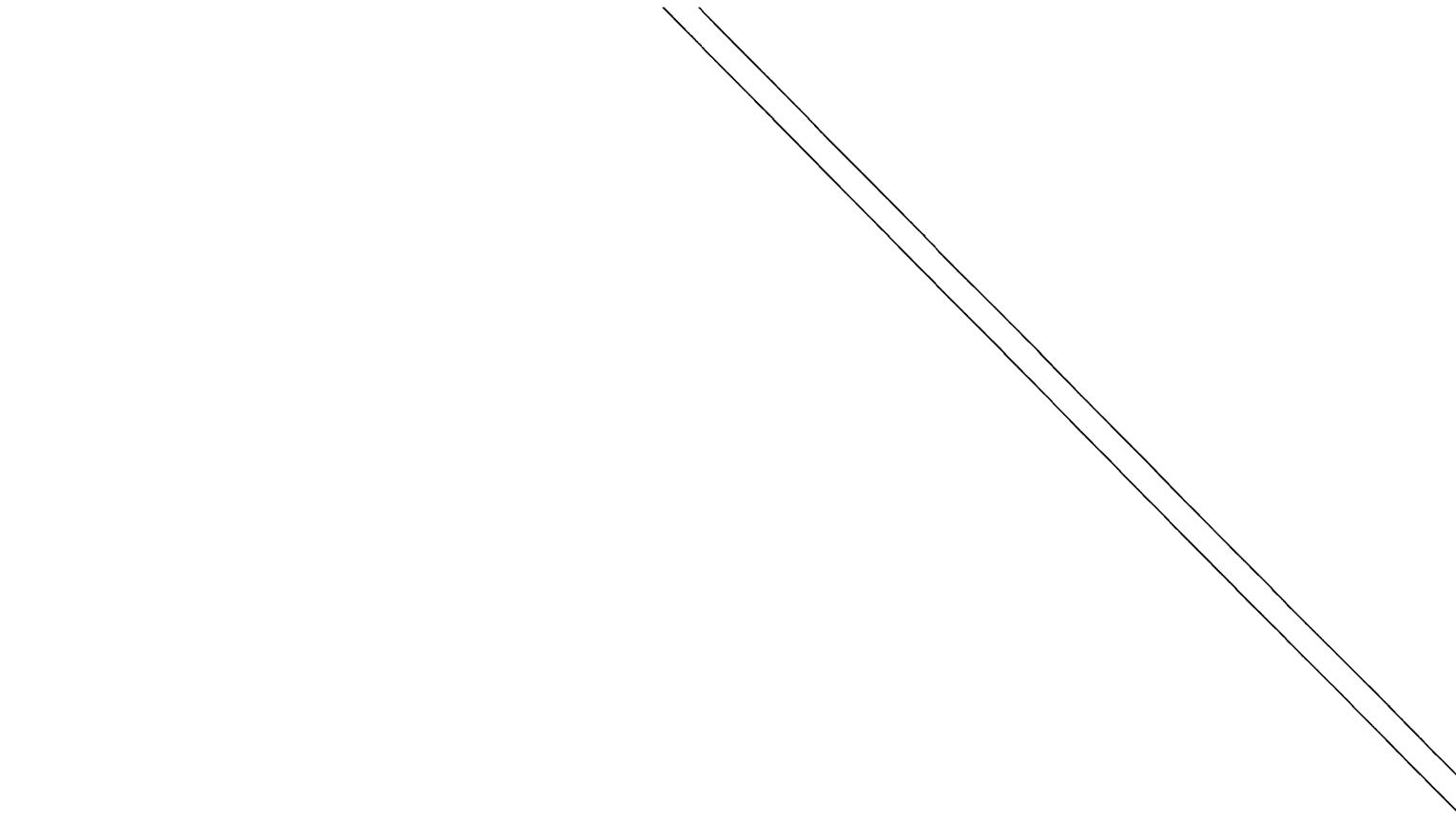

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ISSUES ASSOCIATED WITH THE CREATION OF A EUROPEAN REGULATORY AUTHORITY FOR TELECOMMUNICATIONS

A Report by NERA and Denton Hall for the European Commission (DG XIII)*

April 1997
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**** The conclusions drawn in this report are those of the authors and do not engage the European Commission.***

TABLE OF CONTENTS

Separately Bound

1. INTRODUCTION

1.1 Terms of Reference

This is the Final Report of a study for DG XIII of the European Commission on the *Regulatory and Legal Issues Associated with the Creation of a Regulatory Authority for Telecommunications at the Level of the Union.*

According to the terms of reference, the study consists of the following:

- identification of what are considered by market players to be the current or emerging core regulatory issues which would best be dealt with at a European rather than a national level;

- analysis of the potential operational problems which might result from the existence of split regulatory responsibilities and recommendations to overcome these problems;

- analysis of the legal issues surrounding the creation of such an authority.

It is not the within the remit of this study to make policy recommendations on the merits of such an authority. The purpose of the Study is exclusively to focus on the level of support within the telecommunications sector for the resolution of certain regulatory issues at a European level, which we have assessed via a survey of organisations active in the sector, and to examine the legal and operational issues surrounding the creation of an EU-level regulatory body for telecommunications (henceforth referred to as the 'European Regulatory Authority').

The full terms of reference are contained in Appendix 1.

The conclusions drawn in this report are those of the authors and do not engage the European Commission.

1.2 Context of the Study

The European Community is currently in the final stages of adopting the proposals for the regulatory framework governing the telecommunications industry after 1 January 1998 when all special and exclusive rights of telecommunications networks and services in the Community will have been removed[1].

[1] Greece, Ireland, Portugal, Spain and Luxembourg have been given the right to apply to the Community for derogations to the 1 January 1998 deadline for liberalisation. The Commission is currently examining requests received which, with the exception of Greece, do not attempt to delay liberalisation beyond 2000.

As part of this process, a common regulatory framework is being developed for a number of key areas, such as universal service, interconnection and licensing, which draws on the current institutions in the telecommunications sector in order to optimise the respective roles of the national regulatory authorities, the European Commission and the Community and of pan-European and international bodies and their off-shoots (such as the International Telecommunications Union (ITU), the Conference of European Post and Telecommunications Administrations (CEPT) or the European Telecommunications Office (ETO)).

Both the European Parliament and telecommunications industry participants have identified the need to streamline enforcement of the regulatory framework in Europe and called for an authority at a European level. In 1994, the Report on "Europe and the global information society" ("Bangemann Group Report") argued for such an authority, without, however, seeking to define its remit.

A European Regulatory Authority could have varying powers and functions according to the wishes of the Community and the common position established with Member States. The range of possibilities for increased Community-level telecommunications regulation, starting with the lowest level of European co-ordination and integration and ending with the highest, includes:

- a co-ordinating role for the Commission to guide national regulatory authorities and encourage best practice among them;
- a rationalisation of the work of the various existing telecommunications committees and bodies that operate at a Community or wider pan-European level;
- creation of a body which:
  - receives and carries out specific mandates from the Commission on a broad or narrow sphere and advises it and the national regulatory authorities on current or future regulatory issues; and
  - takes over, in a more rationalised and comprehensible form, some of the technical functions of other existing European telecommunications bodies and committees (both inside and/or outside the Community) but with greater resources and a larger secretariat enabling it to take on a more effective ex-ante role in developing policy recommendations and/or monitoring the market;
- a regulatory body having day-to-day management powers which complement some of the duties of national regulatory authorities, particularly in relation to pan-European networks or services, but which work within objectives and policies set from time to time by the Community;
- an independent regulatory body.

Against the background of emerging competition and the offering of pan-European networks and services, the purpose of the Study is to look beyond 1998 to examine, in the light of our Survey of telecommunication market players, whether the current responsibilities of different telecommunications bodies and the balance between them will be sufficient to meet market needs or whether gaps exist in the current regulatory framework which call for resolution at a European level or by a new European Regulatory Authority.

1.3 Structure of Report

The structure of the rest of the Report is as follows:

Chapter 2. *Overview of Current Regulatory Structure*: In the second chapter of the study, we present an overview of the current regulatory structure, and proposals already on the table for regulating telecommunications following liberalisation in 1998.

Chapter 3. *Survey Results*: In this chapter, we identify the views of market players regarding which, if any, current or emerging core regulatory issues would best be dealt with at a European rather than a national level.

Chapter 4. *Analysis of Legal Powers of the European Community as Applied to Telecommunications*: In Chapter 4, we look at the legal powers of the European Community as applied to telecommunications in general and, in particular, the powers that would need to be invoked by the Community in order to create a European Regulatory Authority.

Chapter 5. *Lessons from Other Countries and Sectors and Issues raised by Convergence*: In this chapter, we draw lessons regarding the function and form of a European Regulatory Authority from the division of regulatory responsibilities between federal and state governments in the United States, Canada and Australia and from the role of pan-European and Community bodies in other sectors. We also examine some of the implications of the convergence for the creation of a European Regulatory Authority.

Chapter 6. *Legal and Operational Issues*: In Chapter 6, we discuss legal issues arising from the creation of a European Regulatory Authority, which includes issues raised by any decisions on the geographic reach of a European Regulatory Authority and legal issues relating to the specific functions of a European Regulatory Authority suggested by Survey respondents. We then discuss some of the general operational issues that would need to be considered in creating a European Regulatory Authority.

Chapter 7. *Conclusions*: In the final chapter of the Report, we draw together our conclusions from the study.

In addition to the main body of the Report, we have produced a stand-alone Executive Summary and a separate volume which contains the appendices to the Report. The appendices contained in this separate volume are as follows:

Appendix 1. *Terms of Reference*

Appendix 2. *List of Interviews*

Appendix 3. *Briefing Note for Interviewers*

Appendix 4. *Questionnaire*

Appendix 5. *Existing Institutions in Telecommunications*

Appendix 6. *Lessons to be Learned from Other Sectors*

Appendix 7. *Covington & Burling Report on Federalism in United States Telecommunications Policy*

Appendix 8. *Subsidiarity under Recent Proposals*

Appendix 9. *The Proposed Community Position on Licensing and Interconnection*

2. OVERVIEW OF CURRENT REGULATORY STRUCTURE

2.1 Introduction

A decade ago, the market in Europe was dominated by state-owned telecommunications operators and broadcasters enjoying national monopolies, and by 'national champions' supplying equipment which conformed to locally set standards. In 1984, the Community adopted a telecommunications policy designed to promote an advanced European telecommunications infrastructure, stimulate a Community-wide market for services and equipment and contribute to the competitiveness of European industry and services.

In 1987, the Commission published a Green Paper[2] setting out a blueprint for a coherent programme of Community action based on three broad objectives:

- the liberalisation of services;
- opening up national borders in the terminal equipment market;
- promoting open access to the telecommunications infrastructure.

In 1993, following the so-called '1992 Telecoms Review[3]' which examined the partial liberalisation of telecommunications services introduced up to that date, the Council called for the liberalisation of all public voice telephony services by 1 January 1998 (subject to additional transitional periods of up to five years for Member States with less developed networks) in its resolution of 22 July 1993, and followed this with the call for provision of telecommunications infrastructure to be liberalised according to the same timetable in its resolution of 22 December 1994.

Between 1990 and 1996, further Green Papers were published on satellite communications policy (1990)[4], on mobile communications (1994)[5], and on the liberalisation of telecommunications infrastructure and cable television networks (1995)[6]. In November 1996, the Commission also produced a Green Paper on numbering policy[7].

To give effect to the political decisions which followed the Green Papers and the 1992 Telecoms Review, four Article 90 Directives, culminating in the Full Competition Directive (96/19/EC)[8] of 13 March 1996, have been adopted by the Commission, and five

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2 COM(87)290.

3 See Commission Communication of 21 October 1992, SEC(92) 1048 and Communication on the consultation on the review of the situation in the telecommunications services sector, COM(93) 159 final, 28.4.93.

4 COM(90)490.

5 COM(94)145.

6 COM(94)440 and COM(94)628.

7 COM(96)590.

8 The other three were Directives 94/46/EC (satellite communications), 96/2/EC (mobile and personal communications) and 95/51/EC (cable television networks).

harmonisation measures have been proposed to the European Parliament and the Council and are at varying stages of agreement[9]. The proposals for a Licensing Directive and Interconnection Directive are discussed in Appendix 9 of the Report.

As a result of these measures and proposals, Europe now has a well-developed regulatory framework for the telecommunications sector which balances:

- day to day management of the sector and policy-making functions at a national level;
- a policy function and common set of regulatory principles established at the Community Level;
- a Commission role in:
  - enforcing Community legislation,
  - policing internal market and Treaty competition rules,
  - funding at a Community level of technical mandates carried out by the European Committee of Telecommunications Regulatory Affairs (ECTRA), the European Telecommunications Office (ETO) and the European Telecommunications Standards Institute (ETSI), and conducting external trade negotiations on behalf of the Community;
- Europe-wide activities under pre-existing arrangements established by the Conference of European Post and Telecommunications Administrations (CEPT) in the area of numbering, radio frequencies; one-stop shopping for licensing and harmonisation of licensing conditions.

The regulatory framework for the new era post 1 January 1998 is not yet set in stone, although the Full Competition Directive (96/19/EC) has been adopted, and Common Positions have been reached on the proposed Interconnection Directive (July 1996), ONP Framework amending Directive (September 1996), and Licensing Directive (December 1996).

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[9] These are:

- Common Position (EC) No 34/96, OJ C220, 29.7.96 (Interconnection Directive);
- Common Position (EC) No 58/96, OJ C315, 24.10.96 (Amendment to ONP Framework and Leased Lines Directives);
- Common Position (EC) No 7/97, OJ C41, 10.2.97 (Licensing Directive);
- Common Position (EC) No 6/97, OJ C41, 10.2.97 (Decision on Satellite-Personal Communications Services (S-PCS));
- Proposal for a European Parliament and Council Directive COM(96)419, OJ C371, 9.12.96 (Amendment to the ONP Voice Telephony Directive).

2.2 Role of the Commission

The Commission is the guardian of the EC Treaty: its most important function is to ensure that the provisions of the Treaty are implemented and it also monitors the observance of measures promulgated by all institutions, particularly Regulations, Directives and Decisions.

In the context of liberalisation, the Commission may adopt legislation under its competition powers. Article 90 of the Treaty gives the Commission express powers to adopt Directives and Decisions to ensure the application of Treaty rules, in particular the competition rules to undertakings with special and exclusive rights. It may do so without the necessity to consult with the Council or European Parliament. The Commission has, however, tended in practice to consult the public, the Council and European Parliament before embarking on important legislation, for example the four most recent telecommunications Article 90 measures. In all other areas of importance, legislation is adopted by the Council (or jointly by the Council and European Parliament). While the measures liberalising the telecommunications sector have been adopted by the Commission (under Article 90), the measures creating a harmonised regulatory environment for, in particular, voice telephony, licensing and interconnection have been or will be measures which are proposed by the Commission but adopted by the European Parliament and Council (predominantly under Article 100a).

Within the Commission there are 24 Directorate Generals, five of which have at least some responsibility in relation to telecommunications. Those with the greatest involvement are DG XIII, which has primary responsibility for telecommunications policy, and DG IV, which is responsible for competition policy and, in particular, for measures taken under Article 90 of the Treaty, as well as for investigating complaints of anti-competitive conduct. DG IV was responsible (inter alia) for promoting the Services Directive (90/388/EEC) and the Full Competition Directive (96/19/EC).

To assist the Commission in its work, a number of Committees have been established by Community legislation:

- ***the ONP Committee*** has advisory, regulatory and dispute resolution functions in relation to its work on Open Network Provision issues (further discussed in Section 4.3.2b);

- ***the Approval Committee on Terminal Equipment*** advises the Commission on draft measures taken under the Terminal Equipment Directive;

- ***non-statutory Committees***:
  - the proposed Licensing Directive now envisages the creation of a Licensing Committee to assist in monitoring the application of the Licensing Proposal (see Appendix 9);

- the Senior Officials Group on Telecommunications has not met since July 1993 and its functions have largely been taken over by the High Level Committee of National Regulatory Authorities, which was created by Council at the time of the 1992 Telecommunications Review.

2.3 National Regulatory Authorities

National Regulatory Authorities (NRAs) have been established in most (but not all) Member States. These NRAs have various degrees of authority and various degrees of independence from the relevant Ministry. In keeping with the terms of reference of this study, the Report assumes that, in the near future, there will be independent and effective NRAs in all Member States and hence that some of the current problems of enforcement of European Community (EC) measures will no longer exist. The Council of Ministers recently affirmed its commitment to NRAs when reaching a Common Position on Satellite-Personal Communications Systems (S-PCS).

Directives are transposed into national legislation and implemented locally, and prime responsibility for the implementation and enforcement of Directives therefore lies with Member State governments and NRAs. This would, of course, continue to be so were a European Regulatory Authority to be established. The regulatory structure and power of NRAs in the European Union (EU) is set out in Table 2.1.

Table 2.1 - NRA Powers

	National Regulatory Authority	Responsible for Granting Licences	Responsible for Frequency Allocation	Responsible for Numbering Plan	Appeal to NRA against TO's decisions	Involved in Legislative Process	Reference to legal text creating or proposing NRA
Austria	Ministry's Division VII[1]	Ministry	Ministry	Ministry's Division VII	No	Yes	Telecommunications Law of 1993 (as amended)
Belgium	Belgian Institute for Post & Telecommunications (BIPT)	Ministry	BIPT	Ministry	No	Yes	Law of March 21, 1991 on the Reform of Certain Economic Public Enterprises (as amended)
Denmark	Telestyrelsen[2]	Telestyrelsen	Telestyrelsen's Radio Division	Ministry	Yes	Yes	Act of 1996 on competition in the telecommunications sector
Finland	TeleHallintokesKus[3] (THK)	Ministry	THK	THK	Yes	Yes	New Telecommunications Act of Aug 1, 1996
France	Autorité de Régulation des Télécommunications (ART)	Ministry/ ART[4]	National Agency of Radio Frequencies[5]	ART	Yes	Yes	Law of June 1996 on Telecommunications Regulation
Germany	Regulatierungsbehörde für Telekommunikation & Post[6]	RbTP	Ministry	RbTP	No	No	German Telecommunications Act of July 25, 1996
Greece	EET[7]	Ministry	Ministry	Ministry	Yes	Yes	Telecommunications Law of October 1994 (as amended)
Ireland	Ministry's Department of Communications[8]	Ministry	Ministry	Ministry	No[9]	Yes	The Postal & Telecommunications Services Act of 1983 (as amended)
Italy	Autorità per le Garanzie nelle Communicazioni (AGC)	AGC	Ministry's Division (DGPGF)	Ministry's Division (DGPGF)	Yes	Yes	Bill on Communications Authority approved by Cabinet on July 17, 1996 (now submitted to the Parliament)
Luxembourg	Institut Luxembourgeois des Communications (ILC)	Ministry	Ministry	ILC	Yes	Yes	Draft Law of February 16, 1996 on Telecommunications
Netherlands	TND[10]	TND	Ministry	Ministry	Yes	Yes	Interim Law of June 1996
Portugal	Instituto das Comunicações de Portugal (ICP)[11]	Ministry/ ICP[12]	ICP	ICP	No	Yes	Decree-Law of August 23, 1989 (as amended)
Spain	Dirección General de Telecommunicaciones (DGTel)[13]	Ministry	Ministry	Ministry	Yes	Yes	Royal Decree of June 7, 1996
Sweden	Post och Telestyrelsen[14]	Post och Telestyrelsen	Post och Telestyrelsen	Post och Telestyrelsen	Yes	Yes	Telecommunications Law of 1993
United Kingdom	Office of Telecommunication (OFTEL)	Ministry[15]	Ministry's Radio Agency	OFTEL	Yes	Yes	Telecommunications Act of 1984

Source: *European Commission.*

Notes

(1) The NRA will become Division VII of the new Ministry for Science, Transports and Arts. The definitive change will be made by the end of September 1996.

(2) The NRA operates currently under guidelines set by the Ministry, but, in near future, the Ministry will have no right to give specific instructions to the NRA in connection with its supervisory functions or in individual cases.

(3) The Telecommunications Administration Centre is an agency under the Ministry of Transport and Telecommunications.

(4) The Minister is responsible for granting individual licences and the NRA for class licences.

(5) From January 1, 1997, a National Agency for Radio Frequencies will be established. The agency will be managed by a board of directors representing all the Ministries and authorities involved in the allocation of frequencies.

(6) The NRA will be established within the portfolio of the Federal Ministry of Economics by January 1, 1998.

(7) The NRA is supervised by the Ministry of Transport and Communications. The Presidential Decree to provide a complete legal framework for the EET has been delayed and is not expected before October 1996.

(8) The Minister, acting through the Department of Communications, is the NRA. However, according to the request for a transition period for full liberalisation, the Irish Government will, if a derogation is granted by the Commission, establish a fully stand alone telecommunications regulatory authority with appropriate arrangements for industry funding.

(9) Appeals by way of judicial review of administrative decisions remain open.

(10) The TND, an OFTEL-like independent regulatory authority, will be established. A separate bill will be tabled to this effect.

(11) The NRA has been created under the Ministry for Public Works, Transport and Communications.

(12) The Ministry is responsible for granting concessions to public telecommunications operators and the NRA for licensing complementary telecommunications services providers and authorising value added providers.

(13) The DGTel is a department of the Secretariat for Communications.

(14) The NRA operates currently under guidelines set by the Ministry, but the Ministry has no right to give specific instructions to the NRA in connection with its supervisory functions or in individual cases.

(15) The Ministry is responsible for granting licences. However, OFTEL must be consulted before issuing new telecommunications licences

We set out below, in Table 2.2, details of the number of staff in NRAs in Member States and a number of non-Member States and in ERO and ETO.

2.4 Pan-European Non Community Bodies: CEPT, ECTRA/ETO and ERC/ERO

The Conference of European Post and Telecommunications Administrations (CEPT) is a long-standing organisation of national bodies. It has no formal link with the EU and its membership of 43 includes 28 non-EU countries. The CEPT has two committees dealing with telecommunications matters. These are:

- the European Committee of Telecommunications Regulatory Affairs (ECTRA); and
- the European Radiocommunications Committee (ERC).

Representatives of the EC are councillors within both ECTRA and the ERC.

Two bodies, one of which is an organ of ECTRA and the other an organ of the ERC, are of particular relevance for the present study. These bodies are respectively:

- the European Telecommunications Office (ETO); and
- the European Radiocommunications Office (ERO).

2.4.1 ECTRA and ETO

a. ECTRA

The European Committee of Telecommunications Regulatory Affairs (ECTRA) is one of the working committees of the CEPT. Of interest in the context of the present study are the ECTRA working groups and project teams which are developing harmonised licence conditions for specific services.

b. ETO

The European Telecommunications Office (ETO) was formed in September 1994 and is based in Copenhagen. The ETO Memorandum was signed by 24 of the 43 countries of the CEPT. It participates in the areas of licensing and numbering and its main tasks are undertaken for the European Commission. ETO currently has 9 members of staff.

In the area of numbering ETO plays a role in:

- the establishment of a European telecommunications numbering scheme;
- providing assistance to national administrations on numbering issues such as carrier selection, number portability and the harmonisation of short codes.

Table 2.2
Personnel in Telecommunications Regulatory Bodies (1)

Member States

Country	Total Personnel	Personnel in Frequency Management
Austria	≈300	n.a.
Belgium	≈175	≈95
Denmark	≈150	10-15
Finland	≈130	≈70
France	≈200	≈30
Germany	≈400	≈80
Greece	≈60	n.a.
Ireland	≈40	≈25
Italy	≈300	n.a.
Luxembourg	≈12	≈4
Netherlands	≈450	≈40
Portugal	≈300	≈120
Spain	≈350	≈100
Sweden	≈165	≈115
United Kingdom	≈215	≈55

Non-Member States

Country	Total Personnel	Personnel in Frequency Management	Personnel in Telecommunications
Australia	n.a.	n.a.	≈150
Hong Kong	≈250	n.a.	n.a.
Singapore	≈150	n.a.	n.a.
United States (FCC) (2)	≈2,000	n.a.	n.a.
United States (state regulators) (3)	≈9,600	n.a.	n.a.

Pan-European Bodies

Body	Total Personnel
European Radiocommunications Office (ERO)	14
European Telecommunications Office (ETO)	9

Source: *National Regulatory Authorities, ERO, ETO, NARUC.*

Notes:
(1) Figures in this table are provided to give an indication of staff levels, but are based on national figures which are not directly comparable.
(2) Figure includes broadcasting and spectrum management.
(3) Figure includes total number of staff and Commissioners in all state regulators covering all sectors, as these agencies regulate both energy and telecommunications and, in many instances, also transportation, water and sewerage.

In the area of licensing, ETO has two specific but rather different roles. First, it provides a one-stop shopping procedure for 15 of the ETO Memorandum Signatories, whereby companies can fill in an application form and ETO takes the necessary steps to ensure that the applicant obtains a licence for liberalised services in the countries which are parties to this process[10]. Second, ETO provides logistical support in co-operation with ECTRA working groups and project teams and is developing harmonised licence conditions for specific telecommunications services.

2.4.2 ERC and ERO

a. European Radiocommunications Committee (ERC)

The European Radiocommunications Committee (ERC) is a body made up of representatives of NRAs. The ERC meets three times a year.

b. European Radiocommunications Office (ERO)

The European Radiocommunications Office (ERO) was opened in 1991 as the executive body of the ERC. ERO provides technical expertise to the ERC. Like ETO, ERO is based in Copenhagen. ERO currently has 14 members of staff.

The role of ERO includes the following activities which cover all 43 CEPT countries:

- undertaking detailed spectrum investigations and making proposals to the ERC for a European Frequency Table;
- carrying out specific studies for the European Commission[11];
- providing a centre of expertise on radio regulatory matters, including frequencies, licensing (excluding public networks), type-approval, etc.

A summary of the various telecommunication bodies mentioned above, which are discussed more fully in Appendix 5, is set out in Table 2.3 below.

2.5 Purpose of Study

Against this backdrop, this study is intended to identify whether there are gaps in the existing structure, or whether there are areas where the creation of a European Regulatory Authority could make the structure function more efficiently.

[10] It can be noted that membership of the ETO one-stop shop for licences includes some non-EU countries and excludes some EU countries.

