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Summary

Co-coordinating the single market and EU regulation is a complex task. Much work has focused on increased demand for EU regulation, be this from firms, governments or the European Commission. But, for regulation to be implemented, appropriate institutions for the greatly enhanced EU regulation also have to be established. This study looks at such institutions, notably the European Regulatory Networks (ERNs) composed of national regulators in three sectors; Telecommunications, Energy, and Securities. This report is divided into four parts. The first offers an analysis of the overall ‘regulatory space’ in Europe and its evolution. Part 2 offers an in depth analysis of the ERNs’ functions and powers. As ERNs face a tension between pressures for centralisation and those for autonomy and decentralisation, Part 3 examines how ERNs operate in practice and are perceived by key actors by presenting the findings of a survey of National Regulators in 27 member states across three sectors: Telecommunications, Energy and Securities. The fourth part offers overall project conclusions.

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0. Introduction

Co-coordinating the single market and EU regulation is a complex task. Much work has focused on increased demand for EU regulation, be this from firms, governments or the European Commission. But, for regulation to be implemented, appropriate institutions for the greatly enhanced EU regulation also have to be established. This study looks at such institutions, notably the European Regulatory Networks (ERNs) composed of national regulators in three sectors; Telecommunications, Energy, and Securities.

Since the 1980s there have been radical changes in regulation in EU member states with horizontal delegation to new independent regulatory agencies (IRAs) and vertical delegation to EU institutions. However, such delegation has resulted in an EU regulatory implementation deficit. The study seeks to explore how tensions between centralised rule-making and decentralised implementation have given rise to significant debates about the creation of new ERNs to ensure effective implementation of EU regulation and then which modes of integration and governance have been adopted.

The report is divided into four parts. The first offers an analysis of the overall ‘regulatory space’ in Europe and its evolution. Hence it places ERNs in the context of the development of European regulatory coordination, showing how they are the latest phase in a process of development. Debates about administrative arrangements to coordinate the implementation of regulation across the EU have seen discussion of several models. Unfortunately, labels such as ‘Euro-regulator’ have been used without adequate definition, and indeed sometimes with different meanings over time. This first section therefore sets out six major models that have been given serious attention for implementation. It shows that there has been no movement towards a neat and tidy regulatory space. Instead, that space is filled with multiple organisations and is strongly marked by past steps. Indeed, evolution has been far from painless or consensual: rather it has involved strong debates about the extent of centralisation of powers at the European level and the respective roles of the European Commission and national and EU regulatory agencies, showing that implementing institutions link to wider political battles about integration and the form of the EU.

Part 2 offers an in depth analysis of the ERNs’ functions and powers. Taking a principal-agent perspective as a starting point for the formal analysis of powers and functions delegated by the European Commission and Independent national Regulators (IRAs), the central argument is that the network represents a new round of double delegations. ERNs are a response to the multiplication of regulators, and their uneven development by coordinating implementation of regulatory member states. But as part 1 already noted, at a formal level, the European networks of regulators remain highly constrained by existing actors. In particular, the European Commission and national regulators maintain controls over the networks, which lack resources and rights of initiative.

ERNs face a tension between pressures for centralisation and those for autonomy and decentralisation. Hence Part 3 examines how ERNs operate in practice and are perceived by key actors by presenting the findings of a survey of National Regulators in 27 member states across three sectors: Telecommunications, Energy and Securities. The survey attempted to assess the formal powers and influence of the ERNs, quantify their capacity and resources, assess the potential Principal and Agent relationships (between ERN and EU and ERN and NRA) and finally assess preferences for different institutional models for European regulatory space. In so doing it is hoped that the study will help us tackle a number of understand if ERNs set regulatory agendas? Do they deal with politically salient issues? Have altered the distribution of power in regulation? Are they dominated by certain national alliances? What is

the role of the European Commission? Are ERNs the first best or second best regulatory solutions to the implementation deficit problem?

The fourth part offers overall project conclusions. It suggests that the outcome of responses to implementation deficits and endogenous institutional evolution has been a process of gradual strengthening of European networks of national policy makers. ERNs form part of this process. Moreover, once set up, ERNs have in recent years become more formalised and centralised. This overall conclusion is important both empirically and theoretically. With respect to the former, regulation is the EU's core activity and hence the choice of modes of coordination for EU legislation goes to the heart of European integration. This it raises uncomfortable issues about the extent to which the EU should seek uniform administrative arrangements and application of European legislation across 27 member states; the allocation of responsibilities for different elements of policy making between organisational levels; relationships between the Commission and national actors; how to bring together the different parts of the policy cycle to avoid implementation gaps; the development of coordination mechanisms outside the formalised comitology procedures used for legislation. With respect to theoretical debates, the report shows that EU institutional development proceeds incrementally, and often endogenously, as previous steps influence future ones. It suggests that this process leads to a gradual strengthening of coordinating institutions.

