007a) another arrangement; an independent Authority was suggested ("the European Electronic Communications Market Authority", hereinafter: EECMA⁶) working in close cooperation with the national regulatory authorities (NRAs) and the Commission. EECMA, accountable to the European Parliament, would include a board of regulators comprising the heads of the national regulatory authorities of all EU Member States and would replace the European Regulators Group (ERG). The proposed tasks of EECMA were (art. 3):
 - a. issue opinions at the request of the Commission or on its own initiative and assist the Commission by providing it with additional technical support in all matters regarding electronic communications;
 - b. assist the Community, its Member States and the national regulatory authorities in the relations, discussions and exchanges with third parties;

⁶ In preceding documents also known as "European Telecom Market Authority" (ETMA)

- c. provide advice for market players and national regulatory authorities on regulatory issues;
 - d. exchange, disseminate and collect information and undertake studies in areas relevant to its activities;
 - e. provide advice and assistance to the Commission or any competent body appointed by a Member State with regard to any network and information security issue falling within the Authority's remit;
 - f. take individual decisions in relation to the issuance of rights-of-use for numbers from the European Telephone Numbering Space (ETNS);
 - g. assist the Commission in the selection of undertakings to be granted rights of use of radio frequencies and numbers;
 - h. collect and redistribute usage fees for rights-of-use of radio frequencies and numbers;
 - i. issue recommendations to the national regulatory authorities on cross-border disputes and on e-Accessibility matters.
8. The proposed tasks would complement, and not duplicate, at European level the regulatory tasks performed by the national regulators. EECMA would provide the means for establishing an effective partnership between the Commission and the National Regulators on issues where European consistency is needed such as: market definitions, analysis and remedies; harmonisation of radio spectrum usage; definition of trans-national markets; quality of service. At the same time it would provide a cost effective platform for addressing pan-European issues that reach beyond those that are within the purview even of an enhanced ERG, such as network and information security; implementation of the '112 emergency call number'; administration of the European Telephony Numbering Space.
9. Upgrading the ERG to the desired Authority was no realistic option according to the Commission (European Commission 2007a, §3.1): “The option of an enhanced ERG, with voting rights in order to take majority decisions, has also been examined. Notwithstanding the difficulties of implementing a commonly acceptable system of votes, such a body would not be in a position to issue decisions that were binding on its members. Under the current Treaty, such a role can only be undertaken by the Commission. Moreover, there are serious institutional constraints on the extension of the ERG to achieve the level of competence needed to carry out such an enhanced role. Any extension of the ERG would require a significant enhancement of its existing resources to allow it to carry out its work as the current system of rotating presidencies of the ERG has reached its limits (establishment of an executive director, reinforcement of its secretariat, formal rules of procedure for taking decisions, etc). The resources for such an enhancement of the ERG's role cannot be drawn from outside resources as the Commission must be sure that its opinions and advice are transparent, accountable and independent. (...) In fact, the ERG can only enhance its advisory role to the Commission in the way needed if it becomes a Community body, subject to the same rules of administration and budget that apply to all community bodies (staff regulation, financial regulation, reporting requirements to Parliament, etc.). The Commission

has therefore concluded that the tasks required could be best fulfilled by a separate entity which is independent and outside the Commission and which reinforces the powers of the NRAs by taking over the functions of the ERG and giving them a robust and transparent foundation in Community law.”