[11] It can be noted that, even in this area, the studies cover all member countries and not just those of the EU.

Table 2.3 - Matrix of European Telecommunications Bodies

Name of body	Membership	Mechanism for establishment	Inter-relation with other bodies	Role and responsibility	Achievements and outputs	Accountability, decision-making and appeals	Enforcement powers
European Conference of Postal and Telecommunications Administrations (CEPT)	National postal, telecommunications and radiocommunications administrations[12]	1959 administrative arrangement	The body consists of CERP (European Committee for Postal Regulation), ECTRA and ERC Committees	Promotes service improvement and harmonisation between member administrations	European Common Proposals for ITU conferences; Decisions via its Committees	None	Recommendations are not binding
European Committee of Telecommunications Regulatory Affairs (ECTRA)	same as CEPT	CEPT arrangement (1990)	Working Committee of CEPT; MOU with European Commission on co-ordination of activities and programme of contracted work	Developing common telecommunications regulatory policies, exchange of regulatory experience amongst members, agreeing programme of contracted work for ETO	Decision on European Telephony Numbering Space, reports on interconnection (i.e. technical interfaces), accounting rates, universal service, satellites, testing and certification, licensing, creation of ETO	None	Decisions normally binding on members who sign up to agreement; European Commission to give 'due consideration' to relevant outputs
European Telecommunications Office (ETO)	24 of the signatory countries of CEPT	MOU 1994, draft Convention to be ratified	Permanent organ of ECTRA, Framework Contract with the Commission	Promotes harmonised licensing and numbering	One-Stop-Shopping , licensing database services, studies for European Commission on licensing harmonisation and numbering, creating a centre of expertise and European schemes for numbering	Reports to ECTRA and ETO Administrative Council	None

[12] Albania, Andorra, Austria, Belgium, Bulgaria, Bosnia Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Former Yugoslav Republic of Macedonia, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and Vatican City

Name of body	Membership	Mechanism for establishment	Inter-relation with other bodies	Role and responsibility	Achievements and outputs	Accountability, decision-making and appeals	Enforcement powers
European Radiocommunications Committee (ERC)	Radio regulatory administrations of CEPT members	CEPT arrangement ERC Rules of Procedures	Working Committee of CEPT/MOU with ETSI and MOU and Framework Contract with The European Commission	To co-ordinate frequency, regulatory and technical matters in radiocommunications and to liaise with regulatory telecommunications bodies (other than radio) within CEPT, to develop guidelines in radiocommunications matters in the framework of the ITU and the International Radiocommunications Consultative Committee (IRCC)	Decisions on harmonised frequency bands; production of Recommendations and Reports	Decisions subject to public consultations	Decisions normally binding on members who sign up to agreement; Recommendations and Reports are not binding
European Radiocommunications Office (ERO)	Administrations of signatory states (27 signatories as of January 1997)	Convention in force from 1/3/96	Permanent organ of ERC/ MOU and Framework Contract with European Commission (through ERC)	To provide centre of expertise in radiocommunications, promoting the most efficient use of frequency spectrum, co-ordination of frequency regulatory and technical matters	Proposals for a European Table of Frequency Allocations- 1st phase Detailed Spectrum Investigation (DSI) (3.4-105GHz) published, 2nd phase DSI (29.7 - 960 Mhz) in progress; Study Reports to the EC		None
European Telecommunications Standards Institute (ETSI)	Telecommunications administrations, public network operators, manufacturers, users	ETSI Statutes and Rules of Procedure	Derived from standardisation function of CEPT /European Commission has special status	Technical standardisation of European telecommunications, IT and broadcasting	European Telecommunications Standards (ETS), Interim-ETS	Approval of ETS by set procedures incl. public enquiry and national weighted voting	ETS are voluntary standards - up to national standards organisations to adopt them

Name of body	Membership	Mechanism for establishment	Inter-relation with other bodies	Role and responsibility	Achievements and outputs	Accountability, decision-making and appeals	Enforcement powers
International Telecommunications Union (ITU)	International Signatory countries - sovereign states and their telecommunications administrations	International treaty - ITU Constitution		Regulation of all international telecommunications, allocation of radio spectrum	Radio Regulations, the ITRs and the Convention	Decisions made by agreement between Signatory members	Instruments are binding upon members - implementation is a domestic matter - failure to observe could result in the member country being taken to International Court of Justice (ICJ) or being proceeded against under the arbitration provisions contained in the Constitution
ONP Committee	European Commission and Representatives of EU Member States	Directive 90/387/EEC		Promote objective of open and efficient access for telecommunications services	Assists in settling disputes between users/ telecommunications organisations and NRAs under a conciliation procedure; delivers opinions on draft Commission measures; fosters discussion between NRAs; proposed dispute resolution function	Reports to European Commission	Non-binding, but European Commission to have 'utmost account' of opinion
Licensing Committee	European Commission and national regulatory authorities of EU Member States	Proposed Licensing Directive		Promote harmonisation of EU telecommunications authorisations, forum for discussions on telecommunications policies	N/A	To take a position on Commission proposals	Non-binding, but European Commission to have 'utmost account' of opinion.

3. SURVEY RESULTS

3.1 Background

The purpose of this chapter is to identify the views of market players regarding which, if any, current or emerging core regulatory issues would best be dealt with at a European rather than a national level.

The interviews took place in the first half of 1996 encompassing nine Member States along with a variety of pan-European bodies and market participants. Our sample of nine countries was selected to gauge views from both the north and the south of Europe and from smaller and larger Member States:

- Austria;
- France;
- Germany;
- Greece;
- Italy;
- Netherlands;
- Spain;
- Sweden;
- United Kingdom.

In all, a total of fifty two interviews were carried out as part of this study, fifty of which form part of the Survey (along with a further two fact-finding interviews with the European Telecommunications Office (ETO) and the European Radiocommunications Office (ERO)). **The Survey covers dominant telecommunications operators, regulators and policy makers, competitors and users.** For the purposes of this Survey, the term "competitors" covers both service and infrastructure providers, operating either nationally or across borders. To get a broad coverage of users' views and expertise we spoke to telecommunications managers at multinational enterprises and to national and international users associations. A full list of interviewees is contained in Appendix 2.

The purpose of the Survey was to identify technical arguments put forward by market players as to whether, and, if so, in which areas, a European Regulatory Authority would add value to the current institutional set-up, assuming that NRAs will become both independent and fully effective. It was not our purpose to survey existing regulatory inadequacies that stem from the lack of independence or effectiveness of NRAs. **The Survey presents a detailed picture of views relating to the need for a European Regulatory Authority and, more generally, it identifies those areas which, because of**

their pan-European dimension, industry feels may not be adequately safeguarded under the existing regulatory framework.

To assist in the interview programme, NERA prepared a briefing note for interviewers designed to ensure maximum coverage and the correct focus. The briefing note is contained in Appendix 3.

Interviews were structured by use of a general questionnaire sent to all respondents prior to the interview. The questionnaire provided a focus for discussions. However, interviewees were able to concentrate on those areas considered most pertinent to their interests and their expertise. Respondents were also able to raise issues considered relevant but not covered by the questionnaire. The full questionnaire is contained in Appendix 4.

We note here that there was substantial variation in the awareness shown by interviewees of issues relevant to the possible creation of a European Regulatory Authority. We believe that this demonstrates that **the technical debate surrounding the creation of a European Regulatory Authority is still very much in its infancy, and consciousness of its possible relevance varies widely**. For example, we found that smaller competitors, operating only in national markets, had not formalised a view on European regulation and found it difficult to see its direct relevance to their operations. In these cases, a few interviewees stressed that, given the absence of any formal company position on this issue, the views expressed would necessarily be of a personal nature. Other respondents stated that they found it difficult to discuss the possible added value of European regulation for different regulatory activities without first having details of the institutional framework and structure that would exist given a new European Regulatory Authority.

In the rest of this chapter, we present the results of our Survey, looking at each regulatory area contained in our questionnaire and examining respondents' views of the potential added value of regulation at a European level. We have also included a section relating to general support for a European Regulatory Authority, as expressed by interviewees, which did not relate to any particular regulatory activity. In the final section, we present a summary of the Survey results.

At the start of each section we have included a table which provides a summary of the current regulatory framework in the relevant area. We also provide, in each section, tables summarising the views of respondents, one table divided according to interviewee country and a second showing views according to interviewee category (i.e. principal TO, regulator, etc.). The tables show respondents answers to the question: "would there be added value to the participation of a European Regulatory Authority in this activity?". Answers are shown as "✓" (yes), "×" (no), and "–" (no comment, no preference).

Caution is required in interpreting these summary tables, as:

- the sample of organisations interviewed is limited to fifty;
- interviewees' answers were not always in the form of "yes/no/don't know" and in some cases we have interpreted interviewees' responses to produce the summary tables;
- interviewees showed different strengths of feeling in different areas and this will not be reflected in the tables.

Despite the qualifications listed above, we consider that the summary tables provide a useful snapshot of respondents' views in each area and allow comparisons to be made between responses relating to different areas of regulation.

3.2 Support for a European Regulatory Authority

The tables below show the general views of interviewees regarding the potential value added by a European Regulatory Authority. We note that **regulators and policy makers were mostly against the creation of a new European regulatory body**, arguing that it would create a new layer of regulatory bureaucracy and that, if this body were given any

Would a European Regulatory Authority add value to the current regulatory framework within the EU?

Interviewee Type	✓	×	–
Principal TOs	4	2	2
Regulators and Policy Makers	3	6	1
Competitors	18	3	2
Users	6	1	
Others[13]	2		
TOTAL	**33**	**12**	**5**

Interviewee Country	✓	×	–
Austria		2	2
France	3		2
Germany	3	1	1
Greece	4	1	
Italy	3	2	
Netherlands	5	1	
Spain	4	2	
Sweden	3	1	
United Kingdom	3	2	
Other[14]	5		
TOTAL	**33**	**12**	**5**

real powers at the expense of the NRAs, it would also contravene the principle of subsidiarity. **Principal TOs were split in their responses, while the vast majority of competitors, users and other interviewees considered that there might be at least some**

[13] In addition to principal TOs, regulators and policy makers, competitors and users, we interviewed one Member of the European Parliament and one equipment manufacturer.

[14] Five of the interviewees were not representing organisations based in one of the nine Member States that formed our core sample for the Survey.

advantages in the creation of a new body dealing with some aspects of telecommunications regulation at the level of the European Union. We did not find a significant national split in interviewees' views on Community-level regulation.

Some interviewees wished to present arguments concerning the possible creation of a European Regulatory Authority which cut across the analysis of the advantages of European regulation on an area by area approach.

Amongst other things, it was put to us that there was a clear and urgent need for a European Regulatory Authority for the following reasons:

- **Transition** from a situation, where it was said that telecommunications was a natural monopoly to the current environment in which it has been agreed that there should be liberalisation throughout Europe. It was argued that this transition needs a watchdog operating at a European level.

- The term "**Pan-European**" represents the concept of the single market and the pan-European aspect of the telecommunications market needs a pan-European body.

- **Reassurance:** Investors bidding for licences, TOs and consumers need reassurance that someone is guaranteeing the stability of the operating environment throughout Europe.

- **Consistency**: At present, a lot of authority is being handed to NRAs as a result of the subsidiarity requirement, an example being the proposed Interconnection Directive that some interviewees believed may result in a common principle interpreted in 15 different ways.

- **Forum** is a concept which is closely related to transition. At present, some countries have independent NRAs, some do not. It is considered that there is an enormous need to establish best practice. A possible role for a European Regulatory Authority would be to assist the NRAs in doing this. It was also argued that there is a need for a body to ensure that ideas about best practice were disseminated throughout the Community.

Those that opposed the creation of a European Regulatory Authority for telecommunications tended to argue that there would be no value added from a new body as:

- the current institutional set-up, reformed to make existing bodies more responsive to the needs of regulation (e.g. by securing NRA independence) would be sufficient to meet the need for regulatory harmonisation in the single market for telecommunications;

- the creation of the body would lead to over-regulation of the sector, when we should be moving to a situation under which competition and market development is primarily left to market forces;

- a European Regulatory Authority could cause damage to the telecommunications sector through its inability, relative to the NRAs, to take sufficient account of specific local circumstances;

- the creation of such a body would constitute an over-centralisation of regulation contravening the subsidiarity principle which gives Member States some scope for determining the direction of their own telecommunications regulation.

We also note here that some interviewees, who saw clear technical advantages to shifting some aspects of telecommunications regulation to a new European body, argued that they considered such an option to be unrealistic under the present political climate.

3.3 Interconnection

a. Summary of current regulatory framework for interconnection

National Regulation	Interconnection agreements are seen initially as a matter for commercial negotiation - although procedures vary between Member States (in a few Member States, they are determined by the regulator without any negotiations taking place). NRAs or the relevant Ministry may approve the agreement ex-post or intervene in the event of a dispute between parties - procedures vary between Member States
EC Regulation	Availability of interconnection, and related technical and commercial arrangements are covered by the ONP Voice Telephony Directive. The proposed Interconnection Directive establishes rights and obligations to interconnection, lays down harmonised principles for interconnection terms and costings and establishes an ex-ante dispute resolution mechanism. Member States are to comply with this Directive by 31.12.1997.
Other Regulatory Involvement	Interconnection issues may be discussed within ECTRA.

b. Survey results

Nearly all those who see some overall added value from the creation of a European Regulatory Authority consider that this body should have a role in the area of interconnection. This makes interconnection one of the best supported candidates for involvement of a European Regulatory Authority. The view was expressed that harmonisation of interconnection terms was crucial to the evolution of a single European market and the development of trans-European (seamless) networks. It was further considered that the current institutional set-up, however reformed, would prove unable to deliver the required harmonisation. This was because the mechanism available at present to harmonise interconnection terms - the use of Directives - would allow national diversity in

transposition and enforcement which, in the case of interconnection, may provide insufficient harmonisation for the needs of the single market. The proposed Interconnection Directive was generally held to be a positive step, but many thought that it would be insufficient in preventing market distortions post-liberalisation.

Should a European Regulatory Authority have a role in interconnection?

Interviewee Type	✓	×	–
Principal TOs	4	3	1
Regulators and Policy Makers	2	5	3
Competitors	19	3	1
Users	5		2
Others	2		
TOTAL	**32**	**11**	**7**

Interviewee Country	✓	×	–
Austria		1	3
France	4		1
Germany	3	1	1
Greece	3	2	
Italy	3	2	
Netherlands	5	1	
Spain	4	1	1
Sweden	2	1	1
United Kingdom	3	2	
Other	5		
TOTAL	**32**	**11**	**7**

Relative to other possible areas for the involvement of a European Regulatory Authority, such as licensing, interconnection is a regulatory activity in which NRA involvement so far has been less substantial, mainly due to the limited amount of interconnection that has so far occurred in most Member States. **The principal difficulty identified by interviewees was the existence of different national accounting systems.** If a European Regulatory Authority were involved in the determination of the cost basis for interconnection, it would have to take account of national differences in the accounting systems and would probably be unable to impose a uniform cost accounting system throughout Europe, at least until accounting systems could be harmonised.

Supporters of the involvement of a European Regulatory Authority in the area of interconnection varied greatly in what they saw as the possible role of such a body. Options included:

- a fully empowered body, determining the cost basis for interconnection and either determining, ex-ante, price and interconnection terms, or acting as the body to which negotiating parties can appeal if they fail to agree interconnection terms;

- a body which would intervene in disputes which NRAs could not resolve to the satisfaction of the negotiating parties, or to which NRAs could pass on disputes for resolution;

- a body which has a stronger harmonisation role than existing pan-European and Community institutions and may also act as a forum for NRA discussions and cross-fertilisation of experience, but leaves actual enforcement and policing to the NRAs.

Another distinction which was advanced by a large number of respondents was that:

- NRAs could continue to regulate interconnection within borders; while
- a European Regulatory Authority could be responsible for regulating interconnection across borders.

However, it was held by some that this distinction was not relevant. The fact that cross-border traffic involves interconnection does not mean that you need a regulator that has cross-border jurisdictions. This is because, even for cross-border traffic, the overwhelming majority of points of interconnection will be on the territory of a Member State and, as such, interconnection will fall under the jurisdiction of that Member State.

Some of those opposing a European Regulatory Authority's involvement in interconnection argued that the real motivation behind support for such a role, despite statements to the contrary, was a lack of faith in the objectivity of the NRAs. Such a lack of faith was held to be premature, as the latest package of Directives is designed to ensure the true independence of the NRAs.

In addition, it was argued that the proposed Interconnection Directive also states that decisions of the NRA must be open to appeal in the national courts, and that this will create a relatively speedy legal mechanism for those that are not happy with NRA decisions.

Some support was voiced for the involvement of a European regulator in the negotiation of international accounting rates. The 1998 liberalisation in Europe will bring an effective end to the system of accounting rates for international telephone traffic within Europe. This is because new infrastructure providers will be able to bypass any TO networks governed by non-cost based accounting rates. However, it was perceived by some that there would be a need for a European body to negotiate accounting rates with the rest of the world, on behalf of the EU as a whole. If this does not happen, it was argued, there will be a very real danger of whipsawing - that is countries with monopoly operators playing off EU operators against each other in order to reduce outgoing international accounting rates, while maintaining high rates for incoming traffic.

3.4 Standards

a. Summary of current regulatory framework for standards

National Regulation	Member States have historically adopted standards for apparatus, including terminal equipment.
EC Regulation	ONP Framework Directive may require the implementation of specified European standards for technical interfaces and or service features. Standards list is published by the Commission.
Other Regulatory Involvement	ETSI has the responsibility for designing technical standardisation. The European Standards Committee (CEN) and the European Electrotechnical Standards Committee (CENELEC) prepare harmonised standards to achieve a free market for goods and services not covered by ETSI. In respect of terminal equipment, Directive 91/263 requires mutual recognition of apparatus which is tested, approved and marked in accordance with certain minimum criteria in other Member States. The ITU-T (standardisation sector) recommends standards.

b. Survey results

As shown by our summary tables, **support for the involvement of a European Regulatory Authority in the area of standards was relatively weak.** The line taken by many respondents was that standardisation at the European level was already undertaken by ETSI. **Some respondents were happy with the work carried out by ETSI up to now, while some of those that had reservations concerning the work of ETSI argued that reform of this body was the direction in which we should move, rather than the creation of a new body which would result in confusion.** A user representative argued that standards should be international and that European regulation of standards, by ETSI or by another body, was a distraction from this aim and only served to create wasteful standards 'blocs'.

Should a European Regulatory Authority have a role in standards?

Interviewee Type	✓	✗	–
Principal TOs	1	6	1
Regulators and Policy Makers		8	2
Competitors	7	11	5
Users	4	2	1
Others		1	1
TOTAL	**12**	**28**	**10**

Interviewee Country	✓	✗	–
Austria		1	3
France	1	3	1
Germany		3	2
Greece	2	3	
Italy	2	3	
Netherlands	4	2	
Spain	2	4	
Sweden	1	3	
United Kingdom		3	2
Other		3	2
TOTAL	**12**	**28**	**10**

Those that did support the involvement of a European Regulatory Authority in the development of standards either considered ETSI to be beyond reform or, more often,

considered that a new body could have a role that is complementary to ETSI. For example, it could:

- ensure the independence of testing laboratories;
- help in the industrial phase of standards implementation, financing manufacturers to help them develop and implement European standards for their equipment;
- ensure the speedy implementation of European standards to allow markets to develop;
- operate in a similar way to the FCC, by mandating standards when interested parties fail within a fixed time to come up with their own, agreed standards;
- leave ETSI to continue with its scientific and technical work agenda and to produce standards, and focus instead on the legal aspects of standard-setting and on the enforcement of standards produced by ETSI;
- indicate to ETSI the areas in which there is a need for standards.

Nevertheless, support for any involvement of a new EU-level regulator in standard setting was strictly limited.

3.5 Allocation and Management of Radio Frequencies

a. Summary of current regulatory framework for radio frequencies

National Regulation	Responsibility of the relevant Ministry - the relevant ministry varies by Member State.
EC Regulation	Community has reserved certain frequency bands for new services (e.g. GSM). The Council recently authorised the Commission to give CEPT a brief to harmonise the use of frequencies.
Other Regulatory Involvement	ERO undertakes detailed spectrum investigations, and radio licensing covering frequencies and spectrum approval. The ERC is responsible for frequency co-ordination at the regional level. CEPT undertakes co-ordination activities on a pan-European basis.

b. Survey results

The tables below show that, **although a majority of respondents with a definite view were against any form of involvement of a European Regulatory Authority in the allocation and management of radio frequencies, there was, nevertheless, a significant proportion of positive replies.** It was argued by some of those opposing European Regulatory

Authority involvement in this area that, in general terms, NRAs and the existing international institutions, ITU, ECTRA and the ERC, are doing what is required on radio frequencies and many questioned the value that could be added by a new European Regulatory Authority.

Should a European Regulatory Authority have a role in frequencies?

Interviewee Type	✓	×	-
Principal TOs	1	5	2
Regulators and Policy Makers	2	8	
Competitors	9	5	9
Users	4	2	1
Others	1		1
TOTAL	**17**	**20**	**13**

Interviewee Country	✓	×	-
Austria	1	1	2
France	3	1	1
Germany	2	1	2
Greece	3	2	
Italy	1	3	1
Netherlands	3	3	
Spain		4	2
Sweden	1	1	2
United Kingdom	1	3	1
Other	2	1	2
TOTAL	**17**	**20**	**13**

Some held that even European regulation would be insufficient and that international negotiations would be required to secure successful treatment of satellites. Nevertheless, **support for Community-level regulation of frequencies was greatest in the area of satellites services**, which were held to be too much of a cross-border issue to be regulated effectively by the co-ordinated efforts of the NRAs.

3.6 Numbering[15]

a. Summary of current regulatory framework for numbering

National Regulation	NRA or relevant Ministry controls the national numbering allocation and plans.
EC Regulation	ONP Voice Telephony Directive provides guidance to NRAs on number allocation, number plans and the appropriate use of possible European numbering schemes. The Full Competition Directive requires Member States to ensure that numbers are made adequately available by 1 July 1997. The proposed Interconnection Directive requires that numbering plans be independently administered and attributed in a non-discriminatory and proportional manner.
Other Regulatory Involvement	ETO is responsible for co-ordination activities in the context of a European telecommunications numbering scheme and the harmonisation of short codes. ENO allows the opinions of interested parties to be taken into account and for the Commission to be involved where necessary.

[15] The issue of number portability is dealt with separately in this chapter under Section 3.10.4.

b. Survey results

As can be seen from the summary tables, **there was relatively strong support for the involvement of a European Regulatory Authority in numbering issues. Much of this support was limited to greater co-ordination of numbering for the long term creation of a European numbering space, and in defining general rules on the management of numbers by the NRAs, rather than in the direct allocation of numbers between operators.** A few respondents thought that a European Regulatory Authority could be given a supervisory role over numbering issues.

In addition, a few respondents felt that, given the importance of uniform access of operators to numbers to secure a single European market for telecommunications, a European Regulatory Authority could have a role in resolving number allocation disputes between operators and NRAs. Additionally, **some respondents argued that if some services become available with truly pan-European numbers (such as freephone services), then the European numbering scheme of such a service should be managed by a European-wide regulatory body.**

Should a European Regulatory Authority have a role in numbering?

Interviewee Type	✓	×	–
Principal TOs	3	2	3
Regulators and Policy Makers	2	6	2
Competitors	12	5	6
Users	4	1	2
Others	1		1
TOTAL	**22**	**14**	**14**

Interviewee Country	✓	×	–
Austria		1	3
France	3		2
Germany	1	2	2
Greece	4	1	
Italy	1	4	
Netherlands	4		2
Spain	2	3	1
Sweden	3	1	
United Kingdom	1	2	2
Other	3		2
TOTAL	**22**	**14**	**14**

Although a relatively large number of interviewees saw a case for creating a full European numbering space "from scratch" equivalent to that of the United States, most respondents thought that this would be extremely costly and that, consequently, harmonisation should be limited to global non-geographic numbers (such as freephone, premium rate, personal numbering etc.) and for the introduction of new services. Retrospective harmonisation was mostly seen as being too costly.

A small number of respondents argued that given only a limited requirement for harmonisation and given that there was not a great need for rapid resolution of problems, current institutions such as the Commission, ITU, ECTRA, ETO and the NRAs are sufficient for securing well thought out and negotiated plans for numbering harmonisation.

3.7 Licences

a. Summary of current regulatory framework for licensing

National Regulation	Licences awarded at a national level by NRA or Ministry - procedures vary between Member States and service type within EC framework.
EC Regulation	Procedures, time limits, reasons for limiting numbers, and conditions which may be attached are determined at a European level by the Full Competition Directive and proposed Licensing Directive - Licence conditions to be notified to the Commission by 31.12.96 and published by 1.7.1997.
Other Regulatory Involvement	ETO is co-ordinating the development of a "one-stop shopping procedure" for licence applications in participating countries for certain services - ECTRA, on the basis of Community-funded mandates, is developing harmonised licence conditions for specific categories.

b. Survey results

Respondents were asked to consider the possibility of the involvement of a European Regulatory Authority in a number of licensing related issues, in particular:

- allocation and issuing of licences;
- the setting of licence conditions;
- the monitoring of compliance with licence conditions.

In some senses, these are separate issues as the allocation and issuing of licences is largely a procedural matter, while the setting of licence conditions and the monitoring of compliance with licence conditions go to the very heart of regulation and thereby encompass a number of other areas, including interconnection and access to radio frequencies.

Should a European Regulatory Authority have a role in licensing?

Interviewee Type	✓	×	–
Principal TOs	2	2	4
Regulators and Policy Makers	1	8	1
Competitors	12	5	6
Users	5	1	1
Others	1		1
TOTAL	**21**	**16**	**13**

Interviewee Country	✓	×	–
Austria		2	2
France	3	1	1
Germany	2	1	2
Greece	3	2	
Italy	3	2	
Netherlands	4	2	
Spain	1	2	3
Sweden		2	2
United Kingdom	1	2	2
Other	4		1
TOTAL	**21**	**16**	**13**

On balance, there was support for the involvement of a European Regulatory Authority in licensing. The strongest supporters were companies wishing to operate across Europe. These considered the case for a single licence to operate across Europe, and issued by a single European body, to be very strong. For example, one interviewee asked "how can you envisage a single market for telecommunications when there is no one to give you a European licence?"