I. Reshaping European Regulatory Space

I.1 Introduction

The first part begins by setting out different institutional models for implementation of EU regulation debated in the past two decades. It looks at institutions for implementation, as opposed to those for passing EU directives that end monopolies or set down re-regulatory principles. Although the distinction between law making and implementation can be difficult to draw, since the latter can involve creating detailed rules through legislation, in practice, EU directives are usually broad and concerned with aims, whereas implementation involves their application in national markets. The models look at the formal 'regulatory space' in Europe- i.e. the structures, powers and relationships between organisations given responsibilities for implementing EU regulation of markets. It is particularly concerned with the allocation of powers and the extent to which organisations are tightly linked.

Thereafter using process tracing in three economically and politically key sectors (financial services, telecommunications and electricity), this part of the report shows how each step has prepared the ground for further reforms and how institutional 'layering' and 'conversion' have taken place. The three phases we identify consist of: EU-supervised national implementation; informal networks of independent regulators and forum governance; European networks of national regulators.

I.2 Institutional choices for structuring European regulatory space

Debates about administrative arrangements to coordinate the implementation of regulation across the EU have seen discussion of several institutional models. Unfortunately, labels such as 'Euro-regulator' have been used without adequate definition, and indeed sometimes with different meanings over time. This section therefore sets out different institutional choices by looking at seven major models that have been given serious attention for implementation of EU regulation (as opposed to passing EU legislation). The models look at the formal 'regulatory space' in Europe- i.e. the structures for taking decisions about implementing EU legisla-

tion concerning regulation of markets.¹ Section 3 then examines why and how choices among these models have been made.

The seven models are stylised and based on five factors that structure regulatory space:

- the principals- i.e. the actors who formally delegate powers over implementation (if any)
- the participants in decisions about implementation (who may be agents if there is formal delegation)
- the allocation of powers and responsibilities for implementation of EU legislation;
- possible mechanisms of implementation, dealing with issues of consistency and interpretation of discretion across EU member states; these can range from informal learning and norms to explicit but non-binding benchmarks/guidelines right up to legally binding decisions and standards and rules;
- which actors have controls over actors responsible for implementation decisions.²

The five factors themselves are of course subject to many variations and combinations but a schematic typology is presented.³ Moreover, elements from different models can be layered on each other within a domain. The different models are presented in an approximate hierarchy of greater centralisation of coordination, starting with implementation in the hands of national bodies and ending with a single EU regulator. It should be noted that they refer to formal powers- their effects on centralisation of power in practice is a different issue.⁴

EU monitoring and supervision involves the classic EU method whereby the EU delegates responsibility for implementing EU regulation to national regulatory authorities (NRAs- public bodies designated by member states, hence normally including government departments as well as independent regulatory agencies, often known as ‘IRAs’). The European Commission and behind it the European Court of Justice are responsible for ensuring that national regulatory authorities correctly implement EU regulation through monitoring and supervision; ultimately this can mean infringement proceedings against member states for failure to comply with EU law. Informal methods such as benchmarking or discussions of national officials may occur but they are not supplied institutionally and hence rely on the initiative of individual actors. Indeed, national agencies may in practice become ‘double-hatted’ as they also become ‘agents’ of the Commission with which they develop links.⁵ National governments have controls over EU institutions such as the European Commission and ECJ, as well as over national regulatory authorities.⁶

Forums are informal consultative groups. They do not enjoy formal delegation of powers and hence lack formal principals and controls (although of course informal delegation of functions, for instance by the Commission or national regulatory authorities may take place).

¹ For discussions of ‘regulatory space’, see Hancher and Moran 1989 and Scott 2001; for ‘administrative space’, see Olsen 2003, although he is mostly concerned with convergence, whereas here we focus on the institutions of such space; we omit self regulation since this is not formally a mode of implementing EU law, although it may be a mode of regulation (for a recent discussion, see Cafaggi 2006).

² For analyses of advantages and disadvantages of different models, see Coen and Doyle 2000.

³ For a comprehensive analysis of different modes of regulation in the EU, see Scott 2005

⁴ Indeed, we can conceive of a situation in which greater centralisation of formal powers actually led to less power for the central EU body or indeed less effective implementation.

⁵ See Egeberg 2006.

⁶ For a full discussion of the role of the European Commission in co-ordinating infringement proceedings and ECJ oversight procedure see Borzel 2002 and Falkner et al 2005.

Their participants can be drawn from across a sector- both public and private, and from EU and national levels. They offer a form of informal sectoral governance.⁷ They can coordinate through informal mechanisms such as policy learning or setting benchmarks and norms. Such forum governance relies heavily on soft law through norms becoming accepted via a process of policy iterations between participants.⁸

Informal networks of national independent regulatory networks (NIRAs) are also informal groupings that do not have formal delegation. But they have a much narrower membership than forums, since they consist of independent regulatory agencies who enjoy domestic independence from national governments and exclude officials from ministries and the European Commission or the private sector. They also rely on informal mechanisms to influence national independent regulatory agencies such as learning, norms and benchmarking, perhaps even aiding the development of a European regulatory ‘epistemic community’.⁹ However, unlike forums they provide a more institutional setting for the national independent regulatory agencies, encourage contact via regular scheduled meetings, and reduce collective action problems by having a narrower and hence less diverse membership in the form of independent regulatory agencies.

