

THE CHANGING TOTEMS OF EUROPEAN TELECOMMUNICATIONS
GOVERNANCE: LIBERALISATION, MARKET FORCES AND THE IMPORTANCE
OF THE EU REGULATORY PACKAGE

Draft

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INTRODUCTION

Since the late 1970s, the telecommunications sector in Europe has undergone nothing short of radical and wholesale transformation in terms of its technologies, goods, services, and market types. Through a complex evolutionary process the long-established twin ‘totemic’ characteristics of state ownership and public service around which the sector was built and functioned have been replaced by those of liberalisation and efficient market functioning. The sector also underwent a process of internationalisation in terms of the outlook and strategies of its key commercial protagonists in each of Europe’s historically highly national-centric and foreclosed markets, as well as in the key area of the sector’s governance. An outstanding feature in the ensuing political-economic milieu of change has been the emergence and growth of the EU as a prominent policy actor in the telecommunications field.

Drawing on the core theme of this volume – the role of the EU in regulation and the public interest in the communications industries – this chapter explores and evaluates the increasingly prominent role which the EU has played in the telecommunications sector in Europe over more than 25 years. Telecommunications provides a case of extensive and well-developed EU policy activities in the communications – it is arguably the most ‘EU-ised’ of the culture industries examined in this volume. It asks and seeks to answers to two questions.

First, why has the EU assumed such significance in telecommunications? In brief, the chapter argues that this can be explained by two core reasons which underpin a rich and complex picture of policy activity: the opportunities, on the one hand, and threats, on the other, perceived by EU Member states from economic internationalisation couched within the globalisation policy discourse; and the active role played by European Commission as the key EU-level institutional actor in the telecommunications policy arena. Second, how has EU telecommunications policy evolved over the period in question? The chapter explains this evolution as a still-ongoing process of shifting policy equilibria between national and EU levels in which a plethora national and European level governmental and private actors have played roles in the precise nature of the equilibrium point reached at core policy junctures explored in the chapter.

In undertaking its exploration and analysis in this way, the chapter illustrates how the role of public actors and public interest issues altered in telecommunications. The nation state, the historic key custodian and functionary in telecommunications, gradually – though not without controversy – ceded direct control of the ownership of the key parts of the sector which were in its hands to private interests and the market. It also transferred governance of an increasingly liberalised sector to independent regulatory authority at the national level and, very importantly – through agreeing a legislative package to harmonise and liberalise telecommunications markets – to the EU level. This has been delivered through an important developing regulatory relationship between the national and the EU institutional contexts which is explored in the chapter. The inexorable process of liberalisation through phased re-regulation inevitably impacted upon the definition and treatment of traditionally very strong public interest issues in telecommunications which have become shaped by and expressed through the discourse and practices of the market increasingly: public interest issues are now formulated and delivered in terms of consumer rights rather than the broader conceptualisation of public service.

The chapter is structured as follows: the next section provides a very brief overview of the traditional structure of, and justification for, the telecommunications sector in Europe. The section following this explores the evolution of EU telecommunications policy from

the early legislative activity of the 1980s through to the agreement of a comprehensive liberalisation package by Member States in the early 1990s which entered into force in 1998. The chapter's third section explores the important period of refinement of the 1998 regulatory framework which the EU and its Member States undertook leading to agreement on what came to be known as the Electronic Communications Regulatory Framework (ECRF), agreed in 2002. The penultimate section of the chapter explores the current ongoing review of the EU telecommunications policy framework, which is likely to lead to the next stage of policy equilibrium, making in the process some tentative predictions about its likely shape and significance. Finally, the chapter offers some conclusions on the importance of the EU in shaping regulation and public interest issues in telecommunications.

REGULATION AND THE PUBLIC INTEREST IN EUROPEAN TELECOMMUNICATIONS – THE 'TRADITIONAL' POSITION

Historically, telecommunications was a sector with which the EU had little or no engagement. This was due to the striking nation state centricity and nationally inward-looking nature of the sector, ironic given the potential of communications technologies and services to allow the world to become a 'smaller place'. In fact, the internationality of the sector in organisational terms was inherently intergovernmental in the shape of a minimal series of interface technical and commercial agreements detailing arrangements for the carriage of international telecommunications traffic worked out and administered at the European level in the European Conference of Postal, Telegraph and Telephone administrations (CEPT) and globally within the International Telecommunication Union (ITU).

Within what came eventually to comprise the EU's Member States, the governance of telecommunications was the embodiment of the traditional corporate state (Cerny 1996). Here, telecommunications service provision was entirely absent of market forces, a government owned administration being responsible for telecoms and postal services (the Postal, Telephone and Telegraph Administration). The justification for this sectoral

structure was a conjunction of utility economics and public service provision. In respect of the former, the telecommunications service market – consisting essentially of fixed line voice telephony – was deemed to be an uncontestable natural monopoly (reference) due in the main to the prohibitive market entry costs from investment in a telecommunications infrastructure. In respect of the latter, it was argued that universal access to a basic telecommunications service at a uniform price was effectively a social right for citizens to be pursued as a goal of public policy by the corporate state well accustomed to interventions of this kind in a number of Europe's industrial sectors, not least those of the utilities (energy and telecommunications, principally). Taken together, it was contended that the state-owned and regulated natural monopoly PTT would be able, through cross-subsidisation achieved through tariff re-balancing, to undertake a program of network roll-out which would ensure eventually that every citizen wishing it would be able to access affordable and reliable telecommunications services (ref).