10. However, the first task as mentioned above (to issue opinions at the request of the Commission) must be assessed in combination with another Commission proposal (2007/0247) to amend article 7 of Directive 2002/21/EC (Framework Directive). According to the ‘old’ article 7 procedure, the Commission could (based on a consensus-based advice of the ERG) make comments to a national regulatory authority (NRA) about certain intended measures (with relevance for the internal market) and in general this NRA had to take these comments “into account”. According to the proposed amendment concerning article 7, an NRA shall amend or withdraw the draft measure in response to a Commission decision requiring the NRA concerned to withdraw the draft measure. The new article 7 procedure assigns a stronger role to the Commission in remedies imposed by NRAs. The Commission’s decisions towards national regulators would be based on majority-voted advice of the EECMA.
11. In popular literature, the proposed set-up as described above in combination with the obligation for NRA’s to amend or withdraw their draft measure in response to Commission decisions urging so, was referred to as establishing a ‘super-regulator with a veto-right together with the European Commission’ (Leigh 2008). The veto-power in particular was expected to be used especially to prevent national regulators from granting incumbents “regulatory holidays”.

Critics on EECMA

12. Immediately after conclusion of the proposal, the idea of a ‘super-regulator’ was under a broad discussion in which the ERG stated to be ready to take this extended role of a European Authority itself (ERG 2007), as creating a new layer with a veto-right would be unnecessary centralism and disrespecting the national differences and independency. National regulators (OPTA: “overbodige Brusselse macht en bureaucratie” (Leigh 2008)) and policymakers (the Dutch Ministry: “nationale toezichthouders werken in samenwerkingsverband al hard aan Europese harmonisatie – een extra Brusselse autoriteit is niet nodig” (De Haes 2008) strongly argued against the idea of losing power to a European authority. The Dutch ACT (Associatie van Competitieve Telecomoperators) and the European ECTA (European Competitive Telecommunications Association), representing mainly new entrants in the telecommunication markets, strongly supported the proposal, as members offering international telecommunication services would face major differences in national regulations (ACT 2007a, ACT 2007b and ACT 2007c).

Body of Regulators in Telecom (BERT)

13. In response, the European Parliament accepted an amended text (24-9-2008), aimed at establishing a “Body of Regulators in Telecom” (BERT), comprised of all National Regulatory Authorities (NRAs). BERT would be set up as an association of national

regulatory authorities that would not have an independent legal personality. The national regulatory authorities should support the goals of BERT of promoting greater regulatory coordination and coherence. The NRAs shall take utmost account of common positions issued by BERT when adopting their own decisions for their home markets.

14. MEPs call for a ‘procedure for the consistent implementation of proposed solutions’. This procedure is based upon the principle that only if the Commission and BERT (acting by a simple majority) agree that the proposed remedy is not appropriate the Commission could issue a reasoned decision requesting the NRA concerned to amend the draft measure.
15. While the Commission’s proposal mentioned “a European system for the regulation of electronic communications”, the EP adopted text concentrated on an association serving as a means for the exchange of information and the adoption of consistent decisions by NRAs. BERT should provide an organizational basis for the decision-making of NRAs and adopt common positions and comments; The Body of European Regulators in Telecom (BERT) should be established to accomplish co-ordination between NRAs of Member States without harmonising existing regulatory approaches to a degree which undermines regulatory competition. According to the EP, leaving room for regulatory competition between the NRAs would be important in light of specific national market conditions. The originally proposed tasks e, f, g and h were deleted, i was limited (advise where appropriate instead of issuing recommendations) and some new tasks were introduced by the EP:
 - a. develop common positions on pan-European issues such as GTSS (Global Telecommunication Services) in order to increase regulatory consistency and promote a pan-European market and pan-European rules;
 - b. exchange experience and promote innovation in the field of electronic communications;
 - c. develop common positions, guidelines and best practices for the imposition of regulatory remedies at the national level and monitor their implementation across Member States.

Body of European Telecom Regulators (“The Body”)

16. In response to the EP decision, in a modified legislative proposal (November 2008) the Commission replaced the initially proposed EECMA by proposing a “Body of European Telecoms Regulators (“The Body”); a body with less tasks and power than the EECMA, but still the Commission felt the need to insert “some new drafting underlying the importance of reinforcing the cooperation between national regulatory authorities” by reciting that The Body “would establish confidence by virtue of its independence”.