European Regulatory Networks (ERNs) are composed of designated regulators- usually national independent regulatory agencies, and sometimes also Commission officials. Their role is to coordinate national bodies that continue to implement EU legislation alongside the ERN. They can do so both through participating in formal rule making (eg by setting or advising on standards) or through facilitating learning and best practice through regular interaction and discussion among national regulators and the Commission. ERNs are created through a ‘Double Delegation’- from both the Commission and national regulators, as each delegates formal coordinating functions and powers, such as setting standards or rules for implementation to the ERN.¹⁰ Both can be expected to have formal controls over ERNs. The ERNs are more institutionalised and enjoy greater formal powers compared with forums and informal NIRAs. For instance they have a more homogenous and defined membership than forums, usually have a small secretariat and working groups, and enjoy formal access to the Commission debates via consultation and regular plenary sessions. Yet they remain coordinating bodies- EU regulation continues to be implemented by national authorities that are members of the ERN.

European Regulatory Agencies (ERAs) also involve a double delegation from the Commission and national regulators and/or governments. European Regulatory Agencies can make specific recommendations or proposals that are then subject to Commission acceptance or veto (in contrast, ERNs can only offer advice on EU legislation and their main role is to coordinate national authorities). ERAs can be divided into three groups according to their powers: those offering advice, especially technical and scientific, to the Commission; those carrying out inspections; those empowered to adopt legally-binding individual decisions.¹¹ ERAs are established by secondary legislation to fulfil specific tasks and enjoy a limited degree of

⁷ Cf. Kohler-Koch and Eising 1999.

⁸ In terms of EU governance debates Sabel and Zeitin 2007 would argue that these new networks are an experimentalist form of governance whereas Heriter and Knill 2007 would argue that that these networks operate under a shadow of hierarchy that constrains development.

⁹ Similar forces were also seen to be at work in the modernisation of European Competition Policy – see Wilks 2005.

¹⁰ See Coen and Thatcher 2008 for a discussion.

¹¹ Majone 2005: 94.

autonomy from the Commission.¹² They also have management boards composed of representatives of national governments, the Commission and sometimes the European Parliament rather than just national IRAs, underlining the greater degree of integration and independence from national bodies. Nevertheless, ERAs face important constraints. They can only apply rules to specific decisions rather than making rules: the ‘Meroni’ doctrine of non-delegation, at least as currently interpreted, prevents the Commission from delegating rule-making powers. They also rely on national bodies for information and expertise, and sometimes for undertaking functions that the ERA delegates. Examples of ERAs include the European Food Safety Authority or the European Agency for the Evaluation of Medicinal Products (EMA), or the European Aviation Safety Authority or the Trademark Office.¹³

‘Federal European Regulatory Agencies’ (FERAs) would have powers to make rules and set standards for implementation throughout the EU; national regulatory authorities (NRAs) would continue to exist but they would be subordinate to the FERA in the FERA’s domains. A FERA could be composed of representatives of each member state; the European Central Bank offers an analogous body. Powers would be transferred from both the Commission and national governments and hence they would be its principals. The creation of Federal European Regulatory Agencies would require treaty amendment to be agreed by national governments. The rationale for such bodies has been argued to be increased policy-making efficiency, as well as insulating national bodies from domestic pressures.¹⁴ If the US experience in sectors such as telecommunications and energy were copied, lower-level regulatory agencies would continue to exist and to have powers in certain fields, notably intra-national issues, but questions that affect inter-(member) state trade would be under the jurisdiction of the ERA.

A *Single European Regulator* (SER) differs from a FERA in being the sole body responsible for implementation and being composed not of representatives of national regulatory agencies but of officials who are chosen to serve the EU as a whole. It would be a radical step in that national regulatory authorities would be abolished, ending issues of coordination of such bodies (but perhaps transforming them into intra-organisational ones). Instead the Single European regulator would take all decisions on individual cases concerning implementation of EU regulation. It would require Treaty amendment and would involve transferring powers from both the Commission and member states, who hence would be its principals and be expected to have controls over it. The closest analogous body is the Securities and Exchange Commission (SEC) in the US which regulates securities markets. No SERs have yet been established; the closest analogy is direct regulation by the European Commission, but this is rare, being limited to certain (admittedly very important) parts of competition policy, notably cross-border mergers and acquisitions over certain thresholds, abuse of a dominant position and state aids. Yet a major part of the Commission’s regulation, namely vetting agreements between firms that have the potential to affect inter-state trade, were handed to national competition regulators in 2002, greatly reducing such direct regulation.¹⁵

¹² See Keleman 2005, especially pp175-7.

¹³ For discussions, see Keleman 2002, Dehousse 2002, Vos 2000, Majone 2005: 83-99; Nicolaidis 2006; for the European Agency for the Evaluation of Medicinal Products see Gehring and Krapohl 2007; ‘information gathering agencies, such as the European Agency for Safety at Work are excluded- see Keleman 2002 for the division between these and regulatory agencies.

¹⁴ Majone 1997, 2001, 2005 has been a strong proponent of the single regulatory model on the grounds of political and economic efficiency.