This stable system went largely, though not completely, unchallenged across Europe for most of the 20th century. However, as has been thoroughly documented elsewhere development in telecommunications technologies, not least of which was the digitalisation of communications, provided the potential for new market and service possibilities undermining and calling into question the status quo. In particular, innovations which allowed computer terminals to be attached and to communicate with each other in conjunction with human users across telecommunications network created a series of new service possibilities yielding three kinds of pressure for change in the organisation of telecommunication. First, economically, the market for these new Value Added Network Services (VANS) bore no relation to the natural monopoly traditional voice telephony services and were argued therefore to be inherently contestable. Second, commercially providing these services – essentially a combination of IT and telecommunications – proved highly attractive to a series of firms outside the telecommunications sector. On the demand side, they also proved equally attractive to telecommunications customers, not least powerful multinational companies keen to expand internationally and aware of assistive potential of telecommunications for conducting their business in the most profit maximising manner, yet equally, frustrated

by what they viewed as the nationally constrained, costly and technically myopic series of services then available from PTTs. Third, telecommunications provided an important opportunity for political interests keen to spread the values and practices of new economic liberalism to the global level. The essential message promulgated here was that traditional corporate state sectoral intervention should give way to independently regulated market forces wherever possible: telecommunications, it was argued, was an exemplar of a situation where radical change needed to be effected nationally and internationally in order to reap the potential benefits in terms of economic output and consumer welfare gains from technological developments in the sector.

As the 1980s dawned, these arguments gradually gained increasing weight across EU Member States, a number of which began to alter radically the structure of their telecommunications sectors along broadly neo-liberal lines. Foremost in the vanguard of change was the UK – the leading ‘regulatory state’ in Europe at the time (Bartle et al., 2002) - which, by 1982, had created and ordered competitively new markets in VANS and mobile telephony, introduced duopoly competition in fixed link telecommunications, privatised the majority of its PTT and, lastly, relinquished regulatory responsibility for an increasingly competitive and complex sector to an independent regulatory authority, the Office of Telecommunications (Hulsink 1999). Similar, though less radical moves also occurred in continental Europe, notably in Germany but also France (see Thatcher 1999, Dyson and Humphreys 1986). As a consequence, clear signs of change appeared in the totemic characteristics underpinning telecommunications altering significantly perspectives on regulation and public interest issues. Inevitably, the more competitive states’ outlook on telecommunications became, the more important became the, at that stage, very poorly developed international market context of the sector. It is from this juncture and within this broad context that the influence of the EU began to emerge and develop at a fast pace within the European telecommunications sector.

LIBERALISATION, RE-REGULATION AND THE EUROPEANISATION OF TELECOMMUNICATIONS

The twin structural elements of technological opportunity and neo-liberal economic globalisation which were utilised by ‘reformist’ governments in Europe to alter the nature of telecommunications provision and regulation laid the ground for the EU to consider the sector as one within which it could, indeed should, develop policy responsibility. This process, begun in the early 1980s proceeded steadily through to a first ‘equilibrium’ point in EU telecommunications policy around the turn of the decade (see below). As in most policy areas of the EU, the role of European level institutional actors – in this case the European Commission – proved crucial (see Schneider, Dang-Nguyen and Werle 1994). Noted for being an organisation constantly alive to the possibility of expanding its competence and authority (see Cram 1994), the European Commission quickly developed into a skilful political actor in telecommunications (see Sandholtz 1993, 1998) in the process cementing the development of telecommunications policy authority to a significant and what has turned out to be irreversible extent. Here, the Commission utilised its coercive powers, on the one hand, specifically enshrined in, and cleverly interpreted from, the Treaties establishing the EU (Humphreys and Simpson 2005). On the other, and for the most part, the Commission actively pursued securing a consensus on the creation of EU telecommunication policy competences through what Thatcher (2001) has perceived as partnership building. In this respect, the development of EU telecommunications policy was far from merely a story of the EU and the European Commission specifically driving policy forward with only limited regard for Member States preferences. In fact, the character of policy in telecommunications at EU level at any one time has tended to reflect the thinking of most Member States – or certainly the most influential and powerful of them – on how telecommunications should be ordered.