Group of European Regulators in Telecom (GERT)

17. In February 2009, the Council took the common position not to be convinced of the necessity of institutional change: “(...) the Commission, to a large extent supported by the Parliament,

has proposed to change the (inter) institutional set-up and, consequently, the balance of power between the various actors, regulatory authorities, the EU institutions and other stakeholders. (...) Although the Council believes that an update of the regulatory framework for electronic communications would be beneficial for the sector, it is of the view that this could be achieved by improving the current arrangements rather than by setting up alternative mechanisms. (...) The Council has opted to give the ERG formal status in a Community regulation by laying down a more precise definition of its tasks, its functioning and its relations with the Community Institutions. (...) the Council has opted for a different type of legal act from that proposed by the Commission.”

18. Nevertheless, the Council finally agreed to introduce a new entity instead of upgrading the ERG, but suggested another name for The Body: “Unlike the European Parliament, the Council considers that the name GERT (Group of European Regulators in Telecoms) would be more appropriate for the new body than BERT (Body of the European Telecoms Regulators). It feels, however, that GERT should neither have the characteristics of an agency nor legal personality.”
19. Also, the veto-power claimed by the Commission was not in accordance with the common position of the Council: (...) the Council does not share the approach proposed, that the Commission be granted the possibility to issue "decisions" on draft measures intended to be taken by NRAs. The Council rather believes it appropriate for the Commission to issue non-binding "opinions" on draft measures proposed by NRAs and to require NRAs to publicly justify its final decision. This issue is at the core of the debate on the division of responsibilities in the implementation of the regulatory framework for electronic communications and should also be seen in relation to the proposal to set up a European telecoms authority in this area.” (16-2-2009)
20. Furthermore, the EP and the Council favored an alternative decision-making process within the new body and limited the impact of opinions of the new body on NRA’s: “The Council agrees with the European Parliament that the new body should carry out its tasks independently, impartially and transparently and take decisions on the basis of a two-thirds majority of the members. Like the European Parliament, the Council considers that the NRAs and the Commission should take the utmost account of opinions issued by GERT.”

Agree to disagree...

21. Summarizing we may say that the Commission, the Parliament and the Council fundamentally disagreed about:
 - a. the necessity of a newly established ‘super-regulator’
 - b. the need for legal independency of such a new body
 - c. the tasks and name of a new body (if any) that would best reflect the status of this body
 - d. the possibility to upgrade the ERG to the new body

- e. the division of power between Europe and Member States (veto-power for the Commission in combination with a new body versus discretionary independence of NRA's publicly explaining their decisions
22. On 17 February 2009 the Commission correctly noted: "that the Council's position departs substantially from those of the Commission and the European Parliament, notably as regards the internal market mechanisms, in particular for ensuring consistent regulatory remedies, (...) and the establishment of a regulatory body. As regards the regulatory body, the Commission has particular concerns that the Council's position raises institutional questions that constitute a substantial barrier to a satisfactory settlement".

Body of European Regulators for Electronic Communications (BEREC)

23. On 6 May 2009, the European Parliament approved with amendments, as part of a compromise negotiated with the Council, to establish a "Body of European Regulators for Electronic Communications" (BEREC). About the tasks of BEREC: "BEREC shall draw upon expertise available in the national regulatory authorities (NRAs) and shall carry out its tasks in cooperation with the NRAs and the Commission. It shall promote cooperation between NRAs, and between NRAs and the Commission. Furthermore, BEREC shall advise the Commission, and upon request, the European Parliament and the Council. The tasks of BEREC shall be:
- a. to deliver opinions on draft measures of NRAs concerning market definition, designation of undertakings with significant market power and imposition of remedies, and to cooperate and work together with the NRAs;
 - b. to deliver opinions on draft recommendations and/or guidelines on the form, content and level of details to be given in notifications;
 - c. to be consulted on draft recommendations on relevant product and service markets;
 - d. to deliver opinions on draft decisions on the identification of trans-national markets;
 - e. on request, to provide assistance to NRAs, in the context of the analysis of the relevant market;
 - f. to deliver opinions on draft decisions and recommendations on harmonisation;
 - g. to be consulted and to deliver opinions on cross-border disputes;
 - h. to deliver opinions on draft decisions authorising or preventing a NRA from taking exceptional measures, in accordance with the Access Directive;
 - i. to be consulted on draft measures relating to effective access to the emergency call number 112;