¹⁵ See Wilks 2005 for an analysis

Table 1: Typology of institutions of the European space for implementing regulation

Type of co-ordination	Principals and legal basis	Participants	Allocation of powers and responsibilities	Mechanisms of implementation	Allocation of formal controls
EU supervised national implementation	EU-Treaty	NRAs, Commission and ECJ	NRAs implement, European Commission and ECJ oversee	Legal infringement proceedings	Commission and ECJ
Forum Governance	None formally- no formal delegation	NRAs, Commission, suppliers, users and user groups	None formally	No legally binding measures; learning and norms, and benchmarking	None since no formal delegation
Informal networks of National IRAs (NIRAs)	None- no formal delegation	IRAs	None formally	No legally binding measures; learning, norms, and benchmarking	None since no formal delegation
European Networks of Regulators (ERNs)	EU Commission and national governments and regulators, using EU secondary legislation	Designated national regulators (e.g. IRAs) and Commission)	National IRAs, with guidelines set by ERN	Advice to Commission on legislation; setting formal guidelines, learning, norms, and benchmarking	Commission and national regulators
European Regulatory Agency (ERA)	EU Commission and national governments and regulators using EU secondary legislation	Designated national regulators (e.g. IRAs, national government officials), Commission and sometimes European Parliament	Commission or NRA, except for 'technical' decisions	Specific Decisions, advice to Commission approval or veto; setting formal guidelines; learning, norms, and benchmarking	Commission, member states, European Parliament,
Federal European Regulatory Agency (FERA)	EU Commission and national governments using Treaty amendment	Representatives of member states/IRAs	FERA with NRAs being subordinate in FERA's domains	Setting standards and rules and taking decisions in individual cases within its domain; learning, norms, and benchmarking	National governments; possibly also European Commission and European Parliament
Single European Regulator (SER)	EU Commission and national governments using Treaty amendment	European officials	SER- NRAs abolished	Setting standards and rules and taking decisions in individual cases	National governments; possibly also European Commission and European Parliament
Direct regulation by the European Commission	National governments through EU Treaty	European Commission	European Commission	Setting standards and rules and taking decisions in individual cases	European Court of Justice

I.3. European Regulatory Space in Network Industries

Debates about institutions for implementing EU regulation have occurred in many domains—from economic ones such as general competition policy or chemicals to food safety, environmental protection and workplace health and safety.¹⁶ However, network industries such as securities trading, telecommunications and electricity offer a good example of regulatory space, due not only to their importance but also as classic examples for EU regulation. Traditionally, regulatory space in Europe was dominated by nation states and their publicly-owned network suppliers. Formal regulatory powers lay in the hands of ministries, although in practice they enjoyed very close links with the state-owned suppliers. The EU played almost no role in regulating network industries; thus for instance, the EU telecommunications ministers met twice between 1959 and 1977;¹⁷ almost no EU sectoral legislation was passed, and network industries were seen as outside competition law. Insofar as international coordination took place, it took the form of intergovernmental organisations that were composed of national representatives and had no powers to impose decisions; examples included the CEPT in telecommunications and IOSCO in securities both of whose memberships went beyond the EU.

However, from the 1980s onwards, new European administrative structures were created to regulate network industries. Although the timing of each phase has varied a little across different network industries, we see a repeated pattern, suggesting a cross-sectoral logic rather an industry-specific one. In part, the changes arose from the combination of three developments, namely the growth of EU regulation, privatisation of suppliers and modification of national regulatory structures. However, a fourth factor was endogenous processes from each previous phase of changes in the EU's regulatory space. We show how these processes contributed to an evolutionary pattern of development, with experimentation, layering of institutions, and gradual change.

¹⁶ For general overviews, see for instance Sabel and Zeitlin 2007, Geradin et al 2005

¹⁷ Schneider and Werle 1990: 87

Table 2: Chronology of events

1980s and 1990s	<p>The EU begins to pass sector-specific legislation in network industries to open national markets.</p> <p>Liberalization of national network industries and the creation of IRAs.</p> <p>Concerns emerge about the lack of coordination among IRAs and uneven implementation across member states.</p>
1997	Creation of the IRG (Independent Regulators Group)
1998	Creation of the Florence Forum for electricity
1999	<p>Creation of the Madrid Forum for gas.</p> <p>Creation of FESCO (Forum of European Securities Commissions)</p> <p>Approval of the Financial Services Action Plan, leading to a wave of liberalisation and re-regulation of the financial market in Europe</p>
Late 1990s to 2002	Significant discussion around three proposals: (1.) Federal European agencies, which would have involved considerable centralisation; (2.) Greater EU Commission control over IRAs; and (3.) European networks of IRAs.
2000	Institution of the ‘committee of wise men’, chaired by Baron Lamfalussy. Final report published in 2001.
2001	Establishment of CESR (Committee of European Securities Regulators)
2002	Creation of the ERG (European Regulators Group)
2003	Creation of ERGEG (European Regulators Group for electricity and gas)
Mid 2000s	Vigorous debates about reforming ERNs. Three institutional options: (1.) Euro-regulators, (2.) European agencies, or (3.) federal European agencies.
2006	Exchange of letters between Commissioner Reding and the ERG.
September 2007	Commission proposes Agency for the Cooperation of Electricity Regulators (ACER)
October 2007	Commission proposes European Electronic Communications Market Authority (EECMA)
May 2008	The European Parliament’s ITRE committee adopts amendments strengthening the ACER and increasing their independence from the Commission.
June 2008	The energy Council calls for a weaker version of ACER
July 2008	<p>First reading in the plenary of the European Parliament on ACER. ITRE’s proposal is adopted.</p> <p>The ITRE committee rejects EECMA in favour of BERT.</p>
September 2008	First reading in the plenary of the European Parliament on EECMA
November 2008	The telecoms Council decides on EECMA and BERT.