Early telecommunications policy activity of the EU provides evidence of the European Commission setting out its case for reform of the sector to incorporate the EU institutional context. Here, on the one hand, the economic threats from what were at the time the EU’s two main industrial competitors - the USA and Japan – were used to urge Member States to consider pooling resources of some kind at the EU level (European Commission 1984). On the other hand, the Commission extolled the economic benefits to be derived from the creation of a Single European Market in telecommunications, part

of a much wider policy initiative pursued in the latter half of the 1980s (European Commission 1985). The theme of an EU-wide market in telecommunications services was at the centre of the 1987 EU Green Paper which provided the first comprehensive indication of the EU's intent to develop a detailed legislative policy package of a liberalising kind for telecommunications. Here, the Commission declared its intention to propose legislation to create full EU-wide competition in telecommunications terminal equipment, on the one hand, and VANS on the other (European Commission 1987). The Green Paper also gave a strong indication of the liberal regulatory approach to the sector that would be pursued by the EU. For example, the paper argued that in markets subject to competition in the EU it was no longer tenable for the PTT administration (or the most recent incarnation thereof) to be both regulator and commercial player in the market in question. Indicative of the careful path which the Commission knew it had to tread, the paper nonetheless made reference to maintaining certain of the well-established elements of the telecommunications sector to which certain Member States – notably those of the EU's Southern states - were proving reluctant to countenance changing. Here, first, the Commission affirmed Member States' right to maintain voice telephonic markets as state owned monopolies and, second noted the continued importance of the public interest dimension of telecommunications pursued through universal service provision (European Commission 1987).

The Commission indicated the seriousness of its liberalising intent soon afterwards through the publication of two directives whose purpose was to liberalise telecommunications terminal equipment (European Commission 1988) and VANS (European Commission 1989) respectively. The aftermath was a short but intense period of negotiation which eventually resulted in the first equilibrium point in the dynamic history of EU telecommunications policy. Very much aware that there were essentially two camps among EU Member States on telecommunications policy liberalisation – reformers and traditionalists – the Commission took the seemingly rather bold decision to pass both directives directly into EU law, thereby bypassing the Council of Ministers and European Parliament. This it justified by citing Article 86 (then 90) of the Treaty of Rome which it claimed required it to take direct remedial action in any instances where it found distortions of competition as a result of the granting by states of an exclusive

dominant position to public undertakings in particular markets. Those of telecommunications terminal equipment and VANS were of this kind, the Commission argued.

The Commission's action precipitated two legal challenges in the European Court of Justice around each proposed directive from states opposed to both the substance of the directives and the manner in which the Commission proposed to enact them. However, there were at the same time powerful EU Member States, not least among which Germany and the UK, which supported the directives content, though being opposed to the Commission's methods. It was also the case that as the 1980s ended, countries such as France began to become more attuned to the view that commercial opportunities from liberalising the newer parts of the telecommunications sector might outweigh the threats from so doing. Aware in classic neo-mercantilistic fashion of its leading position at the time in VANS delivered through the ambitious state-funded Teletel programme, France was keen to capture any opportunities which might be gained from exporting its technologies and services internationally. The EU could even act as something of a tool of justifying liberalisation to particularly resistant domestic interests (Thatcher 2002b).

As a consequence, a situation which had initially all the hallmarks of controversy and stalemate proved ripe for compromise, something which the Commission took pains to secure by 1990. The 'settlement package' involved the passage of the two directives, the one on services (European Commission 1990) having been modified to allow Member States to impose certain public service obligations on private telecommunications operators leasing lines on the public network (Woolcock et al., 1991). The second element was the passage of a framework directive on Open Network Provision in telecommunications (European Parliament and Council 1990) which concerned creating harmonised conditions to allow free competition to be practised across telecommunications networks. The 'ONP compromise' as it came to be known provided an important balance between the liberalising power of the article 86 directives (the legal challenges to which were rejected by the European Court of Justice) and the harmonising tenor of the ONP framework directive. The latter would prove in the next phase of EU

telecommunications policy an important focal point for reaching the next equilibrium point in the move towards further liberalisation of telecommunications across the EU since it was able to facilitate competition promoting and public interest defending measures simultaneously (Humphreys and Simpson 2005).

The next significant period of development of EU telecommunications policy involved a much less controversial series of negotiations between Member States in which the European Commission continued to be the key EU level institutional actor. In 1992, it undertook the Telecommunications Services Review which involved in part the canvassing of opinion from interested parties from the public and private sectors across Europe on how, if at all, telecommunications policy should be developed. In this way, the Commission applied its by now well-established tactic of aiming to push the agenda of liberalisation forward, yet at the same time proceeding as consensually as possible. The Review resulted in the presentation to EU Member States of four possible options which ranged from the least radical of stalling the liberalisation process through to the liberalisation of all voice telephonic communications services across the EU. The extent to which the liberalisation 'bandwagon' was gaining speed across the EU was clear in the 1993 agreement by Member States to proceed with the most radical proposal - itself favoured by the Commission – to be achieved by 1998 by the majority of EU Member States (European Council of Ministers 1993). This was soon followed by a further agreement – stimulated by the conclusions of an analysis of Europe's position in the emerging so-called Information Society by the Bangemann Group (European Commission 1994a) – to liberalise all telecommunications infrastructures across the EU by 1998, in complement to the earlier voice telephonic services liberalisation agreement (European Council of Ministers 1994).