Some interviewees identified substantial differences in the licensing regimes of the various Member States.

- Procedures differ widely from country to country. Two extreme cases are the United Kingdom and Germany. Under the United Kingdom system, which uses licence conditions as the principal instrument of regulation, very detailed licences are issued. In Germany, by contrast, licences are much shorter than in the United Kingdom. Here an operator just agrees to have the status of a Public Telecommunications Operator in very broad terms. Rights, restrictions and obligations are established for that category of organisation in the legislative and regulatory measures accompanying liberalisation in Germany.

- There are differences between Member States in the levels of compliance and enforcement. This was seen as being very important, as, even if formal rules are harmonised, different levels of enforcement will mean that harmonisation is not achieved in practice.

- In a number of countries it is not always clear what information is required for licence applications and the application process can be very cumbersome. In others, the process is seen as more easy going. The time taken to prepare a licence application thus varies greatly, and this can be an important practical problem when an operator has to apply for licences.

A number of operators argued that obtaining 15 separate licences imposes an additional cost on operators. The cost of having a multiple licence regime is seen as particularly high if some of the licence applications run into difficulties and local experts need to be hired to handle the negotiating process and to iron out difficulties. In addition, differences in licence conditions between Member States can impose extra costs on those that are trying to establish a seamless network across Europe, rather than a patchwork of national networks.

Those arguing against the involvement of a European Regulatory Authority in the issuing of European Community licences, the setting of licence conditions and the monitoring of compliance believe that the costs of multiple licence applications and of compliance with different sets of licence conditions have been greatly exaggerated and that European measures are currently on the table that will deal with a number of the problems raised.

For example, some respondents pointed to the one-stop-shop available through ETO as a way of minimising the costs of multiple licence applications. However, it was pointed out by others that ETO only deals with the licensing of services and has no authority to impose binding licence conditions or to oblige licences to be granted by the NRAs concerned. Indeed, a small number of respondents referred to ETO's role as that of a mailbox. In response, those that view the ETO one-stop-shop role more positively pointed out that it is very new and, at present, only applies in the case of services liberalised in 1990 and then only to those countries that have signed up. However, being a CEPT organisation, ETO also offers the possibility of a one-stop-shop beyond EU borders. The ETO one-stop-shop is thus seen by supporters as a framework which can be extended as more services become liberalised.

Some of those opposed to the establishment of a single European Community licence have argued that the proposed Licensing Directive addresses a number of the problems raised by multiple licence applications. The emphasis in the Licensing Directive is on general authorisations (e.g. class licences or declaration procedures). When allocating licences which cover the provision of public voice telephony or involve the use of scarce resources such as radio spectrum, the granting of rights of way (the right to dig up roads etc.), the imposition of universal obligations or the imposition of particular competitive safeguards, Member States will be allowed to require that the operators hold individual licences. In general, for other telecommunications activities, particularly resale activities, companies will operate through general authorisations or class licences, which will reduce the need to apply for licences and, where declarations are required, the maximum waiting period that can be required will be four weeks.

Class licences are seen as preferable to both a mutual recognition regime and to a single European licence because the existence of class licences will lessen the administrative burden on new operators. Under mutual recognition or single European licensing, service providers will need to apply for one licence instead of fifteen. Under class licensing, service providers will not need to make any licence applications.

It is further argued that, for the minority of companies that will still need to apply for individual licences, once the Licensing Directive is in force, the Directive anticipates an extension of the one-stop-shop procedures - probably through an enhancement of ETO. This will reduce the administrative burden as operators will be able to fill in a single form to send to ETO for distribution. In addition, it was argued that ECTRA and ETO are doing a lot of work on harmonisation of licences, usually funded through European Commission work orders. This will make one-stop-shopping for licences easier and reduce the burden of meeting different licence requirements in each Member State.

By contrast, supporters of a single European licence argue that the proposed Licensing Directive is insufficient to meet the needs of those wishing to establish pan-European operations. In addition, it was argued that, unlike the proposed Interconnection Directive which was issued four months earlier, the proposed Licensing Directive arrived too late to

be incorporated into national telecommunications laws which are currently being prepared. It was thus concluded by some interviewees that the impact of the Licensing Directive would be relatively limited.

3.8 Ownership and Competition Regulation

a. Summary of current framework for ownership and competition regulation

National Regulation	NRA/relevant Ministry or relevant Competition Authority (if any).
EC Regulation	The Commission's competition rules are contained in Articles 85 to 94 of the EC Treaty and EC Merger Regulation (responsibility of DG IV) - the principal provisions being Article 85, 86 and 90 concerning anti-competitive agreements, abuses of a dominant position and bringing within the competition rules public undertakings entrusted with services of general economic interest and enjoying special or exclusive rights. Article 222 stresses the neutrality of the Community towards national choices of property ownership (i.e. public or private). Full Competition Directive adopted by the Commission under Article 90.
Other Regulatory Involvement	Community's involvement in GATT talks on ownership issues and in on-going WTO talks on basic telecommunications liberalisation (including the issue of removal of ownership restrictions existing in signatory countries).

b. Survey results

Our Survey showed relatively limited support for the involvement of a European Regulatory Authority in ownership and competition regulation.

Under the heading of ownership and competition regulation, interviewees were asked to comment on a number of aspects of regulation:

- merger control;
- prevention of anti-competitive practices;
- state/ private ownership of the incumbent TO;
- regulation of cross-ownership of information technology activities (e.g. telecommunications and broadcasting);
- regulation of common position on foreign ownership of telecommunications companies.

Should a European Regulatory Authority have a role in ownership and competition regulation?

Interviewee Type	✓	×	–
Principal TOs	1	4	3
Regulators and Policy Makers	3	6	1
Competitors	5	10	8
Users	5	1	1
Others	1		1
TOTAL	15	21	14

Interviewee Country	✓	×	–
Austria			4
France	1	1	3
Germany		3	2
Greece	3	2	
Italy	1	4	
Netherlands	4	2	
Spain	1	3	2
Sweden	1	3	
United Kingdom	1	3	1
Other	3		2
TOTAL	15	21	14

Many respondents thought that, although certain telecommunications regulatory activities relevant to competition (e.g. interconnection, licensing) should rightly be handled by a telecommunications specific regulator, competition regulation should be dealt with by a cross-sector competition authority. Respondents tended to think that the present system, with the Commission, acting through DG IV, as the European competition authority, was effective in relation to merger control and general competition issues, although some respondents thought that DG IV should be afforded greater resources for dealing with telecommunications competition matters. Some interviewees also felt that there was a need for a European competition authority that was more independent of the political process than the Commission is at present.

3.9 Implementation and Enforcement of EC Directives

a. Summary of current framework for the implementation and enforcement of Directives

National Regulation	Directives (the most commonly used instrument in telecommunications) are binding as to their objectives but allow for national implementation according to national legal procedures within the time limits defined. Regulations (not used in the telecommunications sector) are automatically part of national law. Decisions are addressed either to Member States or to undertakings (e.g. competition Decisions). They bind the addressee and do not require implementation. Recommendations, Opinions and Resolutions of the institutions are non-binding measures. The issue of enforcement of Directives as well as challenges to the compatibility of national implementing measures with Community law may be brought before national courts.
EC Regulation	Article 189 sets out the rules concerning the need to implement Community legislation or its direct application without implementation. The Commission has the responsibility of overseeing implementation and may bring Member States before the European Court of Justice (ECJ) under Articles 169 and 171 (the latter for failure to comply with judgement). Actions can also be brought under Article 170 by Member States against other Member States but this is extremely rare.
Other Regulatory Involvement	None in particular.

b. Survey results

There was relatively widespread support for a European Regulatory Authority having some role in the implementation and enforcement of the Community framework. However, there was a variation in the nature of the actual proposals for what that role should be. These include:

- resolution of disputes arising from implementation of the Community framework;
- supervision of national implementation of Directives and detection of non-compliance;
- direct enforcement of Directives throughout Europe by a new European Regulatory Authority.

Reasons for support of European Regulatory Authority involvement in the enforcement of Directives varied.

Should a European Regulatory Authority have a role in the implementation and enforcement of EC Directives?

Interviewee Type	✓	×	–
Principal TOs	4	1	3
Regulators and Policy Makers		7	3
Competitors	15	5	3
Users	4	2	1
Others	1		1
TOTAL	**24**	**15**	**11**

Interviewee Country	✓	×	–
Austria		1	3
France	1	3	1
Germany	3	1	1
Greece	3	1	1
Italy	2	3	
Netherlands	4	1	1
Spain	4	2	
Sweden	1	1	2
United Kingdom	2	2	1
Other	4		1
TOTAL	**24**	**15**	**11**

Some responses to this question reflected a refusal, on the part of the interviewee, to accept that NRAs could ever be fully independent and neutral. Some interviewees argued that NRAs would necessarily be more easily influenced by the incumbent telecommunications operator than a European Regulatory Authority would be. They further argued that a regulator which existed outside the jurisdiction of individual Member States would be better able to maintain its stance on particular issues in the face of political opposition.

For some interviewees, the crucial issue on Directives is whether a sufficient level of detail can be harmonised in every Member State (e.g. costing approaches to interconnection) given the current institutional set-up. **It was argued that, under current Treaty powers, the**

Commission is obliged to ensure balance and is restrained in the degree to which it can produce a single common approach to key problems in different Member States by the need to respect subsidiarity.

It was further argued that the current mechanism for the Commission to ensure implementation of Directives is very weak and that a Directive is limited in the harmonisation it can achieve. This is because each Member State has the power to interpret and implement the Directive in the way it sees fit. It was held that there is a case for diversity on some issues. However, in those areas in which harmonisation is most important, current European institutions and enforcement mechanisms are regarded as inadequate, because the power of Member States to interpret (in transposition) and to implement Directives necessarily breeds diversity, even where NRAs are independent. Such diversity is regarded as limiting the impact of EC harmonisation Directives and thus hindering the development of the single market for telecommunications. As a result it is argued that, to ensure the harmonised implementation and consistent enforcement of Directives, a European Regulatory Authority needs itself to have direct power of enforcement or, failing that, the power to oversee the activities of the NRAs.

Those that questioned the merits of having a European Regulatory Authority involved in the enforcement of Directives advanced a number of arguments:

- There was no reason why telecommunications should be treated differently from other aspects of the single market. It was argued that the mechanisms used elsewhere for implementing and enforcing Directives should also work for telecommunications.

- Remedies for non-implementation and non-enforcement already exist. For example, while an appeal to the European Court of Justice could involve a protracted process, complainants could also appeal to national courts and this was likely to be faster and easier. As such it was considered untrue that the only way to ensure Member State enforcement of Directives is through an Article 169 complaint.

- New mechanisms, currently being put into place, would help ensure successful implementation and enforcement of Directives. In future, the creation of independent NRAs and the right to appeal will be beneficial to Directive implementation.

- Creating a new European body to act as a "regulator of regulators" would contravene the principle of subsidiarity.

- The direct enforcement of Directives by a European Regulatory Authority was held to be infeasible by some of those interviewed.

3.10 Other Regulatory Functions

Interviewees also had the opportunity to comment on other regulatory functions that could be assigned to a European Regulatory Authority. On our questionnaire, we included four examples of other such functions:

- consumer protection, i.e. dealing with complaints by users and service providers;
- regulation of price levels and price structures;
- funding and enforcement of universal service obligations (USO);
- issues relating to number portability.

Responses to this section were fairly limited, with a large number of respondents choosing not to comment.

3.10.1 Consumer Protection

a. Summary of current regulatory framework for consumer protection

National Regulation	NRA and/or relevant national "fair trading" authority and the courts.
EC Regulation	In addition to across-the-board consumer protection legislation in a number of areas, Community law provides certain consumer guarantees, such as procedures for resolution of consumer disputes under the Voice Telephony Directive, minimum levels of service and the right to have a written contract. Pricing principles in relation to universal service are contained in the proposed Voice Telephony Amending Directive.
Other Regulatory Involvement	None in particular.

b. Survey results

Few respondents considered consumer protection to be a worthwhile area for the involvement of a European Regulatory Authority. Interviewees considered it illogical and impractical that user complaints, which tend to be of a very localised nature, be dealt with at the European level.

Should a European Regulatory Authority have a role in consumer protection?

Interviewee Type	✓	×	–
Principal TOs	1	3	4
Regulators and Policy Makers		5	5
Competitors	4	7	12
Users	2	1	4
Others			2
TOTAL	**7**	**16**	**27**

Interviewee Country	✓	×	–
Austria			4
France			5
Germany			5
Greece	2	1	2
Italy		5	
Netherlands	1	3	2
Spain	1	2	3
Sweden		2	2
United Kingdom		3	2
Other	3		2
TOTAL	**7**	**16**	**27**

Those that supported the activity of a European Regulatory Authority in this area, tended to argue that the new body should be involved following a first appeal to the NRAs or that the European body would be responsible for establishing a general framework for consumer protection issues. These respondents were worried about the effects on the single market of having cumbersome rules for consumer protection in some countries and lax rules in others.

3.10.2 Regulation of Price Levels and Price Structures

a. Summary of current framework for price regulation

National Regulation	Responsibility of NRA or Ministry - application of price regulation varies widely between Member States.
EC Regulation	Pricing principles defined in ONP Framework Directive, ONP Voice Telephony Directive and the Leased Lines Directive (such as cost-orientation of certain offerings and services and the affordability of universal service).
Other Regulatory Involvement	Actions by DG IV relating to anti-competitive pricing.

b. Survey results

Of the minority of interviewees that chose to give an answer, a majority were opposed to European Regulatory Authority involvement in pricing. Many respondents questioned the need for regulatory involvement in pricing structures at all, arguing that competition would very quickly force rebalancing. Most considered that regulation of price levels should be left to the NRAs. Nevertheless, some interviewees did see possible problems for the single market of having different pricing regulations in each Member State and argued that there should thus be at least limited involvement of a European Regulatory Authority.

Should a European Regulatory Authority have a role in pricing?

Interviewee Type	✓	✗	–
Principal TOs	2	2	4
Regulators and Policy Makers		4	6
Competitors	5	7	11
Users	2	2	3
Others			2
TOTAL	9	15	26

Interviewee Country	✓	✗	–
Austria			4
France	1		4
Germany	1		4
Greece	2	1	2
Italy		5	
Netherlands		4	2
Spain	1	2	3
Sweden	1		3
United Kingdom	1	2	2
Other	2	1	2
TOTAL	9	15	26

3.10.3 Funding and Enforcement of Universal Service Obligations (USO)

a. Summary of current framework for regulating the universal service obligation

National Regulation	Responsibility of NRA or Ministry - existence of USO charges varies widely between Member States.
EC Regulation	The Full Competition Directive sets out certain criteria for universal service schemes. The proposed Interconnection Directive sets out the method of calculating the costs of universal service obligations and possible mechanisms for sharing USO costs.
Other Regulatory Involvement	None yet.

b. Survey results

Half of those responding to the question of whether a European Regulatory Authority should be involved in the issue of universal service obligations responded positively. Many of the respondents favouring Community-level regulatory involvement in USO funding and charging expressed a fear that USO arrangements could lead to the playing field being tilted in favour of the incumbent. Alternatively, some respondents were worried that, if USO arrangements varied between Member States, this would result in higher entry costs in some Member States than in others, which would in turn act as a barrier to the development of a single market. Differences in arrangements could include:

- some Member States setting a significantly higher requirement for universal service provision than others;
- Member States using different funding arrangements (e.g. USO fund, access deficit charges for interconnection, etc.);

- Member States distributing the cost differently between incumbents, competitors and users;

- variations between Member States in the USO requirements imposed on new entrants.

Advocates of involvement of a European Regulatory Authority in universal service arrangements offered a varied selection of proposals, some suggesting that direct determination and enforcement was required, with others arguing for a more limited role.

Should a European Regulatory Authority have a role in regulating the universal service obligation?

Interviewee Type	✓	×	–
Principal TOs	2	2	4
Regulators and Policy Makers		5	5
Competitors	6	5	12
Users	5	1	1
Others			2
TOTAL	**13**	**13**	**24**

Interviewee Country	✓	×	–
Austria			4
France	1	2	2
Germany	1		4
Greece	2	1	2
Italy	2	3	
Netherlands	1	3	2
Spain	2	2	2
Sweden			4
United Kingdom	1	2	2
Other	3		2
TOTAL	**13**	**13**	**24**

Concern was expressed, by a small number of respondents, that European involvement might lead to the requirement for subsidies from Member States to fund network development in other Member States. Some of those arguing against the involvement of a European Regulatory Authority in universal service arrangements also stated that the principle of subsidiarity required that Member States be allowed to determine the level of universal service and the method for provision. They also tended to argue that current institutional arrangements were sufficient to secure the harmonisation required by the single market.

3.10.4 Issues relating to Number Portability

a. Summary of current regulatory framework for number portability

National Regulation	NRA or relevant ministry is responsible for number portability - procedures vary between Member States.
EC Regulation	Proposed Interconnection Directive requires NRA's to introduce number portability by 2003.
Other Regulatory Involvement	ETO has provided technical assistance and studies to national administrations and the Commission on number portability.

b. Survey results

Almost half of those responding to the question of whether a European Regulatory Authority should be involved in the issue of number portability responded positively. Supporters of the involvement of a European Regulatory Authority in matters relating to number portability argued that this was an important regulatory area, which should be dealt with at a European level. Some held that the introduction of number portability was vital to the reduction of entry barriers and, consequently, if implementation occurred at different times in each Member State then entry barriers would differ across Europe, to the detriment of the development of a single market for telecommunications. Equally, differences in the methodology used to allocate the costs of introducing number portability between incumbents, new entrants and users would have an effect on the extent of entry barriers in each Member State.

Should a European Regulatory Authority have a role in number portability?

Interviewee Type	✓	✗	–
Principal TOs	1	3	4
Regulators and Policy Makers		4	6
Competitors	8	4	11
Users	3	2	2
Others			2
TOTAL	**12**	**13**	**25**

Interviewee Country	✓	✗	–
Austria			4
France			5
Germany			5
Greece	2	1	2
Italy	1	4	
Netherlands	3	2	1
Spain		3	3
Sweden	2	1	1
United Kingdom	1	2	2
Other	3		2
TOTAL	**12**	**13**	**25**

Some of those opposing the involvement of a European Community-level body recognised that number portability was important to the development to competition and were disappointed that its introduction was being delayed in many parts of Europe. Nevertheless, they argued that this was a matter to be determined by the Member States themselves and that current institutions would eventually secure the introduction of number portability throughout Europe.

3.11 Other Issues Raised

3.11.1 External Functions of a European Regulatory Authority

a. Summary of current situation with regard to external trade

Current position under Treaty	Article 113 states that the Council may authorise the Commission to open the necessary negotiations on agreements with one or more states or international organisations where this is necessary to implement the common commercial policy.
Position in international fora	The Commission represents the Community in negotiations (such as the WTO negotiations). In other fora, such as the ITU and the World Radiocommunications Conference (WRC), European Common Positions are generally agreed between the 43 members of the CEPT.

b. Survey results

In our questionnaire, sent to survey respondents prior to interview, we chose to focus on seven principal areas where European Regulatory Authority activity might be considered beneficial. We also gave examples of a few other areas which might be seen as relevant. To ensure that respondents had an opportunity to raise issues considered to be important by them, but not specifically mentioned in the questionnaire, the following questions were included:

"8.1 In what other activities do you think the involvement of a European-wide regulatory body might be beneficial?"

"9.2 Are there any other issues, not covered by the above list of questions, which you wish to discuss?"

A number of respondents considered that a European Regulatory Authority might have an important role to play in representing the Community externally in connection with matters relating to telecommunications trade and other issues. A number of examples were raised of how a European Regulatory Authority might exercise this role. These include:

- negotiating accounting rates with non-EU countries on behalf of all Member States (as mentioned in Section 3.3); and
- representing the EU in WTO trade negotiations.

In any such negotiations, and especially those on international trade, it was argued that advantage was to be gained if Europe was able to speak with a single voice.

3.11.2 Convergence

A number of respondents mentioned the convergence of telecommunications, computing, information and entertainment technologies in connection with the possible creation of a European Regulatory Authority. Although interviewees in our Survey did not have strong views concerning how Community and national regulatory institutions should be structured to deal with convergence, a small number expressed the view that some reform of regulation would be necessary.

3.12 Summary

Two summary tables are provided below. The first shows the number of participants, in percentage terms, in favour ("✓"), against ("✗") and with no comment/no preference ("–") on the involvement of a European Regulatory Authority in each of the areas discussed above. The second table shows the same information but with the "no comment/no preference" responses excluded.

Area of Regulatory Activity	✓	✗	–
Interconnection	64%	22%	14%
Implementation and enforcement of EC Directives	48%	30%	22%
Numbering	44%	28%	28%
Licences	42%	32%	26%
Allocation and management of radio frequencies	34%	40%	26%
Ownership and competition regulation	30%	42%	28%
Universal service obligations	26%	26%	48%
Standards	24%	56%	20%
Number portability	24%	26%	50%
Price regulation	18%	30%	52%
Consumer protection	14%	32%	54%

Area of Regulatory Activity[16]	✓	✗
Interconnection	74%	26%
Implementation and enforcement of EC Directives	62%	38%
Numbering	61%	39%
Licences	57%	43%
Universal service obligations	50%	50%
Number portability	48%	52%
Allocation and management of radio frequencies	46%	54%
Ownership and competition regulation	42%	58%
Price regulation	38%	63%
Standards	30%	70%
Consumer protection	30%	70%

[16] Figures do not necessarily add up to 100% due to rounding.

We would again stress that, as with the tables presented in previous sections of this chapter, these summary tables can only provide a broad indication of the views of respondents as, crucially, they sometimes rely on our interpretation of complex views expressed by interviewees and, in a few cases, some of those advocating the involvement of a European Regulatory Authority only did so in support of a body with a fairly limited set of functions.

Advocates of the creation of a new regulatory body at the level of the European Union tended to argue that, as a result of the creation of a single liberalised market for telecommunications, some regulatory activities would require substantial harmonisation and fast action. At the same time, they believed that, in those areas where speedy harmonisation is less important for the successful development of a single market, or where existing structures work well (e.g. the applications of the competition rules), the case for a new body is weaker. In these circumstances, it was felt that much more can be left to be determined by Member States.

Opponents of a new European Regulatory Authority tended to feel that the creation of such a body would conflict with the principle of subsidiarity and that current institutions and procedures, which could continue on a path of development and improvement, would suffice in providing the measures required for the development of a single market.

In our Survey, the following were considered by a majority of market players with a definite view to be areas which required a regulatory role at a Community level as well as at the national level:

- interconnection;
- numbering; and
- licensing, i.e.:
  - licence issuing
  - the setting of licence conditions
  - the monitoring of compliance with licence conditions.

It is important to note that many of those supporting a role for a European Regulatory Authority in numbering saw the activities of such a body as best focused on securing a greater degree of harmonisation rather than being the body primarily responsible for the allocation of numbers to operators.

It is also worth noting that some respondents who support the idea of having a single European licence issued by a European Regulatory Authority, emphasised that there may be substantial difficulties in the transition to such a licence.

A majority of respondents giving a definite view with respect to the implementation and enforcement of the Community regulatory framework also indicated support for European Regulatory Authority involvement. Whether, from a legal perspective, this would be an appropriate role for such an authority is a matter for debate. This is firstly because, under the Treaty (and in particular Articles 169 to 171), there already are well established processes for addressing breaches of Treaty rules and secondly because Member States are already required to provide for a right of appeal to national courts against the decisions of a national regulatory authority. Moreover, the arrogation to a European Regulatory Authority of a judicial role would appear to run counter to the doctrine of separation of powers or 'trias politica'[17]. Nevertheless, the Survey results in this area do reflect a strong concern that more needs to be done to secure implementation and enforcement of Community regulations and, in particular, that these tasks should be adequately co-ordinated and resourced within the Commission.

In addition to those areas identified as being supported by a majority of survey respondents with a definite view, we list the following areas where opinion was evenly divided regarding the involvement of a European Regulatory Authority and where a variety of cogent arguments were put forward, namely:

- spectrum management;
- number portability; and
- universal service.

Although the topic was not explicitly included as part of our Survey Questionnaire (as contained in Appendix 4), a number of respondents considered that a European Regulatory Authority could have a role to play in external trade negotiations.

Market players considered various other areas to be less important for the involvement of a European Regulatory Authority. These are:

- standards;
- ownership and competition regulation;
- consumer protection; and
- price regulation.

[17] This fundamental doctrine means that, in a system of democratic government based on law, the legislative, executive and judicial functions ought to be carried out by distinctly separate institutions. This 'balance of powers' is safeguarded by the EC Treaty. Delegation of these functions to Community bodies other than the institutions established by the Treaty would render that safeguard ineffective.

The European dimension of ownership and competition regulation in telecommunications was held to be very important by most respondents, but a large number of these interviewees advocated the continued role of the Commission (through DG IV) in this area. Some also stated that DG IV should be granted more resources and perhaps afforded a greater degree of independence.

4. ANALYSIS OF LEGAL POWERS OF THE EUROPEAN COMMUNITY AS APPLIED TO TELECOMMUNICATIONS

4.1 Introduction

The purpose of Chapter 4 is to look at the legal powers of the European Community as applied to telecommunications in general and, in particular, the powers that would need to be invoked by the Community in order to create a European Regulatory Authority.

The rest of this chapter is structured as follows:

- In Section 4.2, we provide background to the analysis by summarising the extent of the Community's powers and the general constraints on Community action. We also look briefly at the powers behind Community telecommunications-related action to-date.

- In Section 4.3, we ask the extent to which it is possible to create a European Regulatory Authority without amending the EC Treaty. As part of our discussion, we draw a distinction between policy functions, which could not legally be devolved to a European Regulatory Authority without an amendment to the Treaty, and executive function, which could. We also look at functions relating to dispute resolution and appeals, most of which could also not be devolved to a European Regulatory Authority without an amendment to the EC Treaty.

- In Section 4.4 we discuss the legal procedure for creating a European Regulatory Authority within the current EC Treaty and explore which Treaty Articles would form the most appropriate basis for the creation of such a body.