Phase 1 EU-Supervised National Implementation

In the late 1980s and 1990s, the EU began to pass sector-specific legislation in network industries, beginning with telecommunications and soon expanding to electricity, gas and securi-

ties.¹⁸ Significant legislation for postal services and the railways only began in the late 1990s.¹⁹

The EU's expanding regulatory framework was binding on member states and composed of three elements. First liberalisation- i.e. ending domestic legal monopolies, initially in particular market segments but later throughout industries, including domestic users. But, the EU did not just 'deregulate', for a second element was 're-regulatory rules' that governed market competition and set conditions for suppliers and public actors.²⁰ Key elements included rules about access to infrastructures, cost-based tariffs and universal service.

The third element concerned implementation and is most directly relevant to this report. EU legislation placed duties for enforcing liberalisation and especially re-regulation on 'national regulatory authorities'. It insisted that these NRAs be separate from suppliers, thus ruling out ministries that both regulated and contained suppliers (often the case in telecommunications and postal services). The legislation did not require member states to establish independent regulatory agencies (IRAs), although the Commission often encouraged this. Indeed, this period was characterised by a variety of regulatory solutions in the domestic markets; ranging from IRAs and government departments or agencies with varying links to elected politicians in telecommunications; to IRAs, self regulation and voluntary access agreements in energy markets.²¹

Thus, in this first phase, EU regulation sought to open national markets through liberalisation and re-regulation but left the institutional architecture of implementation to member states. There were few instruments to coordinate NRAs or to ensure consistent implementation of EU law, a major issue for the EU given that most of its legislation was very broadly defined in line with "the politics of compromise" among member states and also between EU institutions.²²

Phase 2 Informal networks of Independent Regulators (NIRAs) and Forum Governance

In the 1990s, concerns emerged about lack of coordination among national regulators, uneven implementation across member states and the need for more policy learning between national officials. Directives were seen as too rigid and "old-fashioned" and instead new modes of ensuring better implementation of EU regulation were sought.²³ Moreover, the 1980s had seen the abandonment of attempts to create very detailed EU legislation to harmonise standards, using instead the 'new approach' of only setting minimum harmonisation standards, leaving member states considerable discretion over implementation, especially of 're-regulatory' measures governing how competition should operate, such as interconnection or networks or licensing, and provision of services beyond competition such as universal service.²⁴ But

¹⁸ Bulmer et al 2007, Coen and Thatcher 2000, Levi-Faur 2005. More specifically see Thatcher 2001 and Humphreys and Simpson 2005 for telecommunications, and Eberlein 2004 and Eising and Jabko 2000 for energy.

¹⁹ See Héritier 2005.

²⁰ Cf Vogel 1996.

²¹ Cf Thatcher 2002, 2007, Levi-Faur 2000.

²² See Eising and Jabko 2000 for a detailed discussion of the Member state bargaining and Commission compromises in the creation of the Energy Liberalisation directives.

²³ Interview senior financial regulator1, Borzel 2001.

²⁴ Pelkmans 1987, although degree of detail must be distinguished from coercion- EU directives remained legally binding and if anything, became more coercive as their scope was extended into new sectors such as the utilities- see Keleman 2004

variation in the forms of NRAs created problems of co-ordination throughout the EU.²⁵ Moreover, this ‘patchwork regulatory environment’ provided opportunities for industry, NRAs and member states to establish regulatory advantages at the expense of a consistent European single market.²⁶

One possible response was to greatly centralise regulatory powers. Thus for instance, in telecommunications there was support within the Commission (including Martin Bangemann, Commissioner responsible) for a powerful EU ‘licensing committee’ or a European-level agency to ensure even and effective implementation of EC regulation.²⁷ The European Parliament called for a Euro-telecoms authority or Committee to prevent separate and different regulatory areas developing.²⁸ But no European agencies were established. The key reason was opposition by member states, many of whom feared loss of control over their domestic markets and increased foreign competition to national firms, and hence preferred national IRAs; for their part, those new IRAs were attempting to establish their political position in domestic markets which Euro-regulators could have threatened.²⁹ As Bangemann observed later, “It would have been too much to ask of member states.....to impose a European Regulator on top of liberalisation”³⁰

Instead, two forms of more centralised coordination emerged in the late 1990s in response to not only exogenous pressures from the ‘Single Market’ but also endogenous pressures to coordinate markets arising from the previous regulatory patchwork and the desire to avoid European regulators. One were informal sectoral governance groups, notably the Florence Forum for electricity in 1998, followed by the Madrid Forum for gas in 1999.³¹ The creation of these forums was led by the Commission. It, politicians, and industry saw them as a low cost institutional design options thanks to their low political saliency. The initial aim was to provide a neutral and informal EU level forum for discussion of issues and exchange of experiences concerning the implementation of the EU Electricity and gas directive and the development of a single EU energy market.³² The new forums included a wide range of participant- e.g. Commission officials, national regulators (both IRAs and government officials), firms, trade associations, consumer groups, commercial experts and academics. They met once per annum in Florence and Madrid and had no permanent secretariat. Instead, the Commission offered its assistance in the day to day issues and NRAs continued to develop independent regulatory solutions.