- j. to be consulted on draft measures relating to the effective implementation of the 116 numbering range, in particular the missing children hotline number 116000;
 - k. to assist the Commission with the updating of Annex II of Directive 2002/19/EC (Access Directive);
 - l. on request, to provide assistance to NRAs on issues relating to fraud or the misuse of numbering resources within the Community in particular for cross-border services;
 - m. to deliver opinions aiming to ensure the development of common rules and requirements for providers of cross-border business services;
 - n. to monitor and report on the electronic communications sector, including publishing of an annual report on the developments in the sector.
24. NRAs and the Commission shall 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.”
25. Also, the EP and the Council reached a compromise about the procedure for the consistent application of remedies: “the Parliament and Council also agree that before taking regulatory decisions, national regulatory authorities will have to consult the Commission and the new Body of European Regulators for Electronic Communications (BEREC). Where an intended measure aims at imposing, amending or withdrawing an obligation on an operator, the Commission may notify the national regulatory authority concerned and BEREC of its reasons for considering that the draft measure would create a barrier to the single market or its serious doubts as to its compatibility with Community law. In such a case, the draft measure shall not be adopted for a further three months following the Commission's notification. BEREC shall, acting by a majority of its component members, issue an opinion on the Commission's notification, indicating whether it considers that the draft measure should be amended or withdrawn and, where appropriate, provide specific proposals to that end. This opinion shall be reasoned and made public. Within the aforementioned three month period, the Commission, BEREC and the national regulatory authority concerned shall cooperate closely with the objective of identifying the most appropriate and effective measure, whilst taking due account of the views of market participants. In the absence of such notification, the national regulatory authority concerned may adopt the draft measure, taking utmost account of any comments made by the Commission, BEREC or any other national regulatory authority. Where the national regulatory authority decides not to amend or withdraw the draft measure it shall provide a reasoned justification.”
26. Right now we’re waiting for a position of the Council on this 2nd reading of the EP.⁷

⁷ It is expected that implementation of any new body will be postponed anyway, as the decision about BEREC is part of a broader review of the total telecommunication regulation package. Part of this package is the discussion about the ISP-position and –power in case of IP-infringement. On this discussion no agreement is expected on a short term.

PART II: WILL BEREC FULLY EXPLOIT THE INNOVATIVE POTENTIAL OF THE INTERNAL COMMUNICATION MARKETS?

How to regulate for innovation?

27. The process description above raises some questions in the area of innovation and regulation. On the one hand, innovation in the telecommunications market (“technological development”) is said to be hampered by inconsistent regulatory approaches by 27 national regulatory authorities. Businesses confirm to experience this obstacle to the delivery of trans-national or pan-European services. At national as well as EU-level, actors seem to share the opinion that innovation in telecommunication markets is to be stimulated, that regulatory authorities possess potential power to stimulate innovation, that European development of telecommunication services is beneficial for the national quality and customer choice in telecommunication services and they also seem to recognize that telecommunication markets are developing cross-border. On the other hand, the actors involved can’t seem to agree on how to organize market authority to stimulate innovation most. According to the Commission, European centralization of market authority would stimulate innovation most, but there appears to be resistance in individual Member States (NRA’s and responsible ministers) to centralize regulatory authorities in this field. According to the critics, NRA’s would be better able to regulate local markets than a central European body could. Different insights seem to exist about which organization of regulation will stimulate innovation most, in particular about the division of tasks, responsibilities and powers between central and national parts of regulatory bodies including the optimal level of independence a central regulatory body should have.