- Finally, in Section 4.5, we draw some conclusions concerning the legal powers of the European Community as regards telecommunications and the creation of a European Regulatory Authority.

4.2 Background

4.2.1 Extent of Community Powers

Clearly, the Community may not create a European Regulatory Authority unless it has the necessary legal authority to do so. We consider below the extent of that legal authority.

The principal legal sources are the Treaty establishing the European Community ("the EC Treaty"), signed in Rome on 25 March 1957, as amended by the Treaty on European Union ("the Maastricht Treaty"), signed in Maastricht on 7 February 1992 and case law of the European Court of Justice ("the ECJ").

Paragraph 1 of Article 3b of the EC Treaty (inserted by the Maastricht Treaty) states that:

> *The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.*

This Article establishes what is known as the principle of "conferred powers", under which the Community only enjoys the powers expressly conferred on it by the EC Treaty. However, the position is complicated because, by referring also to objectives, the definition admits the possibility of additional, less certain, "implied powers".

Implied powers, in their widest formulation, were invoked by the ECJ in ***Germany -v- Commission***[18], in which the ECJ held that, whenever a provision of the Treaty confers a specific task on the Commission, that provision must also be regarded, by implication, as conferring on the Commission, within some limits, *"the powers which are indispensable in order to carry out the task"*.

Given that there are many widely drawn provisions in the Treaty[19], this judgement significantly empowers the Commission (and, by extension, the Community) and has been deployed to approximate the laws of the Member States on a wide variety of subjects.

4.2.2 Constraints on Community Action

The Community is, therefore, empowered (and mandated) to act in certain areas by the EC Treaty as interpreted in ECJ case law. The Community's power to take action is constrained by a number of general concepts:

- subsidiarity;
- proportionality;
- non-discrimination.

In taking action in the telecommunications field, and in seeking to establish a European Regulatory Authority for telecommunications, the Community will be obliged to operate within these constraints. Below, we briefly discuss each of these concepts.

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[18] Case 281/85, [1987] ECR 3203.

[19] For example, Article 155 requires the Commission to ensure that the provisions of the EC Treaty are applied, and Article 100 empowers the Council to issue Directives for the "approximation" of such laws or other provisions of the Member States as "directly affect the establishment or functioning of the common market".

a. Subsidiarity

The Community may only create a European Regulatory Authority if the necessary powers for the intended action have been transferred by Member States to the Community. If the Community does have the necessary powers, it may either have:

- exclusive competence; or
- concurrent (shared) competence to act with Member States (i.e. regulatory responsibilities are shared between the Community level and Member States).

In the latter case, the Community can only exercise its powers if the "subsidiarity" test is satisfied.

It is clear that the whole field of telecommunications regulation cannot be claimed by the Community as being wholly within its exclusive competence[20] and therefore that telecommunications regulation is a matter for concurrent competence.

The meaning of subsidiarity is provided in Article 3b of the EC Treaty:

> *In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principal of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed actions, be better achieved by the Community.*

This is a statement that positively directs Community action where, by reason of the scale or effects, the objectives of that action are better achieved by the Community[21]. In the context of achieving the internal market or trans-European networks, Community action can clearly be, and indeed has been, justified in appropriate cases (See Appendix 8).

Applying these general principles to the telecommunications sector, the Community's view so far appears to have been that it is appropriate to issue Directives liberalising and harmonising the sector in Member States, based on the Treaty Articles identified in Section 4.2.4, but that Member States should be left to determine how to give effect to the detail of the measures under national law.

The subsidiarity hurdle should not be difficult to overcome legally within the Community, since it is principally a political concept and the ECJ has never decided that an act was

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[20] The preamble in recent telecommunications Directives expressly eschews any such notion.

[21] The Commission has stated that *"far from having the effect of freezing Community action, the dynamic of the subsidiarity principle should make it possible to expand it if required, or limit or even abandon it when action at Community level is no longer warranted"* (COM(93) 545). This illustrates the flexible nature of the concept of subsidiarity and, conversely, the difficulty of legal analysis and accurate prediction of its application to specific Community initiatives.

illegal for lack of Community competence (as opposed to institutional competence or wrong legal basis). Moreover, if all Member States agree in Council to a measure under Article 235 (see Section 4.4.2d), adherence to the subsidiarity principle is self-proven[22].

b. Proportionality

The concept of 'proportionality' is contained in the last part of Article 3b of the EC Treaty[23], which states:

> *Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.*

Proportionality also features in two pre-conditions for the application of Article 235, which states that:

- action by the Community must be "necessary to attain" the particular objective; and
- the measure must be "appropriate" for the attainment of the objective.

The concepts of proportionality and subsidiarity are closely related, but not identical. Subsidiarity constitutes a limitation of Community powers with respect to Member States, while proportionality is applicable to the relationship between the Community and its citizens.

Pertinent questions for the Commission to ask before framing its proposals for the establishment of a European Regulatory Authority therefore, are:

- is it necessary to establish a European Regulatory Authority to achieve the objectives of the EC Treaty in the telecommunications area?
- could the objectives be achieved by other means?

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[22] But see the Brunner case [1994 CMLR 57] which arose Under Article 23(1) of the German Constitution. Where the Federation transfers sovereign powers to the Community, the German Courts may rule on whether the subsidiarity principle has been properly applied. In Brunner, the German Court held that the Federal Government should be vigilant to ensure that the second paragraph of Article 3b of the EC Treaty (which states the subsidiarity requirement) is strictly interpreted and stated that it will: *review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them* (see also Footnote 51).

[23] Article 3b was added to the EC Treaty by the Maastricht Treaty (1992). The concept of proportionality actually began life as a general principle of law developed by the ECJ, and has been expressed, in the Fromancais case (Case 66/82[1983]ECR395) as follows:

> *In order to establish whether a provision of Community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve the aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement.*

- will the detriment to those adversely affected be disproportionate to the benefit to the public?

In practice, the ECJ will not interfere unless it is a very clear and obvious infringement of the principle of proportionality, but it is difficult to define when this point has been reached. Provisions struck down for breaching the principle of proportionality tend to be ones that impose taxes, levies, charges or duties on a particular category of business.

In the case of a European Regulatory Authority, if a balanced approach is adopted and if the arguments in favour are sufficient to rise above the subsidiarity threshold, they are also likely to satisfy the proportionality test.

c. Non-discrimination

A further principle governing the Community institutions, often discussed together with proportionality and which can equally be seen as a constraint imposed under the Treaty, is that of non-discrimination or equality. Article 6 states that: "*...any discrimination on grounds of nationality shall be prohibited*".

The ECJ has ruled that disguised discrimination is also covered by the Treaty[24]. In another case the ECJ ruled that, not only overt discrimination would be prohibited, but also all forms of covert discrimination which, although based on criteria which appear neutral, in practice, lead to the same result[25].

In practice the establishment of a European Regulatory Authority should not offend against the principle of non-discrimination, but rather promote it. Care will, however, be needed when formulating its procedures.

4.2.3 Instruments available to the Community in Exercising its Powers

As explained above, the Community exercises its powers as defined by the EC Treaty and case law of the ECJ. In doing so, it has a number of legal instruments available to it:

- ***Directives*** are binding as to their objectives but allow for national implementation according to national legal procedures within the time limits defined;

- ***Regulations*** are automatically part of national law;

- ***Decisions***, which are addressed either to Member States or to undertakings (e.g. competition Decisions), bind the addressee and do not require transposition into national law;

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[24] Case 71/76 Thieffry v Conseil de l'Ordre des avocats a la Cour de Paris [1977] ECR 765.

[25] Cases 62-63/81 Seco v Evi [1982] ECR 223.

- ***Recommendations*** and ***Resolutions*** of the institutions are non-binding measures.

4.2.4 Community Action in Telecommunications to Date

Several of the objectives set out in the EC Treaty impact the telecommunications sector and are clearly wide enough to empower the Community to regulate telecommunications. To date, Directives have been the most commonly used instrument in telecommunications. Regulations have not been used. The Community may only issue a Directive (or any other instrument) if it is permitted to do so by a Treaty Article. That article is then known as the "legal basis" of that measure (see Section 4.4.1a).

Recent telecommunications Directives have taken a number of Articles of the Treaty as their legal basis, the most significant being Articles 90 (which brings within the competition rules certain public undertakings) and 100a (which requires the harmonisation of national legislation or regulation).

Article 90 has been used by the Community to issue Directives requiring Member States to liberalise elements of the telecommunications sector, such as terminal equipment in 1988 and many non-voice services in 1990. The Full Competition Directive, issued under Article 90, now requires Member States to liberalise all telecommunications services not yet liberalised and all telecommunications infrastructure by 1 January 1998[26].

Article 100a has formed the basis of Community telecommunications harmonisation, with several harmonisation measures having been issued following from the 1990 ONP Framework Directive, including Directives on leased lines and voice telephony. Directives under Article 100a on the harmonisation of interconnection arrangements and telecommunications licences are also due to be issued in 1997.

Articles 90 and 100a are discussed further in Section 4.4.2 but one important distinction should already be noted. Under Article 90, Directives or Decisions are adopted by the Commission, whilst under Article 100a it is the European Parliament and Council who finally agree the measure.

Some recent telecommunications measures have also taken other Treaty Articles as their legal basis, including:

- Article 7a which is concerned with the establishment of the internal market;

[26] Greece, Ireland, Portugal, Spain and Luxembourg have been given the right to apply to the Community for derogations to the 1 January 1998 deadline for liberalisation. The Commission is currently examining requests received which, with the exception of Greece, do not attempt to delay liberalisation beyond 2000.

- Articles 57(2), 59 and 66 which are concerned with the freedom of telecommunications companies to provide services into other Member States or to establish companies in those Member States;

- Article 129b-d, introduced by the Maastricht Treaty, which states as an objective the co-ordination of Member States' transport, energy and telecommunications infrastructure and the development of trans-European networks (TENs);

- Article 235 which is employed where action is necessary by the Community to attain a Treaty objective but the Treaty has not provided express powers for this purpose.

4.3 The Extent to which the Creation of a European Regulatory Authority Requires a Treaty Amendment

In this section we examine the extent to which the creation of a European Regulatory Authority for telecommunications would require an amendment to the EC Treaty. Drawing on EC case law, the degree of power given to new Community Agencies to date and the degree of power held by Oftel in the United Kingdom and the FCC in the United States, we provide suggestions for the kinds of tasks that could be delegated to such a body, with and without Treaty amendment. We then move on to discuss the nature of a possible role in the appeals process for a European Regulatory Authority created in the absence of a Treaty amendment.

4.3.1 Degree of Power Allocated to a European Regulatory Authority

EC case law dictates that the creation a European Regulatory Authority would require a Treaty amendment if this body is given very wide power and discretion in its activities. If, however, a European Regulatory Authority is created with a more specific, narrowly defined set of tasks, then it is indeed possible to create such a body without the need to amend the Treaty. As such, although it is not possible to give a new European Regulatory Authority any policy functions without Treaty amendments, there are clear precedents for the creation of Community agencies, within the Treaty, which carry out tightly defined executive functions.

Within this context, we discuss the following:

- case law which dictates that without Treaty amendment, executive functions, and only executive functions, can be given to a new Community agency;

- the degree of power that has been given to new Community agencies to-date;

- the division of labour between the national telecommunications policy maker and the regulator in the United States and the United Kingdom;

- specific executive tasks which it may be possible to delegate to a European Regulatory Authority without the need for a Treaty amendment, and those policy tasks which could only be delegated to a European Regulatory Authority through an amendment of the EC Treaty.

a. Case Law on the degree of power that may be allocated to a new Community body with and without amendment of the Treaty

"Delegation of power" to "Community agencies", defined in this Study as Community bodies other than the Council, the Commission, the European Parliament, the European Court of Justice and the Court of Auditors, is now an accepted part of the workings of the EC.

In ***Meroni v High Authority,***[27] the ECJ concluded that delegation of powers to a Community agency (in that case, to two scrap iron subsidisation bodies) was permissible, but only when *"it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority"*. The Court justified this by referring to *"the balance of powers which is characteristic of the institutional structure of the Community"*. According to ***Meroni***, the legal basis will dictate which powers may be delegated.

Additionally, the ECJ proceeded to state that a delegation of authority *"implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy"* is unconstitutional as *"it replaces the choices of the delegator by the choices of the delegate, bring[ing] about an actual transfer of responsibility."*

The several Treaty provisions which confer legislative powers on the Community may form a sufficient legal basis for establishing a Community agency to which defined tasks may be delegated, but only within the limitations set by ***Meroni*** and only if the establishment of the body contributes to the pursuit of the objectives for which the legislative power in question has been granted.

Two further constraints are relevant in determining the degree of power that may be delegated to a new Community body without the need to amend the Treaty:

- the delegating authority cannot delegate powers other than those which the delegating authority itself received under the Treaty; and

[27] Case 9/56 [1959] CR133.

- the delegate will be subject to all the conditions to which the delegating authority would have been subject had it exercised them directly, two of which were mentioned specifically in ***Meroni***:
  - the duty to state the reasons on which the decisions are based (Art 190); and
  - the availability of review by the ECJ of all decisions.

Applying the principles of ***Meroni*** to a European Regulatory Authority, it appears that its enabling legislation would need to dictate specific executive functions for a European Regulatory Authority to perform, while leaving high-level decisions affecting economic policy in the hands of the Commission. For example, legislation could permit a European Regulatory Authority to administer spectrum auctioning rules, but legislation that conferred to a European Regulatory Authority the power to allocate spectrum in the "public interest" would exceed European delegation principles. In addition, a European Regulatory Authority would not necessarily be limited to executive functions. It could also carry out activities, such as carrying out studies or gathering information, which fall short of executive functions.

If, however, it is considered that a European Regulatory Authority should have more than an executive function and undertake policy decisions with certainty and in complete, unfettered independence, that would require an amendment to the EC Treaty.

The distinction between constrained discretion and policy making powers is sometimes difficult to draw, particularly in the absence of more or clearer guidance from the ECJ. For this reason, we now look for guidance by examining the degree of power granted to existing Community agencies and the degree of power granted to the existing national telecommunications regulators in the United Kingdom and the United States. We go on to suggest some ways in which the distinction could be applied to a European Regulatory Authority.

b. Degree of power given to new Community Agencies to date

It is helpful to look at the extent of the delegated powers enjoyed by other agencies. A brief review of some of these agencies, their powers of decision-making and the nature of their decisions demonstrates the varying levels of authority that the Commission has conferred, and is instructive when considering how much power may be delegated to a European Regulatory Authority. A fuller discussion of some of these bodies is set out in Appendix 6.

Examples of bodies created through amendment of the EC Treaty include the European Investment Bank and the European Central Bank. Both the European Investment Bank and the European Central Bank are autonomous legal bodies which have policy-making functions within the EU institutional framework. The European Investment Bank furthers the development of the EU by borrowing funds on capital markets to finance projects that promote EU policy while one of the European Central Bank's objectives is to define and implement the monetary policy of the Community. Each body has an advisory board which sets the policies to be implemented by its executive board. The European Central

Bank can make regulations on monetary policy that are binding and directly applicable to all Member States.

Despite the ability to formulate and execute policy, these bodies are subject to some restraints. Both the European Central Banks and the European Investment Bank must comply with their founding agreements as well as the EC Treaty and are subject to review by the European Court of Justice. Member States and the Commission also have some input into decisions made by the policy and executive arms of these bodies as they may designate who serves on the representative boards.

No Treaty amendment was considered necessary prior to the establishment of the other bodies discussed in this section, which are:

- the Office of Harmonisation;
- the European Medicines Evaluation Agency (EMEA);
- European Monitoring Centre for Drugs and Drug Addiction (EMCDDA).

The Office of Harmonisation

Created under Article 235, the Office of Harmonisation has a significant role in administering the Community's trademark policy and procedures as set forth by the Community in Council Regulation No. 40/94. The Office of Harmonisation functions independently of the Commission subject to periodic review by the Commission to assess if amendments to Regulation 40/94 are necessary.

The Office of Harmonisation has the greatest amount of executive authority of the three agencies discussed as it independently implements procedures defined by the Commission. In doing so, the Office of Harmonisation evaluates if trademark applicants have met minimal filing conditions, invites observations by third parties and opposition to the application and determines if the trademark can be registered.

European Medicines Evaluation Agency (EMEA)

The EMEA, has a limited amount of executive power within the centralised mechanism for the approval of biotechnology products and veterinary medicines used as performance enhancers.

The EMEA co-ordinates and supervises the two authorisation procedures established by the Commission but, unlike the Office of Harmonisation, the EMEA does not make decisions independently of the Commission. The EMEA presents draft decisions to the Commission about the possible approval of biotechnological medicines and veterinary drugs used as performance enhancers, and the Commission retains the right to veto the EMEA's recommendations, though only "in exceptional circumstances".

The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)

The EMCDDA has the least amount of executive authority and has a minimal role in the Community legislative process. The EMCDDA functions as a research body for the Commission, its purpose being to collect and provide information on drugs, drug addiction and its social ramifications to the Commission and the Community's Member States.

While an important source of the information the Commission may use to develop policy, the EMCDDA has neither executive nor decision-making powers. Policy and executive decisions about drugs rest solely with the Commission. In fact, the EMCDDA "may not take any measure which in any way goes beyond the sphere of information and the processing thereof." (EEC 302/93)

Conclusions on the degree of power given to new Community Agencies to date

As can be seen, the Community has delegated a varying amount of policy and executive powers to its agencies. In most cases, the Commission has tended to retain final decision-making authority while the agencies provide technical expertise or engage in fact-finding that provide a basis for the Commission's policy and executive decisions. The Office of Harmonisation is an exception to this rule as it can make decisions and has a quasi-judicial function independent of both the Commission and Member States.

A central difference between an agency such as the Office of Harmonisation, created under the current Treaty and the European Central Bank, created through a Treaty amendment, is that the former merely applies guidelines to the facts of each case, implementing rules drawn up by the Community institutions, while the latter creates policy and draws up guidelines which are directly applicable to the Member States and implemented by its executive board. The Office of Harmonisation is an executive rather than a legislative or policy-making body, and the fact that it may make decisions within the limited areas in respect of which it has been delegated a degree of discretion does not affect this status. If that discretion were to be too wide, the body would fall foul of ***Meroni***. Another distinction lies in the preparatory nature of tasks carried out by bodies such as the Office of Harmonisation and European Medicines Evaluation Agency, making recommendations to the Commission rather than carrying out the recommendation themselves.

Although ***Meroni*** is concerned with the limits of delegable power, underlying the decision is the fundamental requirement of Community law that policy-making power must stay with the primary Community institutions established under the Treaty in order to maintain the balance of power. This case may be a helpful guide to the policy/execution dichotomy. We might however extrapolate from the judgement that an agency with an executive, as opposed to policy-making, function will have clearly defined powers to implement policy within a pre-determinated framework while remaining subject to a strict review by (for example) the Commission in the light of objective criteria. The European Medical Evaluation Agency (EMEA) is an example of this. However, the Office of Harmonisation

suggests that the Commission need not have the right to overturn or alter all individual agency decisions to remain true to the principles of ***Meroni***. In the Office of Harmonisation framework, appeals are made to an internal agency review board and if necessary, the Court of Justice. Review of the agency is limited to periodic evaluation and amendments to the enabling legislation. By contrast, the creation of agencies such as the European Investment Bank and the European Central Bank, which set policy, determine the framework by which to implement that policy and whose decisions are not subject to Commission approval, require amendments to the EC Treaty.

If we were to define an 'executive role' as the implementation of policy, we note that this is given a wide interpretation in the context of delegation by the Council to the Commission, allowing for the adoption of regulations, the "drawing-up of implementing rules" and "wide powers of discretion and action". The lesson from experience to date is that the distinction between executive and policy making powers depends upon the context. Although this does not provide definitive conclusions, it does at least indicate the flexibility which the Community institutions have in applying these concepts.

These points should be borne in mind in the following discussion. We have been unable to locate any detailed guidance on the policy/executive dichotomy in European Community case law.

c. Degree of power held by OFTEL and the FCC

Below we provide a brief discussion of OFTEL and the FCC to examine how much power the legislature and executive have devolved to these telecommunications regulators. The aim of this discussion is to draw light, given the absence of any guidance in EC case law, on what may consist of the legitimate non-policy executive functions of a European Regulatory Authority. However, the conclusions that can be drawn are limited as both OFTEL and the FCC carry out tasks that would intuitively be deemed to be part of the policy-making level, albeit within certain legal constraints.

The powers of OFTEL in the United Kingdom

The Director-General of OFTEL is given his powers by the Telecommunications Act 1984 ("the Act"). He is empowered to modify and enforce licence conditions and to investigate complaints. The Director-General's functions do not include the formulation and development of policy; in particular, the issuing of licences is a function reserved for the Government, but the powers vested in the Director-General afford him considerable autonomy under the heads of making recommendations, exercise of discretion and issuance of guidance and licence condition amendment.

- ***Recommendations***: the Director-General makes recommendations to the Secretary of State on policy matters, and in practice much of the UK 1991 White Paper reproduced the Director-General's proposals.

- *Discretion*: the Director-General's official functions under the Act necessarily involve exercise of considerable discretion, but within constraints as to the policies and aims to which he must adhere in making decisions which are set out in some detail in the Act. For example, Section 3(2)(a) instructs the Director-General to exercise his functions in the manner which he considers is best calculated to promote the interests of users. His decisions are also subject to UK rules of administrative law and if, for example, the Director-General fails to take into account relevant considerations (or takes into account irrelevant considerations), a Court might overturn the decision.

- *Guidance*: the Director-General has the power to issue guidance which, while it must fall within the policy guidelines to which he is subject, in fact involves significant decision-making power.

- *Amendments to Licence Conditions*: the Director-General may modify the conditions of a licence under Section 12, although within stated limitations. For example, he may not, generally, amend individual licences without the consent of the licensee, nor may he amend class licences where any member of that class objects. Recently, the Director-General has, in fulfilment of his duty to promote effective competition, incorporated a new licence condition mirroring EU competition laws into the licence of BT (the dominant operator in the United Kingdom). BT unsuccessfully challenged the Director-Generals power to amend its licence in this manner. This provision, which will have a dramatic impact on the industry, demonstrates the considerable autonomy which the Director-General enjoys.

The powers of the FCC in the United States

Under the United States Constitution, Congress can delegate some, but not all, legislative functions to administrative agencies. Enabling legislation which creates an agency defines congressional policy objectives and can confer rulemaking authority to the agency, subject to judicial review. Congress can control or restrict an agency by amending enabling legislation to reflect policy changes and can also directly control an agency through funding appropriation and legislative vetoes.

However, under US v. Chada, Congress must follow proper legislative procedures to do so (i.e. the legislation must be voted on by both the Senate and the House and presented to the President). In addition, the Senate has some indirect control as it must approve Presidential appointments of commissioners.

In the case of the FCC, the Communications Act of 1934 gave the agency the task of executing and enforcing interstate and foreign commerce in wire and radio communications to make "available so far as possible to all the people of the United States . . . a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate

facilities at reasonable charges." [47 U.S.C. 151] The Courts, Congress and the FCC have interpreted this as a "universal service at a reasonable price" policy objective.

The 1934 Act gave broad powers to the Commission to meet this objective in interstate and foreign commerce, subject only to the requirement that any action taken is "consistent with the public interest, convenience, and necessity" [Secs. 303/307]. Congress did not define these broad terms and the FCC, in practice if not in right, has enjoyed considerable policy discretion as a result.

The Commission supported, until the late 1960s, AT&T's monopoly as it viewed this as the best way to achieve universal service. However, the Commission later changed its approach and now views competition as the best method to achieve the Congress's objectives: Congress forbore from intervening for 62 years either to endorse or condone the FCC's approach. Although the Telecommunications Act of 1996 formally adopts vigorous competition as the means to achieve the goals of the 1934 Act, it can be argued that the 1996 Act is a codification of policy developed by the FCC and the Courts years earlier.

The FCC's ability to develop policy has resulted from use of the "informal rulemaking" process. Rules promulgated under this process are prospective in application, and informal rulemaking procedures are simplified and less costly than order procedures. In addition, rulemaking proceedings allow for extensive public participation, and decisions are not limited to the record as is the case in order hearings[28].

The advantages of these procedures can be seen given the low standard of judicial review by which courts evaluate FCC rulemakings. Under the Administrative Procedure Act, FCC action must not be "arbitrary, capricious, or not otherwise in accordance with law" and Courts have often deferred to agency expertise in technical areas such as telecommunications[29].

Conclusions from OFTEL and FCC

It is apparent that, although the legal constraints in the two administrations dictate that the regulators have an executive function rather than a policy-making one, this is a somewhat theoretical situation. In practice, the FCC, and OFTEL to a lesser extent, do make policy decisions, although within a wider policy framework governed by legislation. This point illustrates just how difficult it is to provide a cast-iron formula for defining tasks that may be viewed as purely executive (and thus fit for delegation to a European Regulatory Authority). Nevertheless, in Section d below we suggest some functions that might constitute the legitimate executive functions of a European Regulatory Authority.

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[28] Communications Policymaking at the Federal Communications Commission: Past Practices, Future Direction (1987), Stuart Brotman, Annenberg Washington Program Electronic Library.

[29] Id.

d. Suggestions for the demarcation of the policy and executive functions of a European Regulatory Authority

The Office of Harmonisation discussed in Section 4.3.1b has the greatest amount of executive authority of the agencies created without Treaty amendment that are reviewed in this Study, although its powers do not approach those of OFTEL or the FCC discussed in Section 4.3.1c or, we would contend, the upper limit on delegation set by ***Meroni***. In practice, we conclude that the FCC and OFTEL do make policy decisions, albeit in a wider policy framework governed by legislation. It follows that, although a European Regulatory Authority's powers could, without Treaty amendment, exceed those of the Office of Harmonisation, they would still need to stop short of policy-making functions held by the FCC and OFTEL.

Based on the Survey, and for each of the areas identified by Survey respondents as good candidates for enhanced European regulation, we suggest in this section those tasks that might constitute the legitimate executive functions of a European Regulatory Authority. However, as stated earlier, we have been unable to locate any detailed guidance on the policy/executive dichotomy in European Community case law. As such, our suggestions should be considered as indicative only.