The second form of coordination were new informal networks of independent regulators (NIRAs). Their creation was led by national IRAs, many of which were set up in the late 1980s and 1990s,³³ but was also encouraged by the Commission. Each saw advantages: for

²⁵ Interview with Commission official 1.

²⁶ For a discussion how member states played the patchwork regulation see Héritier 2001, and for how NRAs and Business managed the multilevel regulatory environment see Coen and Héritier 2005.

²⁷ Commission 1992, Agence Europe 10.3.95, 24.5.96, 25.2.97, Financial Times 3.7.96, 30.9.96, 19.12.97

²⁸ European Voice 17.4.1997, Coen and Doyle 2000, Agence Europe 11.4.95, 20.2.96, 24.5.96, 21.12.96, 24.2.97

²⁹ Humphreys and Simpson 2005: 102-6; Agence Europe 25.2.97, Financial Times 19.12.97, Interviews with Commission official and NRA.

³⁰ FT19.12.2007. p3.

³¹ On the Florence forum, see Eberlein 2003

³² See Electricity Directives 96/92/EC and gas directive 98/30/EC. For a discussion of the formation of the Forum FT.1.2.2000, Eberlein 2002.

³³ Cf. Thatcher 2002a

the new national IRAs they were a means of cooperating with other European IRAs, expanding their role and learning about how to respond to EU regulation but without being controlled by the Commission; for the Commission, they seemed a step forward towards greater integration.³⁴ In securities trading, French and Italian regulators initiated the creation of an informal network of regulators called FESCO (Forum of European Securities Commissions).³⁵ In telecommunications, a similar group of IRAs was created in 1997, the IRG (Independent Regulators Group), although for this group, the European Commission took a stronger role in its initiation.³⁶ In energy, a network of independent energy regulators was created in 2000, when ten national IRAs established the CEER (Committee of European Energy Regulators).³⁷ This was later than the other utilities, due to the initial move for forums, but occurred when IRAs became dissatisfied with the forums as being too slow, cumbersome and lacking in enforcement capacity.³⁸ Its objectives were to enhance co-operation among national energy regulators and co-operation with the EU institutions. These groups involved informal meetings of national IRAs to exchange experiences. They had no formal powers and no secretariat and drew on the resources and goodwill of leading IRAs. Initially, IRAs from some member states refused to participate, such as the UK while others appeared ineligible as they were not sectoral energy regulators, notably the German general competition authority which had taken the lead at the Florence and Madrid forums.³⁹

Phase 3 European Regulatory Networks

Between the late 1990s and 2002, restructuring European regulatory space again became the subject of significant discussion. Pressures for change arose from concerns about the slowness of ‘classic’ EU legislative decision making, uneven implementation of EU law and the inappropriateness of making detailed EU rules through legislation in fast-moving markets. But the institutional choices were also influenced by developments in the previous phase 2. Their weaknesses resulted in pressures for greater centralisation. Thus the NIRAs and forums created earlier in the 1990s were criticised as inadequate, notably due to their lack of powers, reliance on consensus and slowness.

One proposal was for federal European agencies (also termed ‘Euro-regulators’), which would have involved considerable centralisation.⁴⁰ A second was for greater EU Commission control over IRAs. A third was for European regulatory networks of IRAs created through a “Double Delegation” of functions and powers from the Commission and IRAs.⁴¹ In most network industries, this third option was taken.

These ERNs were relatively weak in formal institutional terms. Their main functions were to advise the Commission on new legislation and sometimes to issue guidelines for implementation of EU legislation. They lacked powers to take decisions or impose them over their own members, and operated with only a small secretariat. The Commission had several controls,

³⁴ Interview, senior French financial regulator March 2007.

³⁵ Interview senior French financial regulator 1 March 2007 and senior former British financial regulator September 2007.

³⁶ Humphreys and Simpson 2005: 86-7.

³⁷ FT1.3.2000

³⁸ Interview European Commission official 2007

³⁹ See Coen 2005 and Böllhoff 2005.

⁴⁰ Financial Times 3.7.96, 19.12.97, 16.9.2000, 8.6.2001

⁴¹ See Coen and Thatcher 2008 for a more detailed discussion of Double Delegation and also Tarrant and Keleman 2007.

such as over budgets or attending meetings. Some changes were also made in line with the second option, as the Commission gained some limited powers (especially in telecommunications), to intervene in the decisions of IRAs.⁴² But no European regulatory agencies or federal European Agencies were set up in the three sectors.