28. In short, the Commission tended to organize the telecom authority in a centralized manner, the EP tended to protect the power of NRA’s next to some central authority and the Council did not seem to experience much urgency to change the current ERG-setup drastically. The main differences between the several proposals are summarized in the table below:

arrangement	ERG	SERA	EECMA	BERT	The Body (BETR)	GERT	BEREC
<i>origin</i>	<i>prevailing</i>	<i>Commission</i>	<i>Commission</i>	<i>EP</i>	<i>Commission</i>	<i>Council</i>	<i>EP+Council</i>
jurisdiction	none	full	partial	partial	partial	partial	partial
legal personality veto with Commission?	no	yes	yes	no	yes	no	Berec does not, the supporting office does
independency from NRA's	irrelevant	fully	not fully	not fully	not fully	not fully	not fully
obligation NRA's after response to EC decision	take comments into account	execute	amend or withdraw draft measure	take utmost account	amend or withdraw draft measure	take utmost account and publicly justify final decision	reasoned justification for not amending or withdrawing
Upgrade ERG?	yes	no	no	no	no	yes	no

29. What strikes one most in the discussion between these actors is the dominant use of political and institutional arguments to centralize or not to centralize (like fear of “too much bureaucracy”, “loosing national powers”, and “institutional concerns”) instead of founding

such a decision on general principles for effective market authority from a scientific perspective.

30. In order to contribute to the discussion which type of European organization of market authority would contribute most to the innovativeness of telecommunications in the internal market, the expected influence of organization - and particularly (de)centralization - of the different bodies that were passed in review during the process described above (hereinafter: "arrangements") on the pace of innovation in the market(s) regulated by those bodies is assessed below, by confronting these arrangements with innovation theory and regulatory insights (general principles for effective market authority).

Lessons from Innovation theory: Regulatory (un)certainty, network effects and regulatory competition

31. Literature on the relationship between regulation and the speed of innovation focuses on the concept of "regulatory (un)certainty". Especially in the tradition of innovation timing advantages, resolution of regulatory uncertainty is considered to be an important second mover ("followers") advantage, conversely regulatory certainty contributes to faster innovation by first movers (Gilbert en Birnbaum 1996). As first movers are responsible for most innovations in products and services, increasing regulatory certainty is important in order to speed-up innovation. Inconsistent application of regulation among Member States might result in uncertainty about local legal requirements to be compliant with. This uncertainty can slow down innovation processes of market players intending to implement innovative services across more than one Member State.
32. The existence of extraordinary economies of scale in the telecommunications sector (network effects through the combination of high sunk costs and low marginal costs), magnifies the mechanism of slowing down innovation processes as meant in the paragraph above.
33. The EP-argument that SERA and EECMA would leave less space for regulatory competition between NRA's, might be valid in the event that telecom operators would pick one Member State (where the NRA regime is most attractive) to register their offices and deliver their services. However, in the current cross-border market situation, regulatory competition (featured by degrees of freedom for Member States in implementing and interpreting European directives) is hampering regulatory certainty in the internal market. From an internal market perspective, a quest for regulatory competition could better be done outside the internal market, by learning from and competing with regulatory authorities in other parts of the world with highly developed telecom infrastructures and sophisticated telecom services.
34. So, the more consistent the application of telecom regulation in the internal market, the more attractive innovating telecom services within the EU will be. So, obviously, the SERA-arrangements as suggested by the Commission, seem to be superior in stimulating speed of innovation as no longer NRA's in individual Member States would be able to take (inconsistent) decisions. Among the other arrangements, EECMA and The Body are superior to the arrangements suggested by the EP / Council, as NRA's in the latter arrangements don't

necessarily have to amend or withdraw their measure in response to Commission-rulings based on input from the European authority.