Licensing

Chapter 3 shows that there is a support from some market players for the availability of a single European licence for networks which extend across national borders, and that this perceived need will not be fully met by harmonisation, mutual recognition or one-stop shopping procedures (although, for services, class licences might provide a solution).

In the context of licensing, we suggest that policy issues which may not be delegated in the absence of a Treaty amendment include:

- whether or not to maintain special or exclusive rights (already determined by Community law);
- whether otherwise to limit the number of licensees, and on what objective basis (again, in the process of determination under the Full Competition Directive and the Proposed Licensing Directive);
- the broad principles for the application process (transparency, non-discrimination etc.).

Once the broad policy has been set in place, the assessment of bids for and the grant of a Community Licence can be seen to be an executive action and could therefore be undertaken by a European Regulatory Authority at a European level, at least for certain types of network (or perhaps services) which may be said to enjoy a Community dimension, for example Trans-European networks or, perhaps, Satellite-Personal

Communications Systems. In the latter case, however, Member States would be particularly concerned about handing over the administration of valuable radio frequency spectrum to the Community.

Interconnection

Nearly all respondents who favoured a European Regulatory Authority felt it should have some role in interconnection, and many also thought that, while it was a positive step, the Proposed Interconnection Directive would in itself be insufficient to prevent market distortions post-liberalisation.

In the context of interconnection, policy matters clearly included the issue (already decided in the Community) of whether operators should be required to allow interconnection and the broad framework for interconnection (transparency, cost-orientation and non-discrimination). Accounting separation of interconnection costs and setting common cost principles might also be considered policy issues: there is scope for debate here.

Other actions in relation to interconnection would appear to be merely executive in nature, although undoubtedly complex and capable of resulting in diverse results (in itself an argument for further action at Community level in the quest for a true Single Market).

For networks which, when connected, will extend beyond national borders, a potential role for a European Regulatory Authority with executive powers would be to step in and determine interconnection terms in cases where the operators cannot agree terms. Viewed another way, we can see scope for a European Regulatory Authority to formulate and propose detailed trans-border interconnection conditions which could then be adopted by the Commission and recommended to, or imposed on, NRAs.

Numbering

While a few respondents saw a Community role in the creation of an overall European numbering space (e.g. 00 3-XX for Europe or equal length strings of numbers for all locations in Europe - as in the USA), more saw a more limited, but still important role in identifying and prescribing common numbering ranges for important business services such as non-geographic numbers (e.g. premium rate or nation-wide local rate numbers and numbers for future advanced business services).

In the context of numbering, policy issues are perhaps limited to the decision to transfer (or otherwise) the administration of control of the numbering space to an independent body and the principle of non-discrimination in allocation.

Other actions appear executive in nature and, not only to promote the Single Market, but in the context of promoting European businesses generally, one can see an important role for a European Regulatory Authority in harmonising number allocation procedures and the use of present and future non-geographic numbers on a Community-wide basis or, taken one

step further, in taking over blocks of such numbers from NRAs and making allocations directly. Other roles may also develop, particularly in relation to numbering and for future Trans-European networks.

Number portability

Number portability can be seen as a partial sub-set of Interconnection. Number portability is seen by most as an essential ingredient for infrastructure liberalisation. Experience in the United Kingdom has shown, not only, that lack of number portability acts as a barrier to entry, but also that complex issues arise when determining what additional costs are incurred by an incumbent operator who is required to allow number portability. Whether or not to require number portability at all is perhaps a policy issue but, below that, determining the terms on which it is brought in is clearly an executive act which falls within the same ambit as a determination of interconnect terms so that, in some cases, it may become an area for regulation by a European Regulatory Authority with executive powers only. In the medium term, the requirement for number portability across national borders may also be expected to grow.

Universal service

Support for a role for a European Regulatory Authority in relation to Universal Service funding stemmed primarily from a fear that a level playing field across the Community might otherwise not be achieved.

In the context of Universal Service, policy issues may be limited to the concept and, perhaps, the determination of a framework (for example establishing a fund) from which costs are to be met. The basic principles for costing must be determined at Community level (for example, the recent debate about whether mobile telephony should be part of the equation), as should the assessment of whether national approaches are compatible with Community law on a case-by-case basis as national schemes are notified to the Commission. Other high level principles, for example transparency and non-discrimination, are also in the policy realm.

Below that, there is a clear possible role for a European Regulatory Authority without policy making powers in formulating and proposing more detailed harmonised rules for the determination of the costs of Universal Service, the categories of licensees who will contribute to those costs and the methodology to be used in allocating costs between operators. By reason of subsidiarity, it is clear that NRAs must retain a material role, but there is a strong case for further intervention at a Community level to avoid distortion.

Spectrum management

Chapter 3 shows that a number of respondents to the Survey felt that regulation of spectrum at Community-level could add value, particularly where satellite communication was involved.

Spectrum continues to be regarded by most Member States as a national resource and this belief may be expected to intensify as, in the wake of the recent FCC auctions, the value of spectrum is better understood. So, in the case of spectrum management, subsidiarity, or political views, may speak against a significant role for a European Regulatory Authority in this area.

The Community's role so far as been limited to co-ordination of allocation and reservation of particular bands for new uses (notably GSM and DECT). Co-ordination remains a necessary executive action and a European Regulatory Authority could perhaps take over this task, and some further role in harmonising licence conditions, and bring forward recommendations to the Community, particularly in the context of new services with a Community dimension, such as S-PCS and beyond.

We also foresee that, if Member States begin, or in some cases continue, to auction spectrum, while others do not, there could perhaps be an impact on the single market. A European Regulatory Authority without policy making powers could carry out certain non-policy aspects of the work in that area and report to the Commission.

If current attitudes of Member States change, there may perhaps be scope in future for some bands of frequency to be released to an executive European Regulatory Authority, for allocation to providers of Trans-European services.

Monitoring and assisting in enforcement

There was widespread support for a European Regulatory Authority to take some role in the implementation and enforcement of EC Directives, but divergent views on what that role should be. Some respondents called for a European Regulatory Authority to take a direct role in enforcement, but that is unlikely to be appropriate for the reasons discussed in Section 3.12.

Nonetheless a European Regulatory Authority might usefully:

- take on the role of monitoring the effectiveness of the new legal and regulatory framework across the Community from a Single Market perspective;
- identify where problems continue;
- stimulate discussion on best practice and;
- where necessary, report back to the Commission on further actions that might be appropriate.

In cases where the Commission or the ECJ decide to take enforcement action, a European Regulatory Authority could also perhaps assist in gathering evidence.

4.3.2 Dispute Resolution and Appeals

Some respondents to the Survey suggested that a European Regulatory Authority should be given a specific role in dispute resolution between (i) market players and NRAs or (ii) between NRAs or (iii) between market players, where a Community dimension is involved. We take a cautious line both on legal principle and in light of other existing dispute resolution mechanisms.

It is not possible, without an amendment to the EC Treaty, to use a European Regulatory Authority as a formal appellate tribunal with the power to make binding decisions. However, a more limited European Regulatory Authority role in dispute resolution, through conciliation or an arbitration procedure where complainants renounce their rights to further action, is possible under the terms of the current Treaty.

Within this context, we examine:

- the general Community position on appeals;
- specific dispute resolution mechanisms and conciliation rules in the Community telecommunications framework;
- the role of existing non-telecommunications Community bodies in relation to appeals.

Finally, we draw on this discussion to examine the possible role of a European Regulatory Authority in relation to appeals.

a. General position on appeals

At present, disputes as regards telecommunications regulation will fall, in the ordinary course, to be resolved under general national law, the Treaty rules (if applicable) and/or special conciliation procedures established under specific EC telecommunications measures.

Under civil law jurisdictions, if there is a dispute between a telecommunications operator and the NRA (or equivalent body, if an NRA has not yet been established) the aggrieved party is likely to be able to request the NRA to reconsider its decision. If the request for reconsideration fails, the aggrieved party is likely to be able to bring the case before a national court or tribunal under national administrative law. By contrast, in the case of OFTEL in the UK, no appeal ordinarily lies against its decisions except on the quite limited basis of judicial review.

However, the European legal framework may open at least two channels through which a dispute raising an issue of Community telecommunications regulation may be challenged (e.g. whether an NRA's approach to interconnection is consistent with Community rules):

- Following Article 177, a national court may refer to the ECJ for a preliminary ruling on the interpretation of the Treaty or the validity and interpretation of acts of the Community (and also now of the European Central Bank) if it considers that a decision on the point is necessary to enable it to give judgement[30]. Moreover, if a case is brought before a national court or tribunal against whose decisions there is no judicial remedy under national law, it must refer the case to the ECJ on these issues.

- If the NRA or similar body can be considered to be a public body, there is the possibility for the Commission to consider an action against the Member State in question under Article 169 for failure to fulfil an obligation under the Treaty. As an NRA would be established by national law (statute or licence), even if it is quasi-autonomous, an NRA might well remain within the reach of Article 169.

The procedure under Article 169 comprises both an administrative/political and a judicial stage. First the Commission delivers a 'reasoned opinion', after sending a letter ('mise en demeure') to the Member State concerned. The judicial stage cannot be commenced until a reasoned opinion has been delivered. The judicial stage gives rise to a case before the ECJ, brought by the Commission.

b. Specific dispute resolution mechanisms/conciliation rules in the Community Framework

There already exist a number of dispute resolution procedures under existing Community measures. These are briefly summarised below.

The ONP Committee

The ONP Committee was established under the ONP Framework Directive. One of the tasks of the Committee is assisting in settling disputes between users and NRAs under, for example, Article 12 of Directive 92/44, using a conciliation mechanism involving a Working Group which includes the Commission, two ONP Committee members (i.e. representatives of the Member States telecommunications ministries or NRAs) and other interested parties. This procedure may be used for any question concerning the

[30] The recent case involving BT Regina v. H.M. Treasury, ex parte British Telecommunications PLC (Case C-392/93), [1996] 2 C.M.L.R. 217 is an example of a national court's decision to exercise its right to obtain a preliminary ruling from the ECJ. BT sued the United Kingdom government alleging that national legislation exempting some telecommunications operators from the provisions of Council Directive 90/531, exceeded the UK's discretion under Article 189, and the United Kingdom national court referred to the ECJ for a preliminary ruling under Article 177 four questions involving interpretation of the disputed provision of Directive 90/531.

infringement of the provisions of the relevant Directive, though in the case of the procedure under the proposed Interconnection Directive this is limited to interconnection disputes.

Procedures under the ONP Voice Telephony and Leased Line Directives

Article 12 of Directive 92/44 ("the Leased Line Directive") firstly states that invoking the conciliation procedure is without prejudice to any action the Commission or any Member State might take pursuant to the Treaty (particularly Articles 169 and 170), illustrating the point that disputes may have a number of alternative manners of resolution. The aggrieved party must, under this procedure, first attempt resolution at national level, either by appealing to the NRA or to the authorities. Written notification is given to the Commission, but here it is also given to the NRA, and either the NRA or the Commission may, where it finds there is a case for further examination, refer the case to the Chairman of the ONP Committee[31]. The procedure is the same as that under the Voice Telephony Directive, but with some differences as to when the procedure can be invoked.

The Leased Line Conciliation procedure has been used successfully on two occasions[32]. Most recently, it was used by the Dutch user association to challenge the price differentials for leased lines between national and international routes covering the same distance. This was argued to show that international tariffs were not cost-orientated. The outcome of the discussions between PTT Nederland and the association was agreement that differentials would be reduced by 2000 to no more than 20%.

Article 27 of Directive 95/62/EC ("The ONP Voice Telephony Directive") contains similar provisions, with the main difference being that this Article contains the specific requirement that the dispute must involve telecommunications organisations in more than one Member State for the conciliation procedure to be invoked.

Procedure under the Proposed Interconnection Directive

Article 15 of the Proposed Interconnection Directive refers to the advisory role of the ONP Committee, but goes on to imbue the Committee, by Article 16, with a dispute resolution function. This is similar to the conciliation procedure laid down in Article 12 of Directive 92/44 and in the Voice Telephony Directive. Article 16 applies to interconnection disputes between organisations operating under authorisations provided by different Member States where the dispute is not within the responsibility of a single NRA. Any party may refer the dispute to the relevant NRAs, and they must co-ordinate their efforts to resolve the dispute. If they cannot do so within 2 months, either party may by written notification to the Commission (copied to all parties involved) invoke the dispute resolution procedure. The final role of the Committee under this Directive will depend on the outcome of conciliation between the Council and the European Parliament on the proposal.

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[31] The ONP Committee is chaired by a senior official of DG XIII.

[32] A dispute still exists as to whether the procedure was invoked on the first occasion, as the NRA in question disputes the fact that national procedures had been launched and that an unsatisfactory result had been obtained.

Where the Commission finds that there is a case for further examination, it may set up a Working Group made up of at least two members of the ONP committee, one representative of each of the NRAs concerned and the chairman of the ONP committee or another official of the Commission appointed by him. If the Group has not defined its position within three months, or the position has not been implemented within, generally, 2 months, the advisory procedure of the ONP Committee will take over. This seems to go further, in terms of ensuring resolution of the issue at national level, than the procedure under the Leased Line Directive. Of significance to this Study, the complainants invoking the dispute resolution procedure must renounce their rights to further action at national law.

Proposed right of appeal under Licensing Directive

Under the present Article 5 of the Proposed Directive on Licensing, certain NRA decisions and refusals would be made subject to a right of appeal to an institution in the Member State concerned which is independent of the NRA. The nature of the appeal process is not specified. The final position, however, is yet to be determined.

c. Role of existing Community bodies in relation to appeals

The EMCDDA does not make any administrative or executive type decisions and consequently no right of appeal exists.

In contrast, the EMEA can and does make decisions (in the form of proposals), but they are subject to review by the Commission. Should approval of a medicine be denied under the centralised procedure, a manufacturer can appeal to the EMEA within 15 days of notice. The Committee for Proprietary Medicinal Products must then re-evaluate its initial decision within 60 days.

A right of appeal also exists within the decentralised decision mechanism of the EMEA. This mechanism allows a manufacturer to seek licensing approval directly from a Member State. If the Member State authorises the medicine, it must then produce a detailed report to be circulated among the other Member States. If Member States refuse to recognise the authorisation, manufacturers can appeal to the EMEA to arbitrate. Again, any EMEA recommendation is subject to Commission review.

As an independent agency, the Office of Harmonisation renders decisions that are not subject to Commission review. Applicants or parties affected by the denial or grant of a trademark can appeal within two months of the decision to the Office of Harmonisation's Board of Appeal. The Board of Appeal reviews the initial decision and can exercise any power conferred to the Office of Harmonisation. The Board can also remand cases back to the initial Office of Harmonisation decision-making body. Appeals from the Board's decisions are made to the Court of Justice. The Commission has no control over Office of Harmonisation's final decisions, and is limited to amending the enabling legislation to

expand or revoke Office of Harmonisation's executive powers if dissatisfied with the agency and its decisions.

d. Role of a European Regulatory Authority in relation to appeals

With reference particularly to interconnection disputes, some respondents emphasised a role for a European Regulatory Authority in hearing appeals from decisions of NRAs. However, in the context of the discussion above on existing legal mechanisms under the Treaty and existing conciliation procedures, we consider that, without an amendment to the EC Treaty, the role of a European Regulatory Authority in the area of appeals would need to be limited.

A European Regulatory Authority might offer conciliation and/or guidance services to NRAs but if it were to act as a forum for appeals, this would, in our view, be inconsistent with the rules enshrined under the Treaty of Rome under which challenges to decisions of Member States or NRAs, arising from a breach of Treaty rules or Community measures, are to be referred to the ECJ. In the absence of an amendment to the Treaty, we do not consider a European Regulatory Authority could take on this role.

This view is supported by the ECJ's opinion on the European Economic Area (EEA) (Opinion 1/91[33]) which held that a proposed court created within the EEA member countries, with the power to issue binding decisions, could impact the balance of powers between Member States and the Community institutions. It therefore risked infringing the ECJ's exclusive jurisdiction, as this would adversely affect the allocation of responsibilities and powers defined in the EC Treaty. As a result, any jurisdiction that a European Regulatory Authority might have could not extend to issues of the respective competences of the Community and the Member States[34].

To date, the Community legal framework has not prescribed a definitive appeals mechanism relating to NRA decisions but instead has provided for conciliation mechanisms to bring the parties in dispute and NRAs together. All the current arrangements would need to be reviewed if a European Regulatory Authority were established. For example, it may be appropriate for a European Regulatory Authority:

- only to assume a conciliation/arbitral role;

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[33] Opinion delivered pursuant to the subparagraph of Article 228(1) of the Treaty, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area.

[34] The ECJ held that an international agreement that created a system of courts to interpret the agreement's provisions was not per se incompatible with the Treaty. However, in this case, the EEA Court impinged on the exclusive jurisdiction conferred to the ECJ under Article 219 of the EC Treaty as the EEA court could also interpret the allocation of Community and Member State responsibilities. Moreover, under the agreement, the EEA Court was not subject to subsequent decisions of the ECJ. Thus, the ECJ concluded that the EEA Court violated Community law.

- to be limited to that role only in the case of disputes between NRAs which have a Community dimension.

Using a European Regulatory Authority as a more formal appellate tribunal would be difficult without an amendment to the EC Treaty.

4.4 Creation of a European Regulatory Authority without Treaty Amendment

In Section 4.2.4 we described how the Community has adopted legislation covering various aspects of telecommunications, and indicated the legal basis or bases upon which it has done so.

In the first part of Section 4.4, we explain in more detail:

- how the legal basis for a measure is decided;
- how different Articles require different procedures for adoption of measures; and
- the circumstances under which a number of Articles may be combined.

In the second part of this section, we consider the appropriate legal and procedural basis for the establishment of a European Regulatory Authority.

4.4.1 Procedure for Creating a New Body under the Treaty

a. Legal and procedural basis

The phrase "legal basis" is used in Community law to indicate the Article of the Treaty (or other source of legal authority) under which a Community institution adopts a measure. For example the correct legal basis of Council Decision 94/445/EC[35] is Article 129b-d. More specifically, it is the second indent of Article 129c(1), since it is that part of the Article which refers to implementing measures to ensure interoperability of networks.

The legal basis of a measure should be distinguished from its procedural basis (which we use in this Study to mean the Article (or part of an Article) which sets out the procedure to be followed by a Community institution in adopting a measure.). **The procedural basis is determined by the legal basis**. That is to say, once it has been decided which Article is to form the legal basis, this Article will dictate which procedure is to be followed. It will do so either by reference to another Article, such as one of the sections of Article 189, which sets out various procedures, or by defining the procedure to be followed within the Article itself. For example, in the case of Article 129b-d, the procedural basis is stated in Article

[35] Council Decision 94/445/EC on inter-administration telematic networks for statistics relating to the trading of goods between Member States.

129d, where measures are to be adopted to ensure interoperability of networks, to be Article 189c (the "co-operation procedure"). Article 235, by contrast, describes within the Article itself the procedure to be used in passing a measure under it, rather than referring to another Article of the Treaty.

The procedural basis is an important factor in the establishment of a European Regulatory Authority. Depending on the legal basis chosen, the procedure may involve Parliament in a purely consultative role, at one extreme, or in a "co-decision" role, in which it may ultimately prevent legislation being finally adopted, at the other.

b. What happens where there is a choice of legal basis?

As will be seen in Section c below, Article 235 may only be used as the legal basis if no other legal basis can be found in the Treaty, so the choice between legal bases will not arise in that case. However, where either of two Treaty provisions other than Article 235 potentially serve as the legal basis for a new measure the situation is quite different.

On numerous occasions, the ECJ has confirmed that the choice of a legal basis for Community measures is a matter of law rather than a matter of discretion. In the context of the organisation of the powers of the Community, the choice must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure concerned.[36]

Where an institution's power to adopt a measure arises under two separate provisions of the EC Treaty, both of which have the same procedural basis, the institution is bound to adopt that measure on the basis of both of the provisions.[37]

However, where an institution wants to adopt a measure which is justified under two separate provisions of the EC Treaty, each of which has a different procedural basis, the institution is only able to use one of the provisions as the relevant legal basis for the measure. The ECJ has held that, in this case, the institution must choose the legal basis that does not undermine, or is least undermining of, the role of the Parliament. In the Titanium Dioxide Waste case[38], for example, the ECJ decided that although the Directive concerned had two objectives, Article 100a was the appropriate legal basis rather than Article 130s, because the latter caused a detrimental impact on the procedural role of the Parliament.

In addition, and in potential conflict to this, the ECJ has separately held that if the objectives of one Treaty provision are more specifically relevant than another to a given measure, the more specific legal basis should be chosen.[39] For instance, the mere fact that a

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[36] Case C-300/89 *Commission v. Council* ('Titanium Dioxide Waste') [1991] ECR I-2867, 10; Case C-426/93 *Germany v. Council* [1995] ECR I-3723, 29.

[37] Case 165/87 *Commission v. Council.*

[38] Case C-300/89 *Commission v. Council.*

[39] Case C-155/91 *Commission v. Council* and Case C-187/93 *Parliament v. Council.*

measure affects the establishment or functioning of the internal market is not sufficient for Article 100a to apply (see Section 4.4.2b).

c. Exclusivity of use of Article 235 as legal basis

Article 235 fully embraces the concept of implied powers (see Section 4.2.1 above) by providing that:

> *If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.*

It follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where other potentially applicable Articles have been considered and no other Treaty provision gives the Community institutions the necessary power to adopt that measure. It is thus not possible to use Article 235 in conjunction with any other Treaty Article as the legal basis for a Community measure.

This point was clearly made in the ***Edicom Case***[40], which concerned the adoption of Decision 94/445/EC by the Council on the basis of Article 235. The ECJ annulled the Decision because it found that it was a measure covered by the second indent of Article 129c(1)[41], and therefore this should have formed the legal basis, not Article 235. Practically, this was important because the two Articles have different procedural bases.

4.4.2 Which Article(s) should form the Legal Basis of the European Regulatory Authority?

The principal candidates for forming the legal basis for the creation of a European Regulatory Authority are as follows:

- Article 90;
- Article 100a;
- Article 129b-d;
- Article 235.

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[40] Case C-271/94 *European Parliament v Council of the European Union.*

[41] Council Decision 94/445/EC on inter-administration telematic networks for statistics relating to the trading of goods between Member States.

Below we consider each of these Articles in turn, discussing their appropriateness to the formation of a European Regulatory Authority.

a. Article 90

Article 90, which is also discussed in Chapter 2, states that:

- certain public undertakings (including telecommunications undertakings) shall be subject to the Treaty rules (especially competition) insofar as these rules do not obstruct them in the performance of their tasks; and

- the Commission shall ensure compliance with this Article, if necessary by adopting Decisions or Directives[42].

The Commission's approach has been confirmed by the ECJ in French Republic v Commission[43], in which it stated that Article 90(3) permitted the Commission to impose, by the adoption of Directives, general obligations with which public undertakings must comply under the EC Treaty. This ruling was a cornerstone to the further development of telecommunications policy in the Community.

In theory, therefore, Article 90(3) may be a legal basis for further Community action in this area. However, there are reasons why Article 90(3) may not be a sufficient base for the establishment of an ERA:

- to justify intervention under Article 90, action must be necessary to ensure compliance of Member States (essentially, in their regulation and control of public undertakings) with other basic Articles of the EC Treaty (for example, Articles 6, 30, 52, 59, 85 and 86) - the establishment of an ERA would need therefore to be clearly linked to, and its tasks restricted to, issues such as maintaining freedom of competition and fair competition and access to markets, which may not mesh easily with its intended role;

- Article 90 is designed to deal with actions of Member States and not actions of undertakings, the proper legal base for which would be Article 85/86 (as stated in Case C-202/88). While, therefore, Article 90 could be an appropriate legal base for regulating the relationship between a Member State and a publicly owned telecommunications operator, it would not appear to allow regulation by the ERA of public or privately owned telecommunications operators;

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42 The Commission may thus issue legislation without formal European Parliament or Council approval, although in practice it engages in a wide consultative process before adopting important legislation.

43 Case C-202/88.

- Article 90 may be used to remedy breaches of the Treaty rules, flowing, inter alia, from the existence of special and exclusive rights. The creation of a European Regulatory Authority would be creating an administrative framework rather than remedying breaches of the Treaty or effects inherent in monopoly situations.

b. Article 100a

Article 100a, which uses as its procedural basis the co-decision procedure as set out in Article 189(b) of the Treaty[44], has been the legal basis of a number of recent telecommunications harmonisation Directives (see Chapter 2 and Section 4.2.4). The first paragraph states:

> *"By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 7a. The Council shall, acting in accordance with the procedure referred to in Article 189b [co-decision procedure] and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."*

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[44] Under the co-decision procedure (subject to certain exceptions) action by the Community's legislative bodies occurs as follows:

- the Commission submits a proposal to the Parliament and the Council;
- the Parliament adopts its opinion;
- the Council adopts a common position by qualified majority;
- the Parliament may then either:
  - approve the Council's common position within 3 months or reserve judgement on the common position. In both cases the Council adopts the proposal in accordance with the common position; or
  - indicate by absolute majority that it intends to reject the common position; or
  - propose amendments agreed to by an absolute majority to the common position.
- If amendments are proposed, the Parliament's suggested amendments are then forwarded to the Council and the Commission, and the Commission delivers an opinion on them.
- The Council, on the other hand, may either adopt or reject the Parliament's amendments within 3 months.
  - If the amendments are adopted, the council may act by qualified majority. However, if the Commission has given a negative opinion of the amendments, the Council must act by absolute majority to adopt the amendments.
  - If the amendments are rejected, then the Conciliation Committee, which consists of an equal number of members from the Council and Parliament, is convened and a qualified majority of the Council and Parliament representatives are required to reach a decision.
- Once assembled, the Conciliation Committee may either:
  - formulate and approve a joint text within 6 weeks, in which case the Parliament and Council both must adopt it or the proposal lapses; or
  - fail to agree in which case the proposal also lapses unless the Council confirms its original common position and the Parliament fails to veto the proposal by absolute majority of its members within six weeks of the Council's confirmation.