These institutional choices reflected battles among several groups of actors- the Commission, IRAs, national governments, the European Parliament and industry representatives.⁴³ In particular, the Commission feared both inconsistent implementation and the development of federal European regulatory agencies that would be rivals to it. Moreover, the spread of IRAs at the national level both offered an example for the EU and also increased coordination problems as well as creating a new group of actors. In response, it sought greater centralisation of powers, preferably in its own hands, and arrangements that brought together national IRAs under its aegis. For their part, IRAs opposed greater Commission control over their activities, but also needed to work with the Commission since they implemented EU legislation and could benefit from new EU legislation. They sought both to increase their powers and resources vis-à-vis national governments and firms, and also to protect their independence from the European Commission. National governments did not wish to lose power to the Commission but were also concerned that uneven implementation of EU law might disadvantage their national suppliers, notably if other member states ‘cheated’ by blocking entry to their domestic markets by overseas European suppliers whilst also seeking access to those overseas markets for their own firms. Equally, governments and IRAs were concerned about the effects of different national legal systems on the functioning of the EU market.⁴⁴ Suppliers, especially large firms, saw advantages in creating a single European market that allowed them to expand abroad and to face similar regulatory demands across countries but were also worried by the creation of another level of regulation and loss of supportive national IRAs.⁴⁵

Support for ERNs and sometimes detailed proposals came from existing NIRAs. ERNs had the advantages of increasing resources for national IRAs without creating a powerful centralised regulator (an ERA, FERA or SER) that could take powers away from them. At the same time, the Commission saw ERNs as a way of creating closer links to IRAs and hence avoiding NIRAs from developing greater autonomy from it. Moreover, the ERNs were often created either through absorption of NIRAs (eg in securities trading and other financial services) or in a process of close layering, as in telecommunications and energy, where they have the same membership and secretariat, and indeed often meet on the same day (the main difference being Commission attendance of ERN meetings but not ones held by the NIRAs such as the Independent Regulators Group in telecommunications).

The institutional debates and choices can be illustrated across several sectors. In securities trading, national governments, the Commission, IRAs, large firms and industry associations were worried that EU legislation moved too slowly with respect to rapidly-changing financial markets.⁴⁶ There were problems of lack of harmonisation, inadequate implementation of EU

⁴² In particular, the Commission was empowered to veto two types of decisions by IRAs concerning competition (definitions of relevant markets and significant market power) that affected inter-member state trade, under Article 7 of the Framework Directive- European Parliament and Council 2002.

⁴³ For a parallel discussion in relation to ERAs, see Keleman 2002.

⁴⁴ Interview senior former British financial regulator.

⁴⁵ For instance, in telecommunications, see BT official noted “*opposition in the industry to creating a new layer of bureaucracy at a time when firms were actually calling for less regulation*”- FT16.9.2000; cf. Coen and Doyle 2000.

⁴⁶ FT 20.3.2001; Lamfalussy 2000 [initial report] and 2001 [final report]

law, and too little cooperation among financial regulators.⁴⁷ International firms, especially from the US, sought common rules and definitions across the EU.⁴⁸ The 1999 Financial Services Action Plan approved by the Commission and Council, was designed to lead to a wave of legislation to obtain considerable liberalisation and re-regulation with the aim of opening up the enormous but largely nationally-segmented financial market in Europe. But implementation was argued to require institutional change, both in terms of EU legislation and national authorities. To make progress, the European Council in 2000 set up a ‘committee of wise men’, chaired by Baron Lamfalussy, who had previously worked on European monetary Union. The Committee found that no fewer than 45% of respondents to its consultation believed that arrangements for cooperation between national supervisors were inadequate.⁴⁹ They criticised differences in supervisory powers, duplication of supervision, inadequate channels of cooperation, high costs and lack of expertise. FESCO was attacked for weaknesses due to lack of official status, decisions having to be taken by consensus and not being binding.⁵⁰ At the same time, the European Commission lacked resources for implementation or even verifying correct implementation by national regulatory authorities- only about 100 people worked on financial services in total.⁵¹ Baron Lamfalussy described the system as “a remarkable cocktail of Kafkaesque inefficiency that serves no one”.⁵²

One response to the perceived deficiencies of regulatory arrangements was put forward the idea of a European SEC (Securities and Exchange Commission of the US), perhaps modelled on the ECB, an idea put forward by some French policy makers, such as Laurent Fabius then Finance Minister.⁵³ But, British policy makers and most national IRAs opposed it, fearing loss of power to the EU level, and justified their position by arguing that a European SEC would lack a legal basis, draw attention away from other issues and “belongs to a very distant future”.⁵⁴ FESCO itself supported its transformation into a European regulatory network with its own powers and drew up a new constitution for its replacement, CESR.⁵⁵

Faced with diverse opinions, the Lamfalussy committee’s report recommended a new committee structure and a new legislative procedure to speed up EU decision making and improve coordination. Its recommendations led to changes in 2000-1. One element the creation of CESR (Committee of European Securities Regulators), a network that brought together national IRAs for securities. CESR was proposed by FESCO, the existing NIRA, and indeed then absorbed FESCO. The procedures for implementing EU regulation were altered to follow a four-level process.⁵⁶ Level 1 comprises classic EU legislation. But level 2 involves further legal measures to implement level one legislation. Here the Commission asks CESR to provide ‘technical’ advice, and in so doing to consult with market practitioners and consumers; but CESR’s role is only advisory- the Commission makes proposals to ESC which acts as a normal ‘regulatory committee within the EU’s comitology procedures. Level 3 sees non-legally binding Guidelines, interpretation and recommendations on national implementation

⁴⁷ Moloney 2002; Commission 1998

⁴⁸ Interview, senior former British financial regulator.