Nonetheless, despite the period lacking the intensity leading up to the previous stage of equilibrium in the development of EU telecommunications policy, there were a number of issues which required resolution before agreement could be reached on this quantum leap forward on liberalisation and, thereafter, the necessary legislation be put in place to realise the 1998 liberalisation deadline. Most significantly, several EU Member States, with less well-developed infrastructures were able to negotiate derogations to allow them

until 2000 (in the case of Luxembourg) and 2003 (in the cases of Greece, Ireland, Portugal and Spain) to open their voice telephonic markets and telecommunications infrastructures to full competition. Others, notably France and fellow Southern states, were able to ensure that the package of legislative measures enacted up to the 1998 deadline in order to lay out the basic parameters of the liberalised telecommunications market also contained measures to protect the provision of public interest in telecommunications through universal service provision (European Parliament and Council 1997 and 1998). It has also been argued by Thatcher (2001) that the European Commission took care to ensure that liberalising legislation necessary to create the potential for competition in so-called alternative infrastructures – satellite, cable and mobile – kept pace with the domestic reform agendas of Member States in these areas.

Overall, that EU telecommunications policy developed to such a significant extent to reach this second equilibrium point is indicative of nothing short of an attitudinal transformation among Member States regarding the place of telecommunications in the global economy and the opportunities to be derived as a consequence. Even those with arguably least to gain from exposing their domestic markets to liberalisation became convinced enough of the likely practical benefits of liberalisation in terms of lower prices and better quality services for consumers to agree to the wholesale changes. The transformation was at times skilfully exploited by the increasingly sure-footed European Commission. For example, it became involved in a negotiation to secure liberalisation of alternative infrastructures in France and Germany two years ahead of schedule in return for regulatory approval of a proposed telecommunications services international joint venture between their increasingly commercially oriented former incumbents France Telecom and Deutsche Telekom (Bartle 2001). Nevertheless, it also became clear at the time that though a considerable transference of legislative sovereignty in telecommunications was occurring to the European level in the service of European-wide competition, day-to-day responsibility for the regulation of telecommunications would be very much the responsibility of the national level thereby effectively remaining overwhelmingly under its control.

REFINEMENT OF EU TELECOMMUNICATIONS POLICY – THE CREATION OF THE ELECTRONIC COMMUNICATIONS REGULATORY FRAMEWORK

Agreement on the 1998 regulatory framework for telecommunications meant that within the space of a decade a battery of legislation of both a competition-creating (liberalising) and harmonising kind had been created at the EU level, over which the latter held shared responsibility with Member States for implementing. Across the EU, a remarkable transition from the traditional telecommunications regime based on state-owned natural monopoly to one of across-the-board neo-liberal market competition had occurred. Here national governments relinquished their role as corporate states in telecommunications, replacing it instead with regulatory state (Seidman and Gilmour 1986) governance in which the key decisions about the functioning of the telecommunications sector were taken by a new series of publicly funded though operationally independent National Regulatory Authorities (NRAs) (see Thatcher 2002a, 2002b). At the EU level too, there is strong evidence in telecommunications policy of efforts to create a European regulatory state (Majone 1994, 1996, 1997) in which the European Commission working alongside regulatory committees composed of national representatives often from the NRA made technical decisions on the possible regulatory evolution of the sector on an EU-wide basis. Outstanding here in the 1998 Framework was the ONP Committee.

Nonetheless, the second key stage of EU telecommunications policy equilibrium which the 1998 Framework represented was only in effect the point at which the fundamental *basic structure* of the European regulatory state in telecommunications was mapped out. Setting out the parameters of such a system was one thing; ensuring its effective implementation was another. So rather like the previous phases of EU telecommunications policy highlighted in the chapter thus far, the European Commission almost immediately set about examining how the framework might more effectively embed a comprehensive efficiently-functioning liberalised market system. The by now well utilised tool of a comprehensive sectoral review and consultation (European Commission 1999) in anticipation of further policy actions marked the commencement of the next developmental phase in EU telecommunications policy launched in 1999. The review itself undertook three main lines of enquiry: the functional efficacy or otherwise

of the 1998 framework; the possibility of making existing regulation in key parts of the telecommunications sector less burdensome and complex in response to evidence of the emergence of a competitive market; and the possibility of creating some kind of convergent regulatory framework for all communications networks and services. The latter issue stemmed from yet another policy review on the matter undertaken by the European Commission in 1997 (European Commission 1997) which proved highly controversial (see Levy 1997, 1999). In brief, Member States decided that it would not be possible to create a convergent regulatory framework for all communications infrastructures and services since the latter would have to cover the highly sensitive area of broadcasting which it soon emerged Member States were unwilling to treat as part of any convergent framework, let alone an EU level one (see Simpson 2000). However, it was considered appropriate to develop a convergent regulatory framework where possible to cover all communications *infrastructures* including those of broadcasting and the Internet. The outcome of the 1999 Communications Review was largely a re-statement of this position and was much more interesting in terms of decisions taken regarding the first two of its core lines of enquiry.