Case law indicates that this Article will only be the appropriate legal basis where the measure intended to be adopted under it is primarily a harmonisation measure. In Case C-155/91[45], for example, the ECJ stated:

> *"The fact that some provisions of the Directive affect the functioning of the internal market is not sufficient for Article 100a of the Treaty to apply. Recourse to that provision is not justified where, as in this case, the measure to be adopted has only the incidental effect of harmonising the market conditions within the Community."*

While the establishment of a European Regulatory Authority will doubtless further the single market and harmonisation of national measures, it is far from clear that the Article is a sufficient legal basis in itself.

c. Article 129b-d

Article 129b-d, introduced by the Maastricht Treaty, states as an objective the co-ordination of Member States' transport, energy and telecommunications infrastructure and the development of trans-European networks (TENs). Article 129c(1) (second indent), which concerns the implementation of measures to ensure the interoperability of networks, uses the co-operation procedure, as set out in Article 189(b) of the Treaty, as its procedural basis[46].

It would not, in itself, provide an adequate legal basis for the establishment of an ERA were the ERA granted powers and entrusted with tasks which go beyond the specific objective of establishing TENs. If, on the other hand, the role and powers of the ERA are so limited as to relate only to the establishing TENs, Article 129b-d could then perhaps form the appropriate basis.

d. Article 235

Under Article 235, the Council may act on a Commission proposal provided it does so unanimously and it has consulted the European Parliament.

Article 235 is of special interest in the context of establishing a European Regulatory Authority because it has been used to establish other Community bodies. For example, both the Community Trade Mark Regulation (40/94)[47] and the Regulation establishing the

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45 Commission of the European Communities v Council of the European Communities Case C-155/91.

46 The co-operation procedure is substantially similar to the co-decision procedure (see footnote 44). However, the procedures differ if the Council intends to reject the Parliament's suggested amendments to the Commission's proposal. Under the co-operation procedure, there is no conciliation mechanism where the Council does not accept the Parliament's amendments. Council can therefore adopt the legislation in accordance with its common position, albeit that unanimity is required (instead of a qualified majority) if (i) Parliament has rejected the Common Position or (ii) it wishes to adopt amendments which the Commission does not support.

47 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community Trademark.

European Medicines Evaluation Agency[48] take Article 235 as their legal basis, reciting, for example, in their preambles that the EC Treaty *"does not provide, for the adoption of a uniform system at Community Level, as provided for by this Regulation, powers other than those of Article 235"*.

Indeed, the only Community agency we have looked at during the course of this Study (other than those created through Treaty amendment) which has not had Article 235 as its basis is the European Environment Agency, which was established under Article 130s. In our opinion, the establishment of this body, which has a purely information-gathering role, is clearly within the ambit of the wording of Article 130s, whereas there is no specific Article for which this could be said in relation to an ERA, unless its role was defined in terms of TENs (see above).

Administrative measures implementing certain "supporting policies" have also been promulgated under Article 235. For example, the European Monetary Co-operation Fund ("the Fund") and the European Monetary System were established on the basis of this Article. Within the framework of its tasks, the Fund (or its administrative council) was given an autonomous administrative power which, in particular, included the authority independently to adopt administrative rules to be applied within a specific framework.

Article 235 may be used only to attain one of the objectives of the Community. The primary objectives of the Community are set out in Articles 2 and 3 of the Treaty and they include, as well as more specific goals, broad objectives such as the promotion of economic growth and the raising of living standards.

Of particular relevance to the present Study are the objectives described in a number of sub-paragraphs of Article 3, namely:

> *(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services, and capital...*
>
> *(d) a system ensuring that competition in the internal market is not distorted...*
>
> *(h) the approximation of the laws of the Member States to the extent required for the functioning of the common market...*
>
> *(n) encouragement for the establishment and development of trans-European networks ("TENs").*

Moreover, as Article 235 does not specifically refer to Articles 2 and 3, it may also be legitimate to deploy Article 235 to attain objectives gleaned from other Treaty provisions,

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[48] Council Regulation (EEC) No. 2309/93 of 22 July 1993 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European agency for the evaluation of medicinal products.

and here we point to those included in Articles 7a, 57(2), 59, 100a and 129b-d (see Section 4.2.4).

Another argument in favour of using Article 235 as the legal basis can be found in the ***Massey-Ferguson case***[49], which concerned a regulation on the valuation of goods for customs purposes enacted under Article 235, which had as its purpose ensuring that uniform rules were applied throughout the Community. It was argued by counsel that the necessary power to adopt the Regulation was granted already by other Articles of the Treaty, provided that these were given a sufficiently broad interpretation. It was thus maintained that Article 235 could not be used as the appropriate legal basis. However, **the ECJ ruled that even if, given a broad interpretation, other Articles did grant the necessary powers, this interpretation was subject to doubt and, therefore, recourse to Article 235 was legitimate.**

Prima facie, therefore, Article 235 would appear to be the most appropriate and logical legal basis for establishing an ERA, and it has been used as such a basis in analogous cases in the past.[50]

As a cautionary note, there may be some limits to the extent to which judicial authorities will accept use of Community's implied powers[51] but, provided broad political agreement is reached, challenge is unlikely. Challenge could be made by a third party before a national court which could in turn (under Article 177) refer this question of Community Law to the ECJ for a preliminary ruling, which the national court would then apply to the facts.

e. Conclusion on legal basis

A prime Community objective is to increase the involvement of the Parliament in the Community's legislative process. The Parliament's participation in that process is essential to the institutional balance and should reflect the fundamental principle that the people take part in the exercise of power through the intermediary of a representative assembly.[52] However, as already stated, the choice of legal basis precedes choice of procedural basis and governs this decision. The choice of legal basis must be made with a clear view of the

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49 *Case 8/73 Hauptzollamt Bremerhaven v Massey-Ferguson*

50 E.g. in case of the Office of Harmonisation and the European Medicines Evaluation Agency.

51 Case 2 BVR 2134/92 & 2159/92, Manfred Brunner and Others -v- The Treaty on European Union, [1994] 1 CMLR 57. The German Federal Constitutional Court held that any measure based on a wide interpretation of the Community's implied powers would not have binding effect in Germany. It referred to the potential of Article 235 as a "dynamic extension" of the Treaties over time and stated that this could not produce any binding effects in Germany. The interpretation of the Treaty "*may not have effects that are equivalent to an extension of the Treaty*". Obviously, this is the view of a national court rather than the ECJ, and so is inconclusive, but it does illustrate that the Supreme Court in Germany believes it has the power to overturn any purported extension of Community power under Article 235 so providing a potentially serious conflict over the supremacy of Community Law.

52 Case 138/79 *Roquette Frères v. Council* [1980] ECR 3333 and Case 139/79 *Maizena v. Council* [1980] ECR 3393, §34.

aim and content of measure to be adopted, based on an objective assessment. This will determine the procedure for adoption of the measure, and only if there is a valid choice of two or more legal bases having different procedural bases does the issue arise of which has the most 'democratic' procedural basis.

So, for example, if it was considered that Articles 100a and 129b-d could both serve as justification for a particular measure, these could not jointly act as the legal basis of the measure, as each has a different procedural basis. A decision would have to be made to use one or the other of these Treaty Articles as the legal basis. In this case, ECJ case law appears to dictate that Article 100a would be the appropriate legal basis, as it is this Article which uses the more 'democratic' legal basis (i.e. co-decision).

Equally, Article 235, which is used where no other Treaty Article specifically provides sufficient power to attain one of the objectives of the Community, cannot be used in conjunction with any other Article as the legal basis for a measure.

While it is true that a European Regulatory Authority would further the single market and harmonisation of national measures, and assist in establishing trans-European networks, Article 100a and 129b-d appear to be insufficient legal bases for establishing a such a body, if the intention were for it to carry out a variety of functions. We thus argue that Article 235 is the better legal basis for the creation of a European Regulatory Authority. Measures introduced under Article 235 require Council unanimity and consultation of Parliament.

4.5 Conclusions

In this chapter, we have looked at the legal powers of the European Community in regulating telecommunications and the powers available for the creation of a European Regulatory Authority. Our main conclusions are as follows:

- The creation of a European Regulatory Authority to exercise policy making powers or act as a formal appellate tribunal would, in both cases, require an amendment of the EC Treaty.

- However, a Community institution could, without Treaty amendment, create a European Regulatory Authority with executive or decision-making power, so long as:
  - the body is set up to operate only within a limited margin of discretion;
  - delegated powers are clearly defined and subject to strict review;
  - the new body is subject to the same procedural safeguards as the delegating body;
  - the delegating body only delegates powers which it has received under the EC Treaty;
  - the delegation of powers to the new body is clearly justified under the principle of subsidiarity;

- the creation of the new body is proportional in relation to the objective sought; and
- the body is created in a non-discriminatory way.

- Unless a European Regulatory Authority were to be created with a very narrowly specified role, our analysis suggests that it would stretch case law to rely on Articles 90, 100a or 129b-d as the legal basis for establishment. A final view on this point can only be taken after the precise role of a European Regulatory Authority is determined, but we consider at this time Article 235 to be the most likely legal basis.

In Chapter 6 we go on to examine some additional legal issues relevant to the creation of a European Regulatory Authority, including those issues raised by any decisions on the geographic reach of a European Regulatory Authority and issues relating to the specific functions of a European Regulatory Authority suggested by Survey respondents.

5. LESSONS FROM OTHER COUNTRIES AND SECTORS AND ISSUES RAISED BY CONVERGENCE

5.1 Introduction

In this chapter, we draw lessons about the possible functions and form of a European Regulatory Authority from:

- the division of telecommunications regulatory responsibilities between federal and state governments in the United States, Canada and Australia, the way in which this division has changed in recent years and the forces behind these changes;

- the role of pan-European and Community bodies in other sectors and the reasons why these were created.

We also examine some of the implications for a European Regulatory Authority of the convergence of telecommunications, computing, information and entertainment technologies.

The result is a frame of reference for the discussion of a European Regulatory Authority, which is further developed in Chapter 6, that looks at the legal and operational issues surrounding different forms of enhanced Community-level activity in those areas identified by the survey respondents.

5.2 Lessons from Other Countries' Experience in Telecommunications

5.2.1 United States

The experience of the United States is of considerable significance in the current context given the important regulatory role played by the federal government and the fact that the federal role has increased in recent years. In this section we consider that experience (a fuller description is provided in Appendix 7) and examine whether the forces which have given rise to a powerful and growing federal role in the United States are also relevant in a European context.

a. Regulatory bodies

Federal Communications Commission

The Federal Communications Commission (FCC) was established, as a quasi-independent institution, by the Communications Act of 1934. The FCC's responsibilities are wide ranging and include the regulation of telecommunications, radio and television broadcasting and radio spectrum.

In the area of fixed telephony, responsibility is split between the FCC and the state level Public Utility Commissions (PUCs). In principle the FCC has responsibility for regulating interstate and international traffic, while the PUCs deal with intrastate telecommunications traffic. In practice, the division between interstate and intrastate issues cannot be defined in a precise manner and the respective roles of the FCC and the PUCs have changed significantly over time.

There are two major reasons for such changes. Firstly, the FCC has attempted, particularly since the late 1960s, to take over certain responsibilities which were previously undertaken by the PUCs. It has done so by the invocation of the principle of federal pre-emption which enables it to supersede state regulation where such regulation has a significant impact on interstate communications. As noted in Appendix 7 the FCC has been successful in using this principle on many, although by no means all, occasions.

Secondly, legislative changes and judicial rulings have shifted the balance of power in favour of the FCC. This is clearly evidenced by the 1996 Telecommunications Act which takes away the power of states to limit entry and gives the FCC sole power over universal service obligations (USOs).

In the area of mobile communications, responsibilities are likewise split between the FCC and the PUCs, although here again the FCC has pre-empted powers from the states in order to remove regulation which reduced competition and to enhance the possibility of nation-wide mobile services.

The FCC also has exclusive control of radio and television station licensing, whereas cable TV is licensed by federal, state and local regulators.

PUCs

Each state has a PUC, as does the District of Columbia. These bodies, which regulate telecommunications and other utilities, differ significantly both in structure, size and policies. In general the PUCs have adopted a more conservative approach towards competition and other aspects of regulation than the FCC and indeed one of the main arguments of the FCC, for federal pre-emption, has been a desire to increase the intensity of competition. However, some PUCs have been very much more innovative than others; for example Illinois, New York and Connecticut were active in encouraging competition at the intra-state level. On the other hand, other PUCs, particularly in states with relatively few telecommunications intensive businesses and large USOs, have been much less keen to foster local competition. It can be noted from Vogelsang's recent study[53] that the FCC has tried to use federal regulation as a means of diffusing the regulatory innovations introduced in the more progressive states.

[53] Ingo Vogelsang, 'Federal Versus State Regulation in US Telecommunications', WIK, Discussionsbeitrag Nr. 134, Bad Honnef, October 1994.

National Association of Regulatory Utility Commissioners (NARUC)

The National Association of Regulatory Utility Commissioners (NARUC) is an organisation of federal and state regulators although, in practice, it represents the interests of state regulators. It discusses and sponsors studies of regulatory subjects, organises federal-state meetings on regulatory issues, participates in regulatory proceedings and attempts to achieve co-ordination between the PUCs. However, it only becomes publicly involved in a particular issue where there is a near consensus between the PUCs.

Competition Authorities

Enforcement of antitrust laws is the responsibility of the Antitrust Division of the Department of Justice (DOJ), the Federal Trade Commission and the states. The DOJ was responsible for initiating the complaint against AT&T which eventually led to the divestiture of AT&T in 1984 under the terms of the Modification of Final Judgement (MFJ). It has responsibilities for telecommunications antitrust issues excepting those relating to certain types of mergers and in cases where issues are state specific.

National Telecommunications and Information Administration

Since 1934, the responsibility for radio spectrum management has been a federal matter. This assignment of responsibilities reflected the view that, due to interference problems, radio spectrum should be managed as a national resource. Radio spectrum management responsibilities are split between the FCC, which manages non-government spectrum, and the National Telecommunications and Information Administration (NTIA), which manages government spectrum. It can be noted that, while the FCC's procedures are open to public scrutiny, those of the NTIA are not. On the other hand it would appear that the NTIA's procedures are considered to be relatively quick in comparison with those of the FCC.

b. The changing balance of federal and state responsibilities in telecommunications

FCC pre-emption in fixed telephony

While the states continue to have responsibility for regulating certain aspects of telecommunications, their role has diminished in recent years and will further diminish as a result of the 1996 Telecommunications Act. The FCC has interpreted its responsibility for interstate regulation broadly and has used the principle of pre-emption to take away powers from the states.

Pre-emption has generally been justified on the grounds that the federal government:

- has the power to regulate interstate commerce and is required to ensure an efficient telecommunications network; and
- is responsible for managing certain scarce resources such as spectrum.

However, the primary motivation behind pre-emption has been the desire to promote competition. This reflects the fact that the FCC has, since at least the late 1960s, been interested in establishing a competitive telecommunications market whereas the PUCs have been more interested in ensuring that long distance charges should subsidise local and rental charges in order to satisfy universal service and related goals. Having said this, it can be noted that a limited number of PUCs, including those in Illinois and New York, have actually been in advance of the FCC in promoting competition and indeed the FCC has often developed its policies in the light of developments in these states.

Pre-emption was initially invoked by the FCC in order to liberalise the customer-premises equipment (CPE) market. Thus, in 1968 the FCC invalidated a CPE tariff[54] which it considered to be uncompetitive and in 1974 pre-empted all state regulations which were anti-competitive in nature. The FCC's pre-emption was upheld by the Fourth Court of Appeals. In 1980 the FCC pre-empted all state regulation of CPE, with the implication that CPE charges would be unbundled and separated from transmission service charges. This decision was upheld by the District of Columbia Circuit.

In 1982 the FCC pre-empted state regulation which interfered with the public's reception of Multipoint Distribution Service[55]. This was also upheld by the Court, as was a further use of the FCC's pre-emption powers in relation to cable TV two years later.

More recently the FCC has successfully exercised its powers of pre-emption in a number of areas including:

- centre marketing;
- enforcement of local exchange carrier (LEC) franchise boundaries;
- disconnection tariffs charged by a local phone company to interstate carriers;
- stopping imposition of structural separation requirements on the regional Bell operating companies (RBOCs) for enhanced services;
- forbidding the introduction of a caller-identification blocking service;
- taking away state entry requirements for paging.

However, the FCC has not always been successful in attempting to pre-empt state powers. For example, in 1986, the Louisiana Public Service Commission was granted the right to use different depreciation rates to those proposed by the FCC in monitoring LEC performance.

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54 In the current context, the term 'tariff' refers to both price and supply conditions.

55 A Multipoint Distribution Service is a one-way domestic public radio service rendered on microwave frequencies from a fixed station transmitting to multiple receiving facilities located at fixed points.

As noted in Appendix 7, there has been a recent tendency for the courts to take more care to preserve state jurisdiction.

Federal pre-emption in mobile telephony

Since the 1980s, when mobile communication services became of significance, the FCC has attempted to pre-empt state regulation of the cellular telecommunications market structure. Initially, these attempts were not entirely successful. However, in 1993 Congress established, in the Budget Act, a federal regulatory framework for Commercial Mobile Radio Services (CMRS) and Private Mobile operators. According to this Act, while the states may seek authority from the FCC to regulate CMRS rates, such authority would only be granted in a limited range of circumstances. In addition, the Act freed some federal government spectrum for PCS and other mobile uses and specified that the FCC should auction this spectrum.

The FCC would also like to pre-empt state CMRS interconnection rules. However, this may prove difficult, in part because, on some interpretations, the Telecommunications Act of 1996 places interconnection arrangements for CMRS in the hands of the states.

Federal pre-emption in cable

The FCC has also made moves to pre-empt state authority in the area of cable television. However, such moves have at times had unfortunate consequences. Thus, the 1984 Cable Act allowed the pre-emption of state and local authorities' rate regulation for those systems where the FCC judged there was "effective competition". However, as noted in Appendix 7, the Cable Act effectively freed the industry from state regulation but prevented competition developing. As a result cable TV rates increased significantly in real terms. In recognition of this problem, the Cable Television Consumer Protection and Competition Act of 1992 redefined "effective competition" thereby imposing federal rate regulation on most systems.

Conclusions on pre-emption

Experience in the United States suggests that the respective merits of federal and state regulatory responsibility will depend, in large measure, on the issue under consideration. Thus, in areas where externalities[56] are important, such as radio spectrum management or numbering, there may be a case for a significant degree of federal responsibility. On the other hand, where the best mode of regulation is uncertain there is a strong case for state regulation, perhaps in combination with federal regulation, since this will result in a variety of different approaches being adopted which will, in turn, show which ones are likely to work and which are not.

[56] An externality exists if the actions of one agent impose costs or benefits on another agent and these impacts are not taken into account through market mechanisms.

It would appear that the primary motivation for FCC pre-emption has been less a belief that the issue is one which would automatically be handled best at the federal level than the desire to promote competition in the telecommunications market and, in pursuit of that objective, get rid of state powers which restrict the degree of competition[57]. In fact many, although not all, of the cases of pre-emption fall into this category. Thus, the pre-emption of state powers in the case of both CPE and cable TV were designed to increase competition, while the attempt to remove the powers of the state body to set its own depreciation rates was also designed with this aim in mind[58].

Other factors increasing the role of the Federal Government

While the principle of federal pre-emption has had a significant bearing on the division of federal and state responsibilities, other factors have also played an important role. In 1984, following the MFJ, AT&T was required to relinquish its interest in all of the RBOCs. The resulting regulatory structure was based on the principle that, in potentially competitive markets such as the long distance and equipment market, competition should be encouraged whereas in other markets (e.g. local loop), regulation should try to replicate the effects of competition.

Regulatory responsibilities were divided as follows:

- AT&T interstate business - FCC;
- AT&T intrastate business - PUCs;
- RBOC local and intraLATA long distance services - PUCs;
- RBOC access and Open Network Architecture (ONA) - FCC.

As noted in the discussion of pre-emption, the dividing line between intra and interstate issues is by no means a clear cut one and the division of powers following the MFJ proved to be a contentious one in a number of respects. This division has now been modified by the 1996 Telecommunications Act which:

- opens up the local services market to any potential entrant;
- allows local exchange carriers (LECs) into the interexchange market;
- introduces mechanisms for limiting the interconnection charges imposed by LECs on interexchange carriers; and

[57] As noted by Covington & Burling in Annex 8, increased competition may, at some stage, reduce the need for any type of regulation and thereby serve as a check on the powers of the federal regulator.

[58] The FCC argued that Louisiana's depreciation rates would not allow the recovery of capital costs and would frustrate the creation of a competitive environment.

- allows the states to retain authority over interconnection rates, including universal service rates, subject to broad federal rules, such as cost based charges. Interconnection charges are submitted to the states for approval but the FCC can review such approvals.

The Telecommunications Act 1996 thus marks a significant move towards competition and away from regulation. In addition the Act increases the role of the federal government and the FCC and reduces the role of the state government.

c. Implications for a European Regulatory Authority

The increasing role of federal regulation in the United States has not, in general, been motivated by a belief that a particular function can be exercised more effectively at the federal level but rather by a desire to increase competition. In the European context the Commission has been instrumental in developing a range of measures to increase competition and has been in advance of the majority of Member States in its desire to create a competitive marketplace. However, if as is assumed in the remit of this study, NRAs will in future be efficient, independent bodies, the need for a European federal body to take additional actions to foster competition will be much reduced, although not necessarily entirely eliminated.

Other possible economic justifications for federal regulation include the existence of externalities, the potential reductions in transaction costs that result from only having to deal with one federal agency rather than a multiplicity of state ones (of particular relevance to licensing in the EU), and the existence of differences between states that act as barriers to the creation of a true single market. On the other hand, there are a variety of economic justifications for state level regulation, namely the importance of having detailed local information and taking local conditions into account (e.g. universal service obligations), the fact that the cost of conducting certain regulatory activities (e.g. granting rights of way or dealing with consumer complaints) at a federal level would be prohibitively high, and the possible benefits that might be derived from the existence of a discovery process whereby the activities and effectiveness of different regulators could be compared.

In practice, the division of regulatory responsibilities in the United States appears logical from an economic viewpoint. Thus, for example:

- issues such as spectrum management, numbering and standards, where externalities are likely to be important, are primarily decided at the national level;

- issues such as rights of way, where regulatory accessibility is important, are decided at the state level.

In contrast, spectrum management and numbering in Europe are primarily regulated at the state level, although ETO and ERO are both working to try to facilitate greater

harmonisation. While it is difficult to compare the effectiveness of regulation in different circumstances, it would appear to be the case that the United States has benefited from a federal (and hence harmonised) approach to numbering which has, for example, allowed the extensive development of nation-wide freephone services. Also, problems such as divergent allocations of radio spectrum, which can lead to interference, have been avoided.

One area where problems have arisen in the past in the United States has been the terms and conditions of interconnection. However, this may change as a result of the Telecommunications Act 1996, which gives the State regulators responsibility for approving rates as long as these comply with FCC principles[59]. Such an approach bears some similarity to the proposed Interconnection Directive and indicates how the appropriate division of state and federal regulation is likely to differ from issue to issue.

There are of course a number of important differences between Europe and the United States. For example, there is no legal equivalent to federal pre-emption in Europe; instead the Community has proceeded by way of establishing political positions, later written in harmonisation Directives, in order to approximate national regulatory frameworks and by adopting measures under Article 90, in each case leaving it to NRAs to implement the new framework. Various other differences also need to be considered:

- the FCC employs 2,271 people. While a significant proportion of these people are engaged in broadcasting regulation and spectrum management, and the numbers are boosted by a large number of lawyers arising from the adversarial nature of the United States regulatory process, a body of this size is unlikely to be feasible, or indeed desirable, in the European context;[60]

- although there are substantial differences in telecommunication networks in different states in the United States, these are relatively small compared to the differences between European countries. The extent of European differences, and of course language requirements, may reduce some, although by no means all, of the benefits which could be achieved through a European Regulatory Authority. For example, the potential scale economies which could be gained from a European Regulatory Authority may be less in a European context since, at least in some cases, it would be necessary to take these differences into account in carrying out policy making and regulation[61].

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[59] A similar approach is taken with regard to RBOC entry into the long distance in their own market area where the Act establishes a checklist of conditions which need to be met. Responsibility for monitoring these conditions rests with the states.

[60] A further breakdown of staffing and responsibilities is contained in Appendix 8.

[61] For example, in countries with developed competitive markets, there may be a considerable degree of scope for regulating operators using competition law. On the other hand, in countries where competitive forces are less developed there is likely to be a need for detailed regulation.

Nevertheless, the fact that United States experience shows that there is a case to be made for both federal and state regulation, and that the regulatory balance will depend on the issue under consideration, is of itself significant. Moreover, the potentially important role of regional diversity in showing what policies should or should not be adopted at the European level is also worth taking into account.

5.2.2 Canada

a. Current position

There are now nine regional telephone companies in Canada, which together form Stentor. By far the largest of these companies is Bell Canada which provides local service in Ontario and Quebec (which account for approximately 70% of Canada's population) and long distance services. There is some competition in the long distance market (e.g. from Unitel), and in the international market from resellers, but not as yet in the local market, although this is likely in the near future.

Following recent judicial and legislative decisions, all dominant telecommunications operators with the exception of Saskatchewan Telephone are regulated by the Canadian Radio Television Commission (CRTC) which, as its name suggests, is a federal body that is also responsible for regulating radio and TV broadcasting. CRTC regulation covers most areas of these companies' activities including:

- the authority to approve all interconnection agreements;
- open access for service providers;
- competition safeguards, although this responsibility is shared with the Bureau of Competition Policy[62].

Nevertheless, the provinces still have a role in the regulatory process. For example, tariffs remain highly unbalanced in Canada in order to satisfy the goal of providing an affordable basic universal service. This goal is supported by both the federal and provincial governments and is explicitly stated in the 1993 Telecommunications Act, which in many other respects is orientated towards increasing competition and ensuring that regulation is only used where it is efficient and effective. Since local telephony charges are set a long way below costs, long distance operators make a payment to local operators, which is effectively a combined access deficit and universal service contribution. While this payment is determined by the CRTC it is apparent that the provinces are able to exert pressure to ensure that rates in isolated areas remain affordable.