General principles for effective market authority

35. Regulatory insights in literature vary in their level of detail and on the elements accented most. Nevertheless, some general principles for effective market authority can be deduced. On the highest level there are four main criteria for the evaluation of (the set-up of) regulatory (market) authorities: (1) effectiveness, (2) independence, (3) enforcement powers / authority and (4) transparency and accountability. In annex A a non-exhaustive account of sub-criteria is elaborated based on a literature overview of Gülen c.s. (2007) and some more specific insights of Berg (2000) and the US Federal Communications Commission (FCC, 1999)⁸. Sub-criteria on which the several arrangements differ and sub-criteria the arrangements appear to be non-compliant with, will be discussed below (numbers 36-39), after a short introduction of the meaning of the main criteria.

Effectiveness

36. Effectiveness is about the ability of a market authority to make a real difference by realizing its objectives. One requirement for effectiveness is the industry coverage of the market authority. A market authority must be fully able to regulate the market(s) involved (Lirneasia 2009, Gülen, Makaryan & Foss YYYY). Hereto, the domain covered by a market authority should ideally be identical or broader than the domain where the behaviour of the market players governed by that authority manifests oneself. In the present case, where improving innovation in the (European) internal market for telecommunications is a main objective of the regulatory framework and where the exploitation of economies of scale is vital and compelling telecom operators to deliver their services internationally, decentralized, nationally organized supervision won't be up to centralized supervision. The centralized characteristic of SERA and, to a lesser degree, EECMA, shows a higher industry coverage than the other arrangements proposed.

Independence

37. Independence according to Larsen c.s. (2004) includes independence from government, organizational autonomy, independence from stakeholders and independent decision-making.

- a. Independence from government is important in order to maintain separation of legislature, executive and judiciary branches and to guarantee regulatory stability lasting longer than a political election round. A remarkable lack of independence

⁸ According to the FCC (1999), an effective regulator “should be independent from those it regulates, protected from political pressure, and given the full ability to regulate the market by making policy and enforcement decisions. The regulator should have the authority and jurisdiction to carry out its regulatory and enforcement functions effectively and unambiguously. And the regulator must be adequately funded from reliable and predictable revenue sources”.

from government applies to all the arrangements under consideration. The ERG has been and EECMA would be established to, among other things, assist the Commission. The EP proposed that BERT would also assist the EP⁹, GERT would also have been established like an ‘assistant’ and BEREC is not intended to be any different in this. Furthermore, the controversial ‘article 7’-procedure puts a lot of discretionary powers in the hands of the Commission. Although in all arrangements considered the authority plays a major role in advising the Commission as a basis for the Commission-decision, in the end it is the Commission and not BEREC, EECMA, BERT or GERT imposing decisions on NRA’s to amend or withdraw certain intended measures.

- b. Also, the organizational autonomy in all arrangements concerned is limited; the Commission has quite some influence on the appointment and evaluation of the managing director of the authority and plays an important role in funding the authority and in the approval of budgets¹⁰. Legal personality is another dimension of organizational autonomy, in particular where relations with third parties are concerned. In the arrangements proposed by the Commission, the authority would have had legal personality. In the arrangements proposed by the EP and the Council the Authority would – just like the ERG - not have had legal personality. In the end a compromise is found by adding a supporting office to BEREC with legal personality.
- c. Independence from stakeholders coheres with impartiality, which is a sub-criterion from transparency and accountability. Apart from SERA (in which arrangement there are no NRA’s taking important decisions anymore), all NRA’s are relevant stakeholders having potentially different interests than the central European Authority, as optimization of all national markets might lead to sub-optimization of the internal market as a whole. On this requirement, SERA thus scores better than the other arrangements.