The first main proposal to emerge from the Review was to create radical rationalisation in what was perceived to be an over-elaborate regulatory framework for telecommunications. The new system – the Electronic Communications Regulatory Framework (ECRF) – would see a reduction in the number of directives making up the previous system from 20 to six in the process reducing the workloads of NRAs and making the system simpler and more cost effective to comply with for telecommunications companies operating in the Single Market. As the name suggests, the ECRF was convergent in scope, covering broadcast and Internet infrastructures alongside those of telecommunications. It was to consist of two measures of a liberalising purpose – a general competition directive (European Commission 2002) and a regulation passed with some urgency in 2000 which mandated Member States to take action to ensure unbundling of the local loop (European Parliament and Council 2000), or last mile, of the telecommunications network in their jurisdictions, seen at the time to be a major impediment to the growth of competition. It would also be made up of five harmonising

directives dealing respectively with general framework issues (European Parliament and Council 2002a), data protection and privacy (European Parliament and Council 2002e), universal service (European Parliament and Council 2002d), authorisation (European Parliament and Council 2002c) and access and interconnection (European Parliament and Council 2002b).

Whilst the above rationalisation element of the ECRF and its implied refinement of the recently established European regulatory state in telecommunications proved relatively uncontroversial, the movement towards the next equilibrium point in the history of EU telecommunications policy also involved significant disagreements requiring typical European compromises. A key indicator of the efficacy of the market liberalisation project in telecommunications would be the extent to, and the speed at, which ex ante sector specific regulation for designated markets within the telecommunications sector could be removed allowing them merely to be governed by general EU competition law, one of the areas in which the EU, and the European Commission in particular, has developed most authority.

The debate centred specifically on the designated threshold figure for determining the existence of Significant Market Power (SMP), thus calling forth ex ante regulatory measures. In the 1998 regulatory framework, any operator holding a 25% or greater share of a particular market was subject to specific regulatory measures requiring it to offer interconnection arrangements to its network to competitors according to a cost based formula. In the negotiations, the European Commission proposed the quite radical step of raising this threshold SMP figure to 50% - operators with a market share below this would be free to negotiate arrangements for the provision of interconnection to their competitors privately. This would have reduced the regulatory burden on itself and NRAs and could also be seen politically as a measure which affirmed the efficacy of an albeit relatively new competitive market environment in telecommunications. The implication here was that market forces were strong enough to counteract anti-competitive tendencies even in situations where one player held as much as 40% of a particular market.

For a number of Member States - not least the telecommunications neo-liberal forerunner, the UK - this proved to be a leap of faith too far. Unsurprisingly, new entrant companies were also concerned that the potential looseness of the regulatory framework regarding SMP would deprive them of the protection necessary to ensure that they held on to their current position in key markets, let alone to develop it further. In the end, a compromise solution was reached: the SMP threshold proposed by the Commission was raised to 50%. However, alongside this the EU issued a detailed list of criteria, other than market share, to be used in an assessment of whether market dominance existed in any particular case, taking into account key issues voiced in the debate such as collective and leveraged dominance (Humphreys and Simpson 2007, forthcoming).

The negotiations on the ECRF also illustrated, once more, the extent to which the European Commission had become a key politico-institutional player in the regulation of the European telecommunications sector. As part of its proposals for the ECRF, the Commission argued that it should be given a right of veto over certain decisions made by NRAs. Specifically, it argued that it should be granted the authority to prevent Member States from making additions to the list of markets which the latter would draw up as being subject to sector-specific ex-ante regulation. The Commission also proposed that it should have the right to examine and if necessary veto NRA decisions on the withdrawal of ex ante regulation from any telecommunications market, necessitating either an amendment or complete withdrawal of the initial decision. Backed by the support of both established and newer telecommunications operators, the Commission secured the significant increase in its power to obtain a veto right in respect of the decisions on whether operators held SMP and the classification of new telecommunications markets as needing sector –specific ex ante regulation. The Commission was not able, however, to secure its desired veto over regulatory remedies proposed by NRAs in any particular instance, an issue which merely was placed on the Commission’s policy ‘backburner’ as a result rather than being dropped (Humphreys and Simpson 2007, forthcoming) (see below).