[62] It can be noted that while there is a shift towards increasing the role of competition law in the regulatory process its role is currently unclear in certain respects.

b. Broadcasting

As noted, the CRTC is also responsible for broadcasting regulation, although it is assisted in this activity by the Department of Industry and Heritage Canada (which is mainly responsible for content regulation). A major concern in the field of broadcasting has been the level of Canadian content and this has been principally influenced through controls on the cable companies (approximately 75% of Canadian households subscribe to cable television). It can be noted that, with the partial exception of Quebec, there has been little concern expressed by the provinces over federal control of broadcasting.

c. Rationale for the current division of responsibilities

Until recently, Bell Canada and British Columbia Telephone Company (BC Tel) were regulated by the CRTC, while operators in other provinces were regulated by provincial bodies. In the 1970s and 1980s there was an extensive debate in Canada over national telecommunications policy issues, such as the introduction of competition and the division of regulatory responsibilities. As a result of technological developments and the experience of other countries, the federal government became increasingly convinced of the benefits of introducing competition, whereas some provincial governments had been more concerned with other goals such as ensuring the continued provision of basic universal service. No changes took place until the Supreme Court decision on Alberta Government Telecommunications (AGT) was made in 1989.

The AGT case concerned the unsuccessful efforts of a provider of corporate network services to interconnect with AGT in the early 1980s. Eventually, in 1989, the Supreme Court ruled in favour of AGT, because of its sovereign immunity, but at the same time provided the federal government with the right to remove that immunity and thereby ensure that provincial operators were subject to federal regulation. After the AGT case, there was a significant increase in the role of the federal regulation and a corresponding decline in the role of the provincial governments. Indeed, following the 1993 Telecommunications Act, the role of the provinces is now largely a consultative one.

The rationale for the increasing role of the CRTC in regulation provides some parallels with the United States experience, since in both cases the federal bodies have attempted to take powers in order to assist the development of competition. Thus, it can be noted that AGT's action on interconnection was clearly uncompetitive and, more generally, that the federal government has been interested in encouraging competition while the attitude of provincial governments has been more equivocal. Moreover, it is evident from the progress that has been made in recent years that, in the absence of the shift towards federal regulation, the development of competition would have been held back. Gowling, Strathy and Henderson[63] also argue that federal authority is perceived by industry representatives to

[63] See 'Multilevel Regulation of Telecommunications: The Experience of the United States, Canada and Australia' prepared by Wilmer, Cutler and Pickering (Washington and Brussels), Gowling, Strathy and Henderson (Ottawa) and Freehill Hollingdale and Page (Sydney), for DGXIII of the European Commission, December 1995.

have resulted in greater efficiency and certainty and that it is appropriate in developing the information highway.

d. Implications for a European Regulatory Authority

With the EU now set on the course of liberalising basic voice telephony services and the provision of infrastructure, there may appear to be some broad similarity with the situation in Canada, particularly given the parallel emphasis on ensuring the maintenance of universal service. However, there are a number of differences between Canada and the European Community which should be noted:

- the relationship between the federal and provincial governments in Canada is fundamentally different from that between the European Community and Member States. In particular, the latter operate within a framework which emphasises the principle of subsidiarity;

- the extent of differences between European telecommunications markets means that there is a greater need for strong state level regulation in Europe than there is Canada;

- as in the United States, the move towards federal level regulation in Canada has been spurred by the desire, of the federal body, to encourage competition in telecommunications. On the assumption that European NRAs become independent and efficient, this reason for an extension of federal regulation is less relevant in the EU context;

- the Canadian approach may reduce the role of the discovery process which is still an important factor in the United States. On the other hand, given the number of countries which have opened the telecommunications market up to competition, it could be argued that a European Regulatory Authority would be able to gain information on best practice by examining performance in countries with competitive markets both within and outside the EU.

Together these points indicate that, if a European Regulatory Authority were to be introduced, it would not be likely to involve the same degree of diminution of state regulation as has occurred in Canada.

5.2.3 Australia

a. Current position

There are two fixed public telecommunication network operators in Australia, as well as three public mobile operators and a variety of service providers. The largest fixed public network operator is Telstra which is a government owned but corporatised company. The other operator, Optus, commenced operations following the 1991 Telecommunications Act.

Further liberalisation will take place from July 1997 when the current network duopoly will come to an end.

Telecommunications regulation is essentially a federal responsibility although the states have powers in certain areas such as land management and environmental planning. The principal regulatory body is Austel which is also responsible for competition regulation in telecommunications[64]. Other relevant bodies are the Australian Broadcasting Authority and the Spectrum Management Agency.

In contrast with some other countries, telecommunication carriers can also be suppliers of cable TV, and both Telstra and Optus have entered consortia for this purpose. Optus is using this as a means of establishing its presence in the local loop.

There has been some criticism of the way in which the telecommunications industry has been reformed. For example, it has been argued that the transition to full competition has been delayed too long and that, as a result, efficiency improvements and price reductions have occurred more slowly than might have been the case. On the other hand, the assignment of most regulatory responsibilities appears to have been quite successful, for example, in the area of resolving access disputes.

A further aspect of the Australian environment is that there is now a move towards using competition law rather than detailed regulation. Thus, the Competition Policy Reform Act, 1995, gives the Australian Competition and Consumer Commission the power to declare certain bottleneck facilities to be "essential facilities". However, it is recognised that, for competition law to be successful, the body implementing that law needs to have the appropriate information. Hence, Austel is required to develop a cost allocation manual and the carriers are required to provide separate accounts for network and other businesses to ensure that transactions are at arms length.

b. Implications for a European Regulatory Authority

Given the major role assigned to Austel, it is debatable how relevant the Australian experience is in illustrating the advantages and difficulties associated with a dual system of regulation. In addition, while it might be argued that the move towards competition law may have some relevance to the EU, it should be remembered that competition has now been established in Australia for a number of years and that it may be easier to rely on competition law in such an environment than in one in which rules regarding interconnection charges and other matters are still being developed.

[64] However, in 1997 this responsibility will be taken over by a body to be called the Australian Competition and Consumer Commission.

5.3 Lessons from Pan-European and Community Bodies in Other Sectors

Pan-European and Community bodies in other sectors include:

- the European Air Traffic Control Harmonisation and Integration Programme (EATCHIP) which was launched in 1990;
- the European Environment Agency which came into force in 1993;
- the European Medicines Evaluation Agency (EMEA) was established in 1995;
- the Office of Harmonisation (trademarks office);
- the European Patent Office;
- the European Monetary Institute (EMI).

These bodies, which constitute possible models for the form and functions of a European Regulatory Authority, and the way in which it might be formed, are discussed in Appendix 6. In that appendix it is suggested that the analogies which can be drawn between such bodies and a European Regulatory Authority are somewhat limited given the generally restricted nature of their operations, and the fact that these may also be quite different to those of a European Regulatory Authority. Consequently, a range of legal and operational issues will need to be addressed in setting up and running a European Regulatory Authority which have not been encountered in running these other bodies.

Nevertheless, an examination of the various bodies is useful in highlighting some of the driving forces towards greater federalism and in indicating some of the operational problems which would need to be dealt with by a European Regulatory Authority.

Possibly the most relevant model is the Office of Harmonisation (trademarks office) which was formed under Article 235. This has the power to make decisions and has a quasi-judicial function.

Another interesting parallel, though yet to be concluded, is the future European air traffic control programme, developed as part of EATCHIP. The reasons for establishing such a body is that there are significant externalities to be gained from European co-operation.

In practice a number of operational problems have been encountered in establishing and running these various bodies. These problems are discussed in Appendix 6 and their

relevance to a European Regulatory Authority is considered in Chapter 6. A summary is provided below:

- the choice of official languages. The use of different languages proved to be a problem in the establishment of the Office for Harmonisation. The need to carry out its functions in different Community languages would clearly impose additional costs on a European Regulatory Authority;

- the choice of location. There were problems encountered in the setting up the Office of Harmonisation and this is likely to be relevant in the setting up of a European Regulatory Authority;

- limited impact. Where systems are not mandatory, a European body might only have a limited impact on European integration. This is a potential problem with the idea of a European Telecommunications Institute which was suggested by Forrester, Norall & Sutton in a recent report for DG IV;[65]

- business complexity. It has been noted that the problem of co-ordinating a collection of businesses operating in quite different environments is likely to be a significant problem in aviation (see Appendix 6). While the analogy with telecommunications regulation is not a precise one, it can be argued that the differences in telecommunication markets between Member States are sufficiently pronounced as to set limits on the desirable degree of harmonisation of legislation and regulation;

- overlapping roles. Where the jurisdiction of a pan-European body is not mandatory, as in trade marks and patents, potential users have a choice between going to a national body or the European body. The choice will be affected by issues such as charges and the speed of decision making. In addition, in certain areas, the national and pan-European bodies may differ in their responsiveness to the needs of the customer. These factors could result in one or other of the bodies being by-passed.

5.4 Convergence

As is widely recognised, we are at the early stages of "the information society". Rapid progress in digital technology, fibre optics, satellite systems, compression technology and encryption has transformed the way in which voice, data, images and video can be transmitted and stored. When converted into digital form, the distinction between types of information effectively becomes blurred as each becomes simply a stream of bits to be delivered to the office or the home by a variety of communications infrastructures: fixed

[65] See 'The Institutional Framework for the Regulation of Telecommunications and the Application of EC Competition Rules - Report to the European Commission (DGIV), Forrester Norall & Sutton, 1996.

and mobile telephony systems, cable television networks, and terrestrial and satellite broadcasting systems.

Due to the use of separate technologies and means of delivery, the existing communications methods have developed separately, a process which has both encouraged and been reinforced by distinct regulatory institutions and frameworks. In the digital era, however, this one-to-one correspondence between the delivery system and its content breaks down. New regulatory frameworks may be required if this convergence process is to be completed. For example, OFTEL, the United Kingdom Telecommunications regulator, is to take a role in the regulation of conditional access service for digital television under regulations proposed by the United Kingdom Government in order to transpose the EU Advanced Television Standards Directive (95/47).

The Community has already begun to respond to convergence, for example by requiring Member States to liberalise the use of cable networks and allow the carriage over such networks of all liberalised telecommunications services. Restrictions on the carriage of basic voice services will also be removed in most of the Community as from 1 January 1988.

By contrast, no action has yet been taken at Community level to remove restrictions (if any) imposed by Member States on the carriage of video, or entertainment services, over public telephone networks. However, the Full Competition Directive requires the Commission to carry out, by 1 January 1998, an assessment of the situation regarding the remaining restrictions on the use of public telecommunications networks for the provision of cable television and related services.

Under the ONP rules, and under the Services Directive itself, a prime objective has been to ensure open access to public telephone networks. The same issues are likely to arise in due course in relation to other delivery mechanisms. For example, in the area of digital television, while a prime motivation for regulation in the analogue era (that spectrum was in highly limited supply) has become less important as a result of the greater spectrum efficiency enabled by digital compression, other possible reasons for regulation have come into sharper focus. For example:

- universal service, or the provision of service throughout the Community at a reasonable price;

- non-discriminatory conditional access, navigational and subscriber management systems and listings;

- proper control over personal data gained by developments in interactive systems.

In the light of greater substitution between different systems of delivery, the logic of separate, and often diverse, rules of content carried over different networks will also need to be reviewed, and indeed this issue has already been much discussed in the European

Parliament during debates on the proposal for a new Television without Frontiers Directive and in relation to concerns over the distribution of pornography on the Internet.

The Commission is studying the regulatory implications of convergence in order to prepare a response[66]. The KPMG report to the Commission[67], addressing public policy issues arising from telecommunications and audio visual convergence, considers that the European Union will need to define a regulatory vision for the future which supports market-led developments in the convergence industries and to develop practical transition arrangements which progressively migrate current regulatory regimes to the new vision.

a. General issues raised by convergence

The fundamental principle of freedom of circulation and the right of establishment, especially free movement of transfrontier services, is impeded by the existence of disparities between Member States in relation to ownership rules. Restrictions placed on public telecommunications operators are an issue in the convergence debate and this will become more important as public telecommunications operators seek to provide services containing an audiovisual content.

At present, services are commonly treated as either telecommunications service or broadcasting services. Convergence has led to a blurring of definitions. For example, whether video on demand is treated as "broadcasting" or "telecommunications" differs between Member States. Regulation tends to be based on the technology of delivery with some subjective assessment of content, and often leads to an unlevel playing field.

A number of issues related to content regulation are also raised by convergence. These include the broad framework of (positive and negative) content regulation, the challenge that the Internet poses to national definitions of, for example, taste and decency, as well as socio-political concerns such as the extent of universal service obligations and the role of public service broadcasting.

It can be noted that different approaches have been adopted in the various Member States with regard to convergence issues. For example:

- in the United Kingdom, the incumbent telecommunications operator is not at present allowed to provide broadcast entertainment services over its own network, although it is allowed to provide video-on-demand;

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[66] For example, KPMG has recently completed a study for the Commission of the public policy Issues arising from telecommunications and audiovisual convergence. A second study addressing convergence from a telecommunications perspective is being carried out for the Commission by Squire, Sanders and Dempsey and Analysys which should be finalised in late spring 1997.

[67] Ibid.

- in Germany, approximately 95% of the cable TV network is controlled by the incumbent telecommunications operator;

- in most Member States, the provision of public voice telephony over cable TV networks is prohibited.

The fact that regulation differs between Member States may act as a deterrent to those companies wishing to develop pan-European strategies.

A further issue raised by convergence is the problem of overlapping jurisdictions. This problem is apparent in the United Kingdom, for example, where there are over 20 bodies which are responsible for regulating the various information industries. An implication of overlapping jurisdictions is that companies may need to deal with a number of bodies in relation to a specific issue and thus incur additional transaction costs and may be subject to delays. The existence of many regulators, combined with the difficulty of determining who is responsible for particular aspects of regulation, raises the costs of companies wishing to develop converged services.

It is possible that this problem may intensify in the future. Thus, OFTEL, the United Kingdom telecommunications regulator, recently released a Consultative Document on the Broadband Switched Mass Market which specified its preliminary views on regulation in this area. This paper suggests that OFTEL's regulatory role should stretch into broadcasting, the technologies used by service providers, and the technologies employed by suppliers of set top boxes, a development which would lead to encroachment into the role of other regulatory bodies.

These issues highlight the fact that convergence provides various challenges to regulation at the national and international level.

b. Need for regulation at the European level

While competition will probably turn out to be the single most important tool for influencing the impact of convergence, ex-ante guidance and regulation and ex-post monitoring are also likely to be needed in this area. This may require more involvement at a European level, including:

- providing a partial solution to the problem of overlapping jurisdictions by giving the NRAs for telecommunications control over infrastructure issues while giving other bodies control over content. (As noted already, the federal telecommunications regulators in the United States and Canada also have responsibility for many aspects of broadcasting regulation). However, a potential problem here is that control of content could be used as a means of restricting competition since stringent content regulation would reduce the willingness of companies to invest in infrastructure. To overcome this problem, the Community

may need to vigilant over the way that content regulations are applied in Member States.

- with convergence, the number of sector-specific regulators, and their respective roles, will need to be re-examined.

- economic allocation of spectrum. Digital compression techniques have led to an increase in the capacity of delivery systems, which reduces the need for spectrum management. However, this trend is partly offset by the development of more sophisticated, bandwidth-hungry applications. Convergence will increase the need for a more co-ordinated approach to frequency allocation at the European level to ensure the provision of pan-European telecommunications and audiovisual services.

- having a unified licence for companies that are developing converged services at a national (and European level for pan-European services).

While much work remains to be carried out on all these issues, one fact is sure: if a European Regulatory Authority is created, it has a possible and indeed probable role in the development of policy for, and regulation of, forms of delivery systems within the Community over and above conventional telephone networks. There will also be a need to ensure that content regulation does not needlessly restrict competition.

Some of these convergence-related activities are analogous to areas identified by survey respondents as requiring the involvement of a European Regulatory Authority. The responsibilities of a European Regulatory Authority could, therefore, extend into the areas listed above, working within a policy framework laid down by the Commission.

5.5 Conclusions

In Sections 5.2 and 5.3 we looked at the telecommunications industry in other countries and existing initiatives in other industries in Europe. On the basis of these case studies, we identified a number of reasons why there has been a move towards an increasing role for federal bodies, particularly in the United States and Canada. For example:

- in the area of telecommunications, there is a growing awareness that there are significant benefits associated with the creation of a competitive marketplace. In both the United States and Canada, federal authorities have been particularly interested in introducing and increasing the extent of competition whereas the state and provincial authorities have, with some exceptions, shown less interest;

- it has been recognised that some functions are better undertaken at a federal level because of externalities. The clearest example of such an activity is radio spectrum management, although numbering would also appear to fall within this category;

- in other areas, for example licensing, the creation of a federal body can bring important benefits in terms of reducing transaction costs and delays;

- in the United States, where there is a dual system of regulation, the FCC has been assigned the responsibility of setting the policy framework in some areas (e.g. competition policy, interconnection charges) while the state regulators are responsible for monitoring whether these conditions are met. Assigning the FCC a role in these areas may help to ensure that a consistent approach is adopted in each state which in turn may generate a number of benefits.

These factors suggest that there may be an important role for a European Regulatory Authority in Europe. However, there are already a number of European bodies in telecommunications and it needs to be considered how far these bodies fulfil the various roles which a European Regulatory Authority might undertake.

The nature and role of existing European bodies involved in telecommunications was considered in Chapter 2 of this Report. We note that there are existing bodies which already carry out a number of the functions which a European Regulatory Authority might undertake, e.g. in the areas of number harmonisation and spectrum allocation. Nevertheless, the Survey we carried out as part of this Study identified a number of gaps in the current regulatory framework for telecommunications in Europe, as described in Chapter 2. While the existing bodies have played some role in reducing transaction costs and delays in certain areas (e.g. ETO's one stop licensing procedure), the Survey indicates that there are areas in which the current activities of European bodies involved in regulation may prove insufficient to meet market needs in relation to certain aspects (particularly pan-European aspects) of areas such as interconnection, numbering or licensing.

6. LEGAL AND OPERATIONAL ISSUES

6.1 Introduction

In this chapter we discuss legal issues concerning the creation of a European Regulatory Authority, including those issues raised by any decisions on the geographic reach of a European Regulatory Authority and also issues relating to the specific functions of a European Regulatory Authority suggested by Survey respondents. We then discuss some of the general operational issues that would need to be considered in creating a European Regulatory Authority.

6.2 Legal Issues Concerning the Geographic Reach of a European Regulatory Authority

As mentioned briefly before, the breadth of membership of a European Regulatory Authority would need to be considered. Membership of a European Regulatory Authority could be limited to EU Member States (and the EEA), but that might be seen to be a retrograde step as other existing bodies, such as CEPT, already enjoy wider membership. This issue is addressed in a previous report[68] which suggests that a European Regulatory Authority would have to fit into one of the following institutional models:

- *"An EU Authority under the supervision of the Commission, whose structure would be similar to that of other existing or trans-European institutions, established under Article 235 legislation";*

- *"an EU Authority that would be totally independent, and outside any control by the Commission or other EU institutions";*

- *"an independent Authority whose membership would not be limited to EU Member States".*

That report also differentiates a European Regulatory Authority from other existing bodies by stating that a European Regulatory Authority:

- *"would probably have to include non-EU members";*

- *"might need to take permanent charge of some areas currently handled (or at least supervised) by the Community"*

[68] See Stanbrook & Hooper, "Legal and Institutional Issues Raised in Preparing for the Full Liberalisation of the Telecommunications Sector", Report to the European Commission, 1994.

- *"for political reasons (at least) would have to be independent of the Commission [especially if it includes non-EU Members]".*[69]

a. Can the European Regulatory Authority admit non-EU Members?

Under Article 210 of the EC Treaty, which states *"The Community shall have legal personality"*, the Community enjoys the right to establish contractual links with third countries if necessary to achieve Treaty objectives. The authority to enter into such agreements need not be explicitly stated in the EC Treaty. As mentioned in Section 4.2.1, it may arise implicitly provided the Community has the power to attain a specific treaty objective and the international agreement is to further that Community goal[70].

However, it was not clear until Opinion 1/76[71] that the Community had the authority to establish an international agency that could enforce the agreed provisions between the Community and a third country. In that case, the ECJ held that the Community not only had the power to create an agency but that it could confer the institution with "powers of decision" provided they were *"appropriate for the objectives pursued."*

The *"appropriate powers of decision"* were stated to be in the case itself limited to delegation of executive authority, and the ECJ raised, but did not address the issue of conferring policy-making authority to international bodies. It stated, however, that transfers of authority should not constitute *"a surrender of the independence of action of the Community in its external relations"* nor a *"change in the internal constitution of the Community by the alteration of essential elements of the Community structure."*

Opinions 1/91 and 1/92[72] also suggest that the Community may not transfer legislative or judicial powers to an international body if the body makes rules that directly affect the allocation of responsibilities and powers defined in the EC Treaty.

In line with the conclusions of Chapter 4, any powers to be delegated to an international body would probably need to be limited to executive functions which would not alter the internal constitution of the Community. In theory, the transfer of executive powers in itself

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[69] In a separate report for DGIV, Forrester Norrall & Sutton have stated that possible options for a European Regulatory Authority include, "a wholly independent Authority, an Authority answerable to the Community institutions, a consolidation of the Commission's functions based on its competence in the field of Competition Law and Policy, and a framework centred on the Commission's competition powers". Because of legal difficulties, Forrester Norrall & Sutton also contemplate the possible interim solution of a European Telecommunications Institute ("ETI") which initially would not have regulatory or supervisory functions, but could be "responsible for strengthening of co-operation between the NRAs and co-ordination of the policies, monitoring single market legislation, consolidating the activities of various committees and the holding of consultations". ETI could also formulate opinions and submit recommendations.

[70] Cornelius Kramer and Others, Joined Cases 3, 4 and 6/76.

[71] Opinion 1/76, given pursuant to Article 228(1) of the EEC Treaty, involved a draft agreement to establish a European laying-up fund for inland waterway vessels.

[72] Opinions 1/91 and 1/92 both concerned the EEA Court under the EEA agreement.

could upset the balance of the Community structure, but the Community could preempt this by preparing European common positions on issues after consulting Member States before any vote is cast in meetings by the international body.

b. *How would a European Regulatory Authority with a wider membership be formed?*

Assuming that authority to delegate the necessary powers to an international body exists, the focus shifts to the mechanism by which authority may be delegated. A regulation adopted under Article 235 could not fully achieve the intended result, as regulations according to the Treaty are binding in their entirety "in all Member States." It therefore applies only to the Community and its Member States. The third country could not be bound by the terms of the regulation without more. Thus, any regulation creating a European Regulatory Authority with third country participation would to be accompanied by, or at least foresee, a separate act to bind those third countries.

The ERTA case[73], however, held that *sui generis* acts by Community institutions enable the Community to enter binding agreements with third countries. The Treaty itself contains both specific provisions for Community co-operation with third countries in certain areas (e.g. Article 129c(3) for the promotion of "projects of mutual interest and to ensure the interoperability of networks") and a general provision (Article 228) providing for the conclusion of agreements between the Community and one or more States or international organisations. This procedure involves the Commission, the Council and the European Parliament. Arguably, this Article does not directly apply in this case as the Treaty does not explicitly provide for the conclusion of agreements with non-EU states for the regulation of telecommunications, but we suggest it is appropriate that these procedures are followed. In some cases, the specific provision makes explicit reference to Article 228 (see Article 130m [research and development co-operation] or Article 130r(4) [environmental cooperation]). Even in the absence of such a specific reference within the provisions of Article 129c(4) in relation to trans-European telecommunications networks, it seems likely that Article 228 would still form the basis for such an agreement with third countries.

c. *Examples of Participation by non-EU members in existing agencies*

The Community agencies discussed at Section 4.3.1b of this report do not provide for participation by non-EU Member countries. On the other hand, as discussed in Section 4.3.1b, Member States themselves are allowed to participate in varying degrees in the decision-making of these bodies.

EU and non-EU member states do, however, participate in the range of bodies and agencies at a European level. The CEPT and the Community Patents Office are examples of bodies

[73] Commission of the European Communities v. Council of the European Communities, Case 22/70.

whose membership extends and, in the latter case, is permitted to extend according to the terms of its Convention beyond Member States of the Community[74].

The European Radiocommunications Office is an example in the telecommunications area of a body with specific tasks, whose membership extends to all European countries who have agreed to ERO Convention[75] as well as operators, manufacturers and service providers involved in telecommunications in those countries. Although ERO strives to achieve consensus among its members, it has no executive decision-making power. Article 18 of the ERO Convention specifically states that the Convention will not interfere with the sovereign right of each member state to regulate its own telecommunications.

Although the Community Patent Convention has yet to be ratified, the Community Patents Office, as envisaged by the Convention, will make and carry out executive decisions on patents. Non-EU nations may join by invitation of the EU countries on terms and conditions agreed to by the Contracting States and the third state. The Convention is an agreement between the Community Member States rather than one between the Community and a third country.

d. Conclusions on the geographical reach of a European Regulatory Authority

The European Regulatory Authority might be established as an international body having executive responsibilities in defined areas of activity. Such delegation should not alter the Community's structure and a co-operative mechanism to ensure that due regard is taken of Community policies on telecommunications would need to be developed.

A European Regulatory Authority could also be established as a Community agency, for example, by Regulation. That Regulation might also foresee invitations for non-EU countries to join the agency. This could be done by binding agreements with the Community, probably based on Article 228. The involvement of third countries would not need to be foreseen, however, in the Regulation as the Community has the implicit power to contract with third countries if the agreement furthers a Community objective. In this scenario, European Regulatory Authority powers also would be limited to executive decision-making and the Community would need to develop a mechanism whereby common positions after consultation with Member States would be adopted.

6.3 Legal Issues Relating to Specific Functions of a European Regulatory Authority

In this section, we deal with specific issues raised by the Survey, examining in each case the legal viability of recommendations made by Survey Respondents.

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[74] Within the overall CEPT structure, telecommunications regulatory issues are handled within ECTRA. Certain technical tasks in the fields of frequencies, licensing and numbering are conferred upon the European Radio Communications Office (ERO) and on the European Telecommunications Office (ETO).

[75] Convention for the Establishment of the European Radiocommunications Office (ERO), The Hague, 23 June 1993.

a. Interconnection

Respondents to the Survey call for some interconnection functions to be transferred to a European Regulatory Authority in order to further the single market and to assist in the establishment of trans-European networks. Others argue the case on the grounds that too much discretion on interconnection terms is allowed at national level, even under the proposed Interconnection Directive. By way of example, respondents argue that the Commission, or a European Regulatory Authority, needs to get deeper into the detail of cost accounting issues if the single market is to be achieved.