Enforcement powers

- 38. Enforcement powers imply among other things that the authority has a distinct legal mandate, free of ministerial control. As shown above, in all arrangements there is extensive control from the Commission. In addition, a legal mandate would require legal personality (especially to protect the authority against too much pressure from the legal person where it depends on) which not all authorities in the proposed arrangements have as mentioned above as well.

⁹ Amendment 63 regarding art. 4, paragraph 2: “The European Parliament may also request (...) assistance from BERT as it may reasonably require in relation to any enquiry pursuant to Article 193 of the Treaty or any legislation within the scope of the BERT’s functions.”

¹⁰ For example: European Commission 2007d, art. 37.1.

Transparency and accountability

39. Transparency and accountability contain a number of different sub-criteria, such as consistency, predictability and impartiality. These elements have been discussed already, by observing that the risk of inconsistent application of the regulatory framework has not been mitigated fully in most arrangements and by explicating the potential conflicts of interest among NRA's in respect of the internal market which can be at the expense of impartiality.

Conclusion

40. Summarizing, we may say that

- a. for all arrangements under consideration, independence from government deserves special attention;
- b. SERA wins on many points from all other arrangements considered; and
- c. BEREC (thus) is not likely to exploit the innovative potential of the internal telecommunication markets to the highest extent possible.

41. The decentralized organizational model of BEREC is sub-optimal with regard to the potential efficiency of regulatory procedures, not likely to take away regulatory inconsistency like SERA might have been able to, leading to higher compliance costs for market players with cross-border ambitions and a less innovation-friendly European environment than might have been possible. Centralizing market authority might overcome most of these disadvantages.

Why BEREC...?

42. The fascinating question remains, why politicians prefer BEREC in spite of the availability of general principles for effective market authority as set-out above. In formal considerations of Commission, EP and Council some empirical arguments and some constitutional arguments were found. One empirical argument from the EP regarding regulatory competition was refuted above already. Another empirical argument found in the documentation is that in a centralized organisational model national market conditions would be overlooked. However, just like in organizational theory with respect to multinational companies, the best solution for regional diversity is not to maintain utter local autonomy but to allow local offices to take local circumstances into account implementing company-wide determined policies ("Think global, act local"). A third empirical argument found is that telecom markets are still predominantly national. As market players would still accrue almost two third of their revenues from activity in their home markets, market authority would not (yet) have to be centralized. However, this image is distorted as providers want and need to grow further internationally but they experience difficulties in doing so because of many differences in the application of rules by Member States. In other words, this is a chicken-and-egg problem which spiral is to break out by pro-actively centralize market authority. Institutional arguments found in the documentation contain doubts on the proportionality and subsidiarity of a such a (among politicians considered to be too drastic) decision to centralize

telecom markets authority and (according to the Commission) “institutional concerns / legal constraints”. These institutional / political reluctance appears to be conflicting with the institutional / political ambition to stimulate innovation in the internal market... Anyhow, from a scientific perspective, there are not much arguments not to organize market authority more centralized.

ANNEX A: non-exhaustive elaboration of requirements for effective supervisory bodies

<<based on a literature overview of Gülen c.s. (2007) and some more specific insights of Berg (2000) and the US Federal Communications Commission (FCC, 1999)>>

A. effectiveness

- o industry coverage of the regulator / full ability to regulate the market
- o jurisdictional boundaries between regulator and ministry
- o relations with other regulators

B. independence

- o independence from government (protected from political pressure, to guarantee regulatory stability)
 - > an arm's-length relationship with political authorities
- o organizational autonomy
 - > legal personality, separate from the ministries
 - > funding (earmarked, reliable, predictable revenue sources like levies on regulated firms or consumers)
 - / financial independence from the state
 - > in charge of own budget
 - > sufficient equipment (budget, buildings, IT technology et cetera)
 - > in charge of own personnel policy (exemption from restrictive civil service salary rules)
 - . meritocratic and impartial appointment of board members (based on professional criteria for appointment)
 - . involving both the executive and the legislative branches in the appointment process
 - . fixed term and mandate, removal for cause only (job-security, protecting them from arbitrary removal)
 - . no (in)direct financial interests in the sector, no conflicts of interest
 - . salary scale for commissioners competitive with private sector and regulated companies
- o independence from stakeholders
 - > an arm's-length relationship with regulated industry / firms, consumers, and other private interests
- o independent decision-making (integrity)
 - > competency
 - . highly qualified staff with clear and sufficient competences
 - > able to make judgement without undue influence from, or reliance on, market participants
 - . industry expertise