Another important issue requiring a compromise solution concerned the Commission's role in EU level regulatory committees for telecommunications. This matter gives a strong flavour of how far EU telecommunications policy had developed since its inception in the mid-1980s: the parameters of the European regulatory state having been established in the domain the detailed mechanics of the functioning regulatory state at the national and EU levels needed to be secured and augmented as necessary. In this regard, the 1999 Communications Review contained a proposal from the Commission to create a High Level Communications Group under its auspices made up of the EU NRAs. This was interpreted by Member States as an attempt by the European Commission to manoeuvre itself into a position something akin to a European telecommunications regulator (Michalis 2004), something which had been vaunted in the past but strongly resisted by both governmental (see Bartle 2001) and commercial interests in telecommunications at the national level. The compromise position eventually reached saw the establishment of the European Regulators Group (ERG) which had a similar composition to the proposed HLCG but with much less power being transferred to the EU level, the Commission securing for itself the chair of the Group for which it also provided administrative support. Nonetheless, this role was enough to give the Commission a better developed opportunity to monitor, and even possibly steer, the unfolding of the single European Market in telecommunications than was at its disposal heretofore.

The extent of the development of EU telecommunications policy can be appreciated through a brief consideration of the kinds of activities which are required to take place at the EU level to ensure the smooth functioning and continued development of the single EU-wide market. It is important to note that whilst the EU has assumed considerable authority in the telecommunications sphere, it has by no means displaced the national level which still maintains the lion's share of responsibility for the day to day functioning of markets. This dispersal of responsibility across the EU policy landscape in a qualitatively different fashion than in the past has created a pan-European network of governance which has been associated with the growth of the regulatory state (Majone 2000). Within this network which is essentially two level - that is EU and national - in nature a broad series quasi state actors tend to predominate. Crucial among these are the

European Commission and NRAs which take part in various technocratically organised committees and working groups at the EU level (Humphreys and Simpson 2007, forthcoming). The gravitation towards agreement on the ECRF both cemented and developed further this arrangement. As a consequence, there was a growth in EU level regulatory committee governance in telecommunications: a Communications Committee, a Radio Spectrum Committee, a Radio Spectrum Advisory Group and an advisory working party to deal with data protection issues were created (Humphreys and Simpson 2005). The Commission formed a task force of members from its Information Society and Media and Competition Directorates-General to deal with pressing issues such as SMP and market definition, illustrating again its influence in orchestrating the mechanics of competition in the new liberalising market scenario.

The more elaborate the regime of competition became in EU telecommunications policy the greater was the requirement for regulation to ensure that competition was nurtured and maintained. This has placed a highly significant regulatory onus on the new quasi-state functionaries of telecommunications governance in the EU. Whilst the era of the corporate state in telecommunications has well and truly disappeared, intervention in the market has arguably increased, the desire of the Commission and others to remove ex-ante regulation notwithstanding. Here, for example, the Commission has since before the agreement of the 1998 framework conducted market reviews of the state of competition across the EU. It has also issued numerous proceedings against Member States for non-compliance with EU legislation of various kinds from transposition to implementation. In general, the regulatory workload of the network of EU and national level regulatory players – from the drafting, transposition, implementation, monitoring and review of an increasingly complex system – is substantial. Telecommunications provides one of the most mature examples of the consequences of choosing to replace the domestically focused corporate state with a European-oriented regulatory version.

MOVING TOWARDS THE NEXT POLICY EQUILIBRIUM IN EU TELECOMMUNICATIONS: THE 2006 COMMUNICATIONS REVIEW

The agreement on, and operationalisation of, the ECRF from 2002 onwards has not marked the end of the evolution of the EU telecommunications to a 'steady state' equilibrium. In fact, one of the paradoxes of early 21st century neo-liberalism is the need for close management and ongoing refinement of the market mechanism (for the core of this idea see Vogel 1996). The result at this point appears far from the light-touch or 'nightwatchman' (Gill and Law) role for the public sector envisioned by advocates of a neo-liberal governance order, albeit that the state is now clearly at one remove from the 'mechanics' of the telecommunications sector. For EU telecommunication policy this has been manifest in the 2006 review of the ECRF which at the time of writing is still ongoing.

Many of the by now well recognised characteristics of the politics of EU telecommunications are evident in its current phase which is likely to lead to the EU and its Member States gravitating towards another equilibrium policy position in telecommunications which further cements the regulatory state in the sector at national and European levels, though any new framework is unlikely to be in place before 2009. The review was launched by a consultation period based on discussion documents produced by the European Commission which drew in part on the findings of a number of consultancy studies of the telecommunications sector which it commissioned. In its proposals, there is yet more evidence of the Commission wishing to consolidate further its position of influence in EU telecommunications, something which is likely to cause resolution through the kind of policy compromises which have characterised EU telecommunications policy since the late 1980s.

In its recommendations, the Commission focused on four key areas, three of which relate specifically to ongoing refinement of the Single Market in telecommunications, the fourth introducing proposals for the creation of a competitive environment for spectrum management, an important consequence of the development of digitalisation and the growth of mobile communications. The former three issues relate to: first, further reduction in the level of ex-ante regulation applying to the telecommunications sector through its removal in six of the 18 markets defined by the Commission (European Commission 2003a); second, making the market review procedure faster and less

burdensome; and, third, measures to ensure that regulatory remedies for problems identified in the markets of telecommunications are consistent and applied in the same manner across EU Member States (European Commission 2006a).