Some options for the role of a European Regulatory Authority with respect to interconnection are suggested in Section 3.3. They are as follows:

- a fully empowered body, determining, at a more detailed level than does the proposed Interconnection Directive, the cost basis for interconnection and either determining, ex-ante, a more detailed framework for prices and other interconnection terms or, alternatively, acting as the body to which negotiating parties can appeal if they fail to agree interconnection terms;

- a body which would intervene in disputes which the NRAs cannot resolve to the satisfaction of the negotiating parties, or to which the NRA itself could pass on disputes for resolution;

- a body with a stronger harmonisation role than existing pan-European institutions (such as ECTRA) and which may also act as a forum for inter-NRA discussions and cross-fertilisation of experience, while leaving regulation and enforcement to NRAs.

The first option in relation to interconnection would, in our view, justify and require the establishment of a European Regulatory Authority. Clearly it raises issues under the subsidiarity principle, but these could be overcome if political consensus can be achieved. Under the delegation doctrine, the Commission would determine the high-level policy objectives, as it has done under the proposed Interconnection Directive, but a European Regulatory Authority could undertake a day-to-day role in the determination and application of interconnection rules.

The second option presents a legal difficulty for reasons discussed in Section 4.3.2. Moreover, under the proposed Licensing Directive, Member States must already provide a national procedure for making appeals regarding the decisions of an NRA to an independent body. The proposed Interconnection Directive also includes provision for "conciliation" at Community level but this falls short of a full appeal process whereby a decision of an NRA might be overruled by the Commission or by the ONP Committee.

The third option might be achievable under the existing framework and without a European Regulatory Authority if:

- existing Community agencies, such as the ONP Committee, become more visible and pro-active and perhaps if they are further resourced (for example, with a larger standing secretariat); and

- the system of work orders and mandates between the Commission and organisations like ETO were used more widely and regularly and worked under tighter timetables.

b. Licensing

Respondents to the Survey make mention of the activities of ETO, but point out that the work ETO is doing in the field of one-stop shopping for licences is presently focused on co-ordinating national applications for licences for a limited number of telecommunications services.

Operators interested in establishing trans-European networks see advantages in being able to apply for a single licence authorising the establishment and operation of systems throughout the Community. They argue that, even under the proposed Licensing Directive, individual licences remain necessary for the establishment of networks or systems in each Member State and that a number of constraints or barriers remain, for example:

- procedures differ from country to country; two extreme cases are the UK and Germany. The UK works out licences in a very detailed fashion, while for example in Germany, licences are much shorter; rights, restrictions and obligations in Germany are instead established by laws and regulations.

- there are differences in levels of compliance and enforcement between Member States; differences in levels of enforcement are important as, even if formal rules are harmonised, the differences may detract from the Single Market.

- in a number of countries it is not always clear what information is required for licence applications, and the application process can be cumbersome. In others, the process is seen as more easy going. This can be an important practical problem; the time taken to prepare a licence application may also vary greatly.

Some survey respondents argued that obtaining 15 separate licences would impose a significant additional burden on operators in terms of finance and the time taken to be granted a licence. At the same time, it was argued that there would be differences in licence conditions, making the life of an operator more difficult. Significant delays and

difficulties in obtaining licences could work against achieving a Single Market and the rapid establishment of the Information Society.

Further progress could be made in this area by further resourcing ETO to allow it to undertake a larger work programme or, perhaps, by providing a larger standing secretariat for ECTRA. Some respondents, however, consider this to be insufficient.

Possible approaches include:

- replacing national licensing altogether in favour of Community wide licensing by a European Regulatory Authority

- establishing parallel national and Community schemes (rather as with the European Trade Mark and European Patent);

- distinguishing between situations having a Community dimension and those that do not, particularly in the context of trans-European networks, and providing an improved means for obtaining a single Community Licence, perhaps from a European Regulatory Authority in the latter case. Merger control serves as an example of a divided process, as mergers having a Community dimension are reviewed by the Merger Task Force of DG IV, while those that do not remain the responsibility of the relevant Member States.

The second or third of the approaches identified above are likely to be more attractive to Member States and more consistent with the principles of subsidiarity and proportionality. The first approach may be difficult to achieve without an amendment to the Treaty (and again would require political consensus).

c. Numbering and number portability

Sections 3.6 and 3.10.4 relate to numbering and number portability[76]. Some interviewees are looking for:

- greater co-ordination of numbering for the long term creation of a European numbering space and in defining general rules for the management of numbers by NRAs;

- the formation of a European Regulatory Authority to resolve number validation disputes between operators and NRAs;

[76] For information on the Commission's numbering policy, see Green Paper on a Numbering Policy for Telecommunications Services in Europe, COM (96) 590.

- true pan-European numbers for services such as freephone.

Some interviewees also stressed the need for harmonisation of the methodologies used to allocate the cost of introducing number portability in each Member State in order to promote the Single Market.

In our opinion, there are no legal constraints, other than the general issue of subsidiarity (which seems relatively minor here), to these activities being undertaken by a European Regulatory Authority. Alternatively, however, it may be possible to adopt a middle solution by promoting the role of the Commission through the work orders in the field of numbering given to ETO, as well as for its work with the ECTRA Project Team on Numbering and initiatives such as the European Numbering Forum.

d. Allocation and management of radio frequencies

Section 3.5 shows that some respondents to the Survey want more effective co-ordination of radio frequencies at Community level, particularly in the area of satellites. Others are content to rely on existing arrangements, a line apparently endorsed by the Council in the context of S-PCS.

At one extreme, a European Regulatory Authority could take over responsibility for allocation of the radio frequency spectrum from Member States, but that is likely to be resisted on a number of grounds including subsidiarity and could possibly require a Treaty amendment.

Alternatively, a European Regulatory Authority could take a pro-active role in the co-ordination of the radio spectrum and the identification of new areas of the spectrum for new services or, as a lesser step still, the Commission could continue its process of funding mandates for work in this area by a European Regulatory Authority and to deliver recommendations on spectrum issues. These last two activities would not appear to raise major issues under the head of subsidiarity, though the former could lead to a charge of duplication of work.

e. Funding and enforcing universal service obligations

Section 3.10.3 shows that one half of those responding took the line that a European Regulatory Authority should have a role with respect to universal service obligations, often for fear that differing approaches to calculating the cost of USOs, as well as related contributions, in different Member States could tilt the playing field in favour of the incumbent or work against the concept of the Single Market. It should be noted that the Survey took place before the publication by the Commission of the criteria to be used in assessing national universal service schemes and providing guidelines for the operation of such schemes, including detailed guidance with regard to the costing and financing of universal service.

The organisation of USOs on a true Community-wide basis, so that for example subsidies might be paid by a German operator to meet the cost of universal service in Greece, is not currently contemplated. The only role of a European Regulatory Authority, therefore, might be in the area of developing a harmonised framework for the calculation of USO costs and harmonised rules for universal service funds within Member States, although this is already occurring via the proposed Interconnection Directive. There would not be any legal impediment to a European Regulatory Authority taking on that role provided that it did not extend to the making of actual policy decisions; also subsidiarity does not appear to be a major barrier.

6.4 General Operational Issues

6.4.1 Roles and Potential Operational Problems of a European Regulatory Authority

In this section we examine some of the operational problems which might be encountered by a European Regulatory Authority. We initially look at the possible roles of a European Regulatory Authority and the operational issues and problems which would need to be addressed in performing these roles, including the relationship between a European Regulatory Authority and existing European telecommunications bodies (a discussion of these bodies and their roles is provided in Appendix 5).

A European Regulatory Authority could perform one or more of a number of alternative roles:

- Under an ***ex-ante role***, high level policy would continue to be determined by existing Community policy making institutions although a European Regulatory Authority could be involved in specifying the detailed rules to implement the agreed policy framework and ensuring consistency across different regulatory areas;

- Under an ***ex-post role***, a European Regulatory Authority could have a role in dispute resolution on a case-by-case basis;

- As a ***European resource centre***, a European Regulatory Authority could assist in the administration and allocation of Community telecommunications resources (such as numbers, licences and frequencies);

- Drawing on best practice throughout Member States, a European Regulatory Authority could assist the NRAs in an ***advisory role*** by providing technical expertise.

Below, we first consider each of these roles in turn, and then move on to highlight some general issues that would need to be considered, regardless of the roles assigned to a European Regulatory Authority.

a. Ex ante role

An ex ante role for a European Regulatory Authority could involve formalising existing policies and developing new policies. However, this role raises a number of important issues as:

- granting a high level policy role to a European Regulatory Authority would require an amendment to the EC Treaty (see Section 4.3); and

- the Community has already taken measures, principally through the use of Directives, to liberalise and harmonise telecommunications, whilst the Commission is increasingly developing guidelines to stimulate best practice amongst NRAs.

These points raise doubts over the need or legal appropriateness, at the current time, of creating a European Regulatory Authority with such a policy role.

As an alternative to being a policy formulating and development body, a European Regulatory Authority could be assigned the more limited role of specifying existing policies in more detail. Thus, in the area of interconnection charges, the body could be involved in the detailed specification of the costing methodology and of the costing allocations to be used for individual asset categories, while in the area of accounting separation the body could have responsibility for defining, at a disaggregated level, what are retail and what are network costs within an overall policy framework provided by Community law.

Resource requirements are an important concern in the creation of a European Regulatory Authority, and issues to be resolved include both the numbers of staff needed and the specific technical expertise required. Some of the issues that might be relevant to this body, such as the detailed specification of the framework to calculate interconnection charges and to produce separate accounts, would require a considerable number of highly skilled people. It can be noted, for example, that OFTEL, in the UK, employs seventeen people in its economics accounting team and, given the need to develop a framework which is appropriate for countries with very different telecommunications markets and information systems, the resource requirements could be significantly higher. Staff numbers for bodies involved in telecommunications are provided in Table 2.2 as an illustration.

While many respondents argued the case for a greater degree of harmonisation, others pointed out that there was a danger in too much harmonisation in some areas. A particular concern was that, in countries in which competition is established, a European Regulatory Authority could result in regulation replacing a market driven approach, e.g. in the determination of cost floors for retail services and the determination of interconnection charges for competitive services.

A further concern is the potential overlap of a European Regulatory Authority with existing European bodies such as ETO, ERO and ETSI. A number of possible solutions might be adopted, including:

- incorporation of these bodies into a European Regulatory Authority. However, this raises a number of issues such as the fact that these bodies have a membership which stretches beyond the EU;

- establishment of formal links between the existing European bodies and a European Regulatory Authority which would enable them to provide advice in their specialist areas to a European Regulatory Authority. It can be noted that the Commission has entered into Memoranda of Understanding with both ETO and ERO to allow the funding of work orders for the Commission;

- establishment of a European Regulatory Authority whose function it would be to provide specialist advice to the Commission;

- limitation of the issues covered by a European Regulatory Authority to those which are not examined by ERO, ETO and ETSI (e.g. interconnection). In this context, it can be noted that few survey respondents believed that a European Regulatory Authority should be involved in standards;

- a mixed option whereby a European Regulatory Authority might take over certain executive tasks (such as the administration of the licensing one-stop-shop) from these bodies but the latter would retain their role in examining technical issues.

b. Ex post role

As an alternative, or possibly in combination with an ex ante role, a European Regulatory Authority might be assigned a role in dispute resolution but, for the reasons discussed above, that would have to be an informal role, to which parties voluntarily submitted, rather than as part of a conventional legal process. Such a role nonetheless raises a number of issues.

An important issue concerns national approaches to the detail of regulations, which are likely to differ to a very significant degree. For example, in the case of interconnection charges, which under the proposed Interconnection Directive are required to be cost based, estimated costs may vary according to the cost standard used, pending the development of guidelines and best practice within the Community by the Commission, and the derivation of individual cost allocations and apportionments. It would require considerable time and effort for a European Regulatory Authority to get to grips with any individual cost system let alone the cost systems of each Member State. One way of reducing this problem would be for the framework for cost systems to be specified at a European level or at least that a requirement exist for information to be produced in a certain format which would allow

comparison between Member States. However, this would impose substantial costs on network operators.

c. European Resource Centre

As a European resource centre, a European Regulatory Authority could assist in the administration and allocation of Community telecommunications resources (such as numbers, licences and frequencies). This role might also build on the administrative support functions already carried out by existing institutions (e.g. the licence one-stop-shop provided by ETO).

Issues which need to be considered in looking at the creation of a European Regulatory Authority acting as a European resource centre include:

- whether Member States would be required to participate in the centralised allocation of European resources or would do so on a voluntary basis;
- how the roles of such a body and those of ETO and ERO could be combined;
- the nature and extent of demand for pan-European resources (such as pan-European freephone numbers, operator licences and frequency allocation).

d. Advisory role

The introduction of competition into monopolistic telecommunications markets will mean that NRAs in these countries will need to deal with a range of important issues. A potential role for a European Regulatory Authority would be to provide advice on telecommunications issues; thus, in effect, it would act as a consultancy service. Alternatively a European Regulatory Authority could collect information on different aspects of countries' performances (e.g. retail and network charges, operators' market shares) which could be made available to operators.

Issues which would need to be addressed in establishing a European Regulatory Authority with these roles include the following:

- the need to determine whether there is any demand for a body, the role of which is merely to collect information and produce statistics;
- given that there is a demand, the difficulty in forecasting level of activity and the skilled resources to satisfy this demand.

e. Other issues

It is also worth briefly highlighting some other issues which need to be considered whatever roles are assigned to a European Regulatory Authority:

- the experience of existing pan-European bodies has highlighted the problems arising from the use of different languages. However, while this would clearly impose additional costs on such a body, it could hardly be regarded as an insurmountable hurdle;

- the need to determine an appropriate location might delay the establishment of a European Regulatory Authority. However, since it would be likely to take some time to establish a body with significant ex ante or ex post functions, this would be unlikely to be a significant problem in practice. On the other hand, if it were decided to integrate ETO and ERO in a European Regulatory Authority this could mean changing the location of these bodies;

- regulation is likely to provide inferior outcomes to competition. Thus, a European Regulatory Authority may only be required for a transitional period until competition is fully effective. This being the case it might be advisable to set up a European Regulatory Authority with a clearly defined lifetime. However, if transitional in nature, some may argue that its creation will represent unnecessary bureaucracy and disproportionate expenditure.

6.4.2 Ways of Dealing with Potential Operational Problems

Section 6.4.1 considered the potential roles that a European Regulatory Authority could perform and the implications for the functions that it might undertake. In each case we have highlighted potential operational problems. The selection of the most appropriate role and functions of such a body is outside the remit of the current study.

In this section we suggest some ways of dealing with the following operational problems identified in the previous section:

- staffing levels and skills;
- determination of the division between a European Regulatory Authority and NRAs;
- relationship with the NRAs; and
- the relationship with ERO, ETO, ETSI.

a. Staffing levels and skills

An issue of particular significance is the resource requirements of the regulatory body. In Table 2.2 we showed the functions of various regulatory bodies in different countries and at

a pan-European level and the number of people employed by these bodies. It can be seen that the resource requirements of a European Regulatory Authority would be significant if it were to carry out most or all of the functions of these various bodies.

In practice, a European Regulatory Authority might not need to perform a number of the more labour intensive functions, as these could be dealt with primarily at a national level. Functions of this type include detailed spectrum allocations and monitoring of frequency usage and consumer affairs. Nevertheless, if a European Regulatory Authority were to become involved in the detailed specification of methodologies, in areas such as setting interconnection charges, and in ensuring that these methodologies are implemented in a consistent way, the resource requirements could still be considerable. Furthermore, a European Regulatory Authority's role could be more complex than those of NRAs in that it has to deal with individual Member States, each of which has at present a dominant operator, rather than a single country.

A further problem is that many of the issues a European Regulatory Authority could in principle address require people with highly developed skills. While it might be possible to second staff from NRAs, this may not be feasible in practice since the NRAs themselves may be short of staff with the appropriate skills.

As the number of people needed to staff a European Regulatory Authority would depend on the roles assigned to that body, it is important to have a clear specification of the duties of a European Regulatory Authority and to consider in detail the numbers of staff required to perform particular duties. Discussions with NRAs in Europe and other countries would provide valuable information on likely resource requirements.

Resource requirements would be likely to be a particular problem if a European Regulatory Authority became involved in monitoring the approach adopted to regulatory issues in the various Member States. While some degree of monitoring is required to ensure consistency of approach it would seem advisable to limit the role of a European Regulatory Authority in this area and where necessary consider the use of outside assistance (e.g. consultants). It can be noted that with the creation of independent NRAs the requirement for a European Regulatory Authority to examine the implementation of regulation in particular Member States may be reduced.

b. Determination of division between a European Regulatory Authority and NRAs

Where possible the division between the role of a European Regulatory Authority and that of the NRAs should be based on economic considerations. For example, where externalities are significant, as is the case with numbering, or transaction costs are important, as in the case of licensing, there may be grounds for transferring some responsibility to the Community level. Where these considerations are less important, or where there are good reasons for issues to be dealt with at the national level, as is the case for consumer affairs, it is less than clear why a European Regulatory Authority would need to be involved.

c. Relationship with NRAs

There would be likely to be some degree of conflict between a European Regulatory Authority and the NRAs. Measures which could be taken to reduce the degree of conflict include the following:

- clearly defining the respective roles of a European Regulatory Authority and the NRAs and their interfaces;

- developing a set of benchmarks to test the extent to which measures are in place to encourage competition; countries which meet these benchmarks could be allowed more flexibility in meeting the precise specification of EC regulations (e.g. costing rules);

- putting in place a clearly stipulated set of procedures to ensure that operators do not try to use a European Regulatory Authority to bypass NRAs.

d. Relationship with ETSI, ETO and ERO

The Survey responses suggest that there would be little need for a European Regulatory Authority to become involved in setting standards. In the case of spectrum management, numbering and licensing issues there was more support for having a European Regulatory Authority involvement. This being the case it is clearly important to examine how such a body would relate to both ERO and ETO. One possible approach would be to use ERO and ETO as research organisations providing analyses which could be used by a European Regulatory Authority to develop inputs to policy-making by the Commission.

7. CONCLUSIONS

This Study has been executed within the context of Community liberalisation of the telecommunications sector set for 1 January 1998. We note that Europe already has a well-developed regulatory framework, so the purpose of the Study is to look beyond 1998 to examine whether the current responsibilities of different telecommunications bodies and the balance between them will be sufficient to meet market needs or whether gaps exist in the current regulatory framework, which call for resolution at a European level or by a new European Regulatory Authority.

Below, we summarise the main conclusions to the study.

1. **From our Survey, it is clear that there is a degree of support for a European regulator.** Support for enhanced European regulation is strongest in the areas of interconnection, numbering and number portability, licensing, frequencies and universal service. There was also strong support for the direct involvement of a European Regulatory Authority in the implementation and enforcement of existing telecommunications Directives, although such a transfer of responsibilities would not be possible without a Treaty change. Nevertheless, action could be taken to address the need to improve implementation and enforcement of Community regulations.

2. **Support for a European Regulatory Authority may grow after 1998 when practical problems show the limits of the current framework.** This is indicated by the Survey results, which demonstrate that the technical debate surrounding the creation of a European Regulatory Authority is still very much in its infancy and that consciousness of its possible relevance varies widely.

3. **Any attempt to create a new regulatory body with a policy function or an appellate role would require a Treaty amendment.** Treaty amendments were adopted prior to the establishment of the European Investment Bank and the European Central Bank, although these bodies arguably have more developed policy functions than the tasks which might fall onto a European Regulatory Authority. On the other hand, the ECJ has already held that executive powers may be delegated by the Community provided they are subject to strict review.

4. **Legally, it would be possible under the Treaty to create a body (which may or may not involve participation by non-Member States) with an essentially "managerial" or "operational" role.** Without an amendment of the Treaty, delegation of clearly defined powers to a Community Agency is permissible so long as the body remains subject to review and so long as the delegating body only delegates powers which it has received under the EC Treaty. As an example, while we do not consider that it would be possible, without Treaty amendment, to create a European Regulatory

Authority with the power to decide whether operators should be required to allow interconnection, we do consider it possible for a European Regulatory Authority to be given the task of determining interconnection terms where operators seeking cross-border interconnection cannot reach agreement.

5. **The legal basis for creating a European Regulatory Authority would depend on its tasks, but the most probable legal basis would be Article 235 of the EC Treaty.** Article 235 provides a mechanism for the Council to take "appropriate measures" to attain a Community objective where the Treaty has not expressly provided the necessary powers. Possible objectives include, under Article 3, attaining an internal market, ensuring that competition in the internal market is not distorted and encouragement of trans-European networks. A European Regulatory Authority, as has been the case with other Community agencies, would be likely to be created by a Council Regulation. If a European Regulatory Authority was created as an international agency, an agreement with third countries would be required.

6. **Experience in telecommunications in other jurisdictions and experience in other economic sectors within the EC establish economic grounds for the creation of an European Regulatory Authority.** There has been a trend towards federal regulation in both Canada and the United States, while, in Australia, telecommunications has always been regulated at the federal level. In both Canada and the United States, the move towards federal regulation has been largely motivated by the need to supervise the introduction and extension of competition in a consistent manner throughout the federal territory. In addition, there has been a recognition that certain roles can best be fulfilled at a federal level, for example where externalities are present (e.g. spectrum allocation and numbering). A parallel move towards resolution at a Community level has occurred in a number of sectors. Indeed, we note that the advantages of undertaking certain functions at a Community level has already been recognised in telecommunications and a range of bodies have been set up including the ONP Committee, the European Telecommunications Office and the European Radiocommunications Office. However, this patchwork of telecommunications bodies may not provide a sufficiently coherent framework for the regulation of the single market.

7. **There are a range of practical issues that would need to be resolved in creating a European Regulatory Authority.** These include:

- resourcing and staffing levels;
- attracting people with the necessary high levels of skills;
- the potential problems of imposing a regulated solution in markets in which competition is already well developed;
- choice of language;

- location; and
- the fact that the body may only be needed during a transitional period.

The creation of a European Regulatory Authority would require some rationalisation to prevent overlap and/or omissions in telecommunications regulation. This might affect the functions of Community level committees working in telecommunications, such as the ONP Committee, and may also lead to some limited modification of the functions of the Commission, pan-European bodies and the NRAs.

8. **Convergence may create new pressures for a European Regulatory Authority and/or new approaches to its role.** The European Union needs to define a regulatory vision for the future, which supports market-led developments in the convergence industries, and to develop practical transition arrangements which progressively migrate current regulatory regimes to the new vision. While competition policy may turn out to be the single most important tool for regulating the impact of convergence, *ex-ante* guidance and regulation, and *ex-post* monitoring, are also likely to be needed in specific areas, including interconnection of, and access to, broadband wired or wireless networks, use of conditional access systems or subscriber management systems and also, perhaps, in the area of content. These issues need be considered in defining the tasks of a European Regulatory Authority.

9. **Europe may not require a single unique regulatory structure. A number of options exist for improving regulation in Europe post-1998.** Each of these options would build on the current set of Community proposals and Directives which establish the framework for regulating European telecommunications after liberalisation:

- a co-ordinating role for the Commission to guide national regulatory authorities and encourage best practice among them;
- a rationalisation of the work of the various existing telecommunications committees and bodies that operate at a Community or wider pan-European level;
- creation of a body which:
  - receives and carries out specific mandates from the Commission on a broad or narrow sphere and advises it and the national regulatory authorities on current or future regulatory issues; and
  - takes over, in a more rationalised and comprehensible form, some of the technical functions of other existing European telecommunications bodies and committees (both inside and/or outside the Community) but with greater resources and a larger secretariat enabling it to take on a more effective ex-ante role in developing policy recommendations and/or monitoring the market;

- a regulatory body having day-to-day management powers which complement some of the duties of national regulatory authorities, particularly in relation to networks or services, but which work within objectives and policies set from time to time by the Community;

- an independent regulatory body.

The last of these options for developing European-level telecommunications regulation would require Treaty amendments.

10. **The creation of a regulatory body for telecommunications at the level of the European Union would be likely to be an organic process, with regulatory functions added or removed as the need to do so became clear.** Regulatory changes instituted now will not preclude further developments at a later stage. In pursuing any of the options for further development of European Union telecommunications regulation, it is important to do so in a way that will allow easy transition to the next option should the need arise.

LIST OF ABBREVIATIONS

AGT	Alberta Government Telecommunications
CEN	European Standards Committee
CENELEC	European Electrotechnical Standards Committee
CEPT	Conference of European Post and Telecommunications Administrations
CERP	European Committee for Postal Regulations
CMRS	Commercial Mobile Radio Services
CPE	customer-premises equipment
CRTC	Canadian Radio Television Commission
DECT	Digital European Cordless Telephone
DOJ	Department of Justice
DSI	Detailed Spectrum Investigation
EATCHIP	European Air Traffic Control Harmonisation and Integration Programme
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMEA	European Medicines Evaluation Agency
EMI	European Monetary Institute
EU	European Union
ECTRA	European Committee of Telecommunications Regulatory Affairs
ENO	European Numbering Office
ETO	European Telecommunications Office
ERC	European Radiocommunications Committee
ERO	European Radiocommunications Office
ETS	European Telecommunications Standards
ETSI	European Telecommunications Standards Institute
FCC	Federal Communications Committee
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSM	Global System for Mobile
ICJ	International Court of Justice
IRCC	International Radiocommunications Consultative Committee
ISDN	Integrated Services Digital Network
ITU	International Telecommunications Union
LATA	Local Access Transport Area
LEC	Local Exchange Carrier
MFJ	Modification of Final Judgement
MOU	Memorandum of Understanding
NARUC	National Association of Regulatory Utility Commissioners
NRA	National Regulatory Authority
NTIA	National Telecommunications and Information Administration

OFTEL	Office of Telecommunications
ONA	Open Network Architecture
ONP	Open Network Provision
PUC	Public Utility Commission
RBOC	Regional Bell Operating Companies
S-PCS	Satellite-Personal Communications Systems
TEN	Trans-European Networks
TO	Telecommunications Operator
USO	Universal Service Obligation
WRC	World Radiocommunications Conference
WTO	World Trade Organisation