C. enforcement powers (authority)

- o distinct legal mandate, free of ministerial control

D. transparency and accountability

- o communication
- o consultation
- o consistency
- o predictability
- o impartiality
- o flexibility
- o independent and effective appeal process for agency decisions
- o public access to decision-making and reasons for decisions
- o external auditing
- o code of ethics to avoid conflicts of interest

References

ACT (2007a), *Review 2006 of the regulatory framework for electronic communications and services*

ACT (2007b), position paper ACT 20-11-2007.

ACT (2007c), position papers ACT 3-12-2007.

Berg, S. (2000) "Developments in Best-Practice Regulation: Principles, Processes, and Performance" *The Electricity Journal*, July, pp. 11-18.

ERG (13-11-2007): *ERG ready for extended role*, ERG Press Release 07 (70)

European Commission (11-3-2003) *Innovation policy: updating the Union's approach in the context of the Lisbon strategy*, Brussel: communication 112.

European Commission (2006), *12th report "EUROPEAN ELECTRONIC COMMUNICATIONS REGULATION AND MARKETS 2006"*

European Commission (2007a) Explanatory memorandum 13-11-2007 (0249)

European Commission (2007b): Annex to Commission Decision 2007/804/EC of 6 December 2007 amending Commission Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services

European Commission (2007c) : IMPACT ASSESSMENT SEC(2007) 1472

European Commission (2007d): COD/2007/0249, *Creation of the European Electronic Communications Market Authority ('Telecoms Package')*.

European Commission (2009a) on ERG, online 19-10-2009

http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/erg/index_en.htm

European Commission (2009b): *Regulatory framework for telecoms in the EU today*, retrieved 19-10-2009 from http://ec.europa.eu/information_society/policy/ecomm/current/index_en.htm

Gilbert en Birnbaum (1996), Innovation Timing Advantages: From economic theory to strategic application, in: *Journal of engineering and technology management*, Elsevier 12 (1996) : p. 245-266

Gülen, G., Makaryan, R., Volkov, D. & Foss, M. (2007), *Improving regulatory agency efficiency and effectiveness: best practices, processes and organizational structures*, in Proceedings, 11th Annual Conference of the International Society for New Institutional Economics, Reykjavik, Iceland, 23 p.

Haes, A.U. de (2007): *OPTA: Samenwerking beter dan Brusselse superwaakhond*, retrieved 14-11-2007 from www.webwereld.nl

Haes, A.U. de (2008): *Nederland tegen Brusselse telecomwaakhond*, retrieved 4-1-2008 from www.webwereld.nl

Larsen, A., Pedersen, L.H., Moll Sørensen, A. & Olsen, O.J. (2004), *Independent Regulatory Authorities in Europe*, Copenhagen: Institute of Local Government Studies.

Leigh, P. (2008): EU states bin telecoms 'super-regulator' idea, retrieved 27-11-2008 from www.euobserver.com

Morck, R and Yeung, B. (2001) *The economic determinants of innovation*, Ottawa: Industry Canada

OECD (2005), *The Measurement of scientific and technological activities, proposed guidelines for collecting and interpreting innovation data: Oslo Manual*, Third Edition, Parijs: OECD.

US Federal Communications Commission (FCC, 1999): *Connecting The Globe: A Regulator's Guide To Building A Global Information Community*, Washington DC: Federal Communications Commission.