Regarding the streamlining of market reviews, the Commission noted the widespread view among NRAs that the undertaking of market analyses and notifications of regulatory action - classic burdens of the regulatory state in action – were proving onerous to the point of being counterproductive. As a consequence, the Commission proposed the introduction of a simplified procedure for those telecommunications markets which were previously found to operate subject to a satisfactory level of competition and for those notifications, such as proposed remedies, which were only of a minor nature (European Commission 2006b). The Commission also proposed a rationalisation and clarification of market review procedures. It noted how under the current ECRF these are spread between the Framework Directive and the 2003 Commission Recommendation on markets and put forward the consolidation of arrangements into a single legislative instrument in the form of a Regulation.

Though not specifically mentioned by the Commission, use of a Regulation would negate the need for transposition of the measure into national law, once passed it being directly applicable to Member States. The Commission argued here that the Regulation ‘could set a precise and legally binding timetable, using defined triggers, for initiating and for completing future market analyses and for the imposition or removal of remedies’ (European Commission 2006: 16). The Commission noted a current inefficiency in the system where NRAs have in certain instances split notification between the three key issues of market definition, SMP analysis and proposed remedies causing delays in the system. The Regulation would bind legally NRAs to undertake all three as part of a single process. The Commission was critical of a lack of response from NRAs to the former’s veto decisions on market reviews granted to the Commission as a result of the ECRF negotiations (see above). It proposed that the Regulation should tighten up the requirements on NRAs to do this, by mandating legally a response within a specified period of time. All of this does not suggest that the work of NRAs will be any less

pressurised and would seem to point to a strengthening of the EU's regulatory grip (through the proposed Regulation) on the evolution of competition in the telecommunications market at the national level.

The most likely controversial area of the current communications review concerns the Commission's proposal to extend its right of veto, itself secured controversially, as laid out in Article 7 of the 2002 Framework Directive. Commenting upon the functioning of the ECRF to date the Commission noted, referring to one of the key elements of the article 7 procedure that 'consistency has been improved in the way that markets are defined and SMP is assessed, but only to a lesser extent in relation to the choice of appropriate remedies' (European Commission 2006b: 18) noting cases of inadequate and ineffective remedial action having been taken by certain NRAs. It also noted specifically that there were cases of different remedies having been applied to similar problems in different Member States and also cases of differential implementation nationally of the same remedies.

As a consequence, the Commission put forward the rather bold proposal that its right of veto be extended to remedies. Sensitive to the potential controversial nature of this proposal and previous baulking by Member States at the idea of transferring too much power into the Commission's regulatory hands, it aimed to allay any such fears in this instance by arguing that it 'would not have the power to replace an NRA remedy by one of its own but would indicate the problems with the remedy proposed by the NRA in its justification for the veto decision' (European Commission, 2006: 18). By implication, the NRA would have to then produce a remedy to the Commission's satisfaction, arguably increasing the regulatory burden it faces even further and emphasising the growing regulatory power of the Commission. The extent to which this proposal will be viewed, on the one hand as a sensible piece of pragmatism, or on the other, as a move to create the Commission as a European telecommunications regulator 'by the back door' may determine whether or not the proposal is accepted in its current form, rejected out of hand or, perhaps most likely given past precedent, modified into a suitable compromise.

The Commission also moved to close what it perceived to be the growing practice across the EU of utilising the legal system, through appeals against NRA decisions, to delay the operationalisation of remedial action to rid abuses of competition in the single telecommunications market. Specifically, it proposed the amendment of Article 4 of the Framework directive so that national courts could only suspend NRA decisions in the face of appeal where there was demonstrable ‘irreparable harm to the appellant’ (European Commission 2006b: 19) as well as an EU wide procedure to monitor the incidence of suspensions. The Commission’s proposals also made reference to two other key areas where it noted inconsistency of approach across EU Member States. First, regarding what should have been in theory a light touch system of general authorisations to provide a service (as opposed to the more onerous system of licences which pre-dated it) it was apparent that ‘most often individual rights of use are required at national level for using scarce resources’ (European Commission 2006b: 19) which tended to differ across Member States. As a result, the Commission proposed to introduce three measures at EU level: first, a system for determining that services had a pan-European scope in order to apply, second, a commonly defined system of authorisation and selection; third a series of commonly applied conditions for rights to use scarce communications resources. Decisions relating to these matters would be taken at EU committee level, an increasingly important aspect of telecommunications policy making. The Commission also addressed what it perceived as a problem of inconsistent use of Article 5 of the 2002 Access directive which permits NRAs to take action against companies without SMP to improve access, interconnection and end-to-end connectivity. The proposed solution would involve devolving more power to the EU level in that NRAs would be required to submit their intentions in this regard to the Commission which, using the aforementioned regulatory committee decision procedure, would adjudicate on the proposal.

Finally, the ‘totemic’ change in European telecommunications which witnessed the replacement of state ownership and public service provision with liberalisation delivered through market regulation over almost 25 years has significantly altered the position of the telecommunications user. The emergence and development of the neo-liberal project in telecommunications inevitably resulted in a focus on users as customers as opposed to

citizens to an unprecedented degree though it must also be stated that universal service was ensconced as a key element of the 1998 regulatory framework and has remained so ever since. Through the original ONP Framework directive, those Member States of the EU, notably France, with very strong traditions of *service public* in telecommunications which they wished to see maintained and protected, were able to upload their preferences here to ensure that a harmonised system of universal service was established legally at EU level. The current review of telecommunications gives an indication of the state of the European Commission's thinking on universal service and its place within the maturing European regulatory state in telecommunications.

In 2005 the EU undertook a review of universal service involving a consultation exercise whose results suggested that Member States did not wish to alter radically in the short to medium term the current stipulations for universal service. As a consequence, current Commission proposals for developing universal service are modest in nature. In response to the emergence of Voice over Internet Protocol (VoIP) services, the Commission's wish is to separate universal service obligations placed on infrastructure providers, on the one hand and service providers, on the other, the assumption being that the growth of VoIP will greatly increase user choice of voice service providers. The extent to which the market will provide the staples of universal service in the future is also clear from the proposal to remove the provision of directory enquiry services from the universal service package and leave its provision instead to the market (European Commission 2006b). The Commission's approach to universal service in the near and longer term future is underpinned by the rather optimistic view that where necessary the system 'could be adjusted to anticipate changes in markets and technologies...[to] allow for regulatory obligations to be reduced once the market is shown to be meeting users' needs' (European Commission 2006b: 34).

CONCLUSION

Telecommunications is arguably the most EU-ised of the culture industries examined in this volume. As shown in the chapter, this has evolved as a complex process involving key institutional and private actors at the national and European level for the best part of

a quarter of a century. Underpinning the development of EU telecommunications policy has been the replacement of the traditional core ‘totemic’ values of state ownership and public interest provision by the new practices of economic liberalisation and market regulation and their associated values. As noted in the chapter, the internationalisation of the governance of the sector to the EU level which has accompanied this fundamental change has proceeded as a steady movement along the scale of liberalisation, reached through the attainment of a series of compromise temporary policy equilibrium points. It is important to point out that, though it has proceeded apace, the maturation of a liberalised telecommunications market through a comprehensive regulatory framework has not yet been completed fully. In fact, the chapter has shown that the creation of the regulatory state in telecommunications (replacing the historic corporate state) was only the beginning – the evolving experiment of the regulatory state in action in telecommunications is still unfolding as illustrated by current ongoing negotiations among EU Member States and the European Commission to modify further the ECRF.

How significant, then, has the EU been in this increasingly important part of the information and communications domain? There is little doubt that a re-ordered governance of the sector along the lines of the neo-liberal model in Europe’s political territories would have occurred without the existence of the EU: the powerful opportunities as well as threats associated with economic globalisation (see Weiss 1998, 2003), would have ensured this. However, the EU has provided a vital means for its Member States of negotiating the complexities of globalisation (see Wallace 2000), in this case the internationalisation of the telecommunications sector. It has allowed them to upload their policy preferences at key junctures - and has provided a relatively familiar and secure environment within which to mark out and refine a single telecommunications market space in Europe, something recognised more widely as a classic set of policy responses to Europeanisation (see Borzel 2002). The EU has been utilised to play an important role in synchronising the liberalisation of telecommunications to the different speeds of reform found across the EU. As in all situations of EU-isation, compromise outcomes have characterised the various equilibrium points reached in the development of EU telecommunications policy and it would also be realistic to assert that the point of

policy lock-in in telecommunications for Member States has been reached some time ago, probably by 1994, with agreements by then made to liberalise comprehensively all telecommunications infrastructures and services.

However, the development of EU telecommunications policy has not been driven completely by the intergovernmental exchanges and compromises of the EU's member countries. Any decision to use the EU institutional context to the extent exhibited by Member States in telecommunications bears a 'cost' in terms of the ceding partially of governance authority. This has been most clearly illustrated by the prominent role played in an administrative and political capacity by the European Commission which has developed into one of the most skilful political actors on the European telecommunications policy landscape. It is also evident in the growth of a clutch of regulatory committees at EU level to deal with the many complex matters that arise from the decision to create competition across Europe in a former utility sector. The resulting pattern is a complex regulatory web (Radaelli 2004) of transnational network (Eberlein and Grande 2005) governance in which a plethora of public and private actors play a part in the evolution of the sector. Here NRAs working domestically and at the EU level interact with the European Commission as the core regulatory relationship in the sector. This has required the creation of an accommodative relationship between regulatory peers from different markets with different degrees of maturity as well as with the European Commission with its specifically European overview agenda. The robustness and continual development of telecommunications policy is testament to the realisation by Member States of the importance of the EU context as well as the various roles – policy entrepreneur, facilitator, monitor and administrator - astutely played by EU institutional actors - most significantly the Commission - across its history. These key binding elements are likely to remain undiminished for the foreseeable future.

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