⁴⁹ Lamfalussy 2000 initial report p34

⁵⁰ Lamfalussy 2000 initial report p17; The Economist 1.3.2001

⁵¹ Economist 7.3.2002

⁵² FT 15.2.2001.

⁵³ Economist 1.3.2001, FT 12.7.2000, 16.9.2000

⁵⁴ Quote, unnamed member of Lamfalussy Committee, FT 16.9.2000, Economist 1.3.2001

⁵⁵ Interview senior European financial regulator 1; FT 20.6.2001.

⁵⁶ For a principal-agent analysis of the new system, see Varone et al 2008.

of legislation issued by CESR. They are designed to ensure consistent policy, financial supervision and enforcement throughout EU member states. But they do not have legal force. Finally, level 4 is enforcement of EU rules by the Commission, using its legal powers.

In telecommunications, the Commission argued in the late 1990s that IRAs had insufficient powers, resources and independence from incumbent PTOs and that member states were failing to implement EU legislation; Martin Bangemann (Commissioner for telecommunications and industry, then called DGXIII and III) supported the creation of a European-level agency to ensure even and effective implementation of EC regulation.⁵⁷ Parts of the telecommunications industry also argued for greater centralisation to avoid inconsistent decisions by national regulators.⁵⁸ Despite these pressures no European regulator was created and the Commission pulled back from seeking one.⁵⁹ The main reason was opposition from member states, who were not ready to accept such a powerful authority.⁶⁰ In its June 2000 proposals, the Commission, under a new Commissioner Liikanen, did not seek to revive ideas of a Euro telecoms regulator.⁶¹ Instead the Commission acted in ‘partnership’ with national governments and was not prepared or able to strike out on its own.⁶² It initiated two changes. One was for it to have the right of veto on how national regulatory authorities applied regulatory frameworks (the so-called Article 7 powers).⁶³ With support from the European Parliament, the Commission ultimately succeeded in gaining veto powers on two important regulatory issues decided by IRAs.⁶⁴ This move represented considerable strengthening of the Commission’s direct powers over IRAs, avoiding the need to undertake a slow and costly enforcement action before the ECJ against a member states. The second alteration was the creation of an ERN, namely the European Regulators Group, established in 2002, to “advise and assist the Commission in consolidating the internal market for electronic communications networks and services” and to consult relevant participants.⁶⁵ It followed arguments by many IRAs that the NIRA in telecommunications, the IRG, should be given a formalised basis for coordination.⁶⁶ It also allowed the Commission to bring together national IRAs and seek to influence them.⁶⁷ However, the ERG was also a response by IRAs to threats by the Commission to take further powers over IRAs, which the IRG and IRAs strongly opposed.⁶⁸ It is noteworthy that the ERG co-exists with the previous IRG, so that IRAs have both their own body and one formally linked with the Commission. Indeed, the ERG’s position reflects the careful compromise between the IRAs and the Commission: membership of the ERG is based on representatives from 27 national IRAs, and observers from accession states and EEA states, while the Commission

⁵⁷ Bangemann pressed over a considerable period for the creation of a EU telecommunications industry watchdog- Financial Times 3.7.96, 19.12.97, 11.3.99, European Voice 11.3.99.

⁵⁸ Financial Times 6.2.2003, European Voice 6.12.2001

⁵⁹ For analyses see Humphreys and Simpson 2005: 103 and Tarrant and Keleman 2007, Cf. Commission 1999b

⁶⁰ Agence Europe 25.2.97, Financial Times 19.12.97

⁶¹ Commission 2000.

⁶² Thatcher 2001

⁶³ Humphreys and Simpson 2005: 103-6, European Voice 29:11:2001

⁶⁴ The definitions of relevant market and of significant market definition and SMP definition Article 7 of EC/2002/21; Interviews with Commission and Telecommunication Regulator 2.

⁶⁵ European Commission, 2002, Decision 627/20002/EC establishing the European Regulators Group for electronic communication networks and Services, 30 July 2002, OJ L200; for a discussion of the ERG, see Nicolaidis 2006 .

⁶⁶ FT 8.6.2001, Communications Week International 4.6.2001.

⁶⁷ Humphreys and Simpson 2005: 111-3, 180-1.

⁶⁸ CommunicationsWeek International 4.3.2002, European Voice 29.11.2001.

has formal observer status; but the day to day functions are run by a small secretariat staffed by 3 IRAs officials and based in the European Commission offices.

In energy, the European Regulators Group for electricity and gas (ERGEG) was created in November 2003 to advise and consult on the completion of the internal market for Gas and Electricity.⁶⁹ It arose from a Commission initiative after difficulties in implementing the expanding EU energy regulatory framework, and frustration that the energy Forums were slow, failed to produce real policy learning, were based on consensus and unable to reach difficult decisions on strategic internal market issues of cross border tariffs, interconnection, and access pricing due to the role of suppliers.⁷⁰ Indeed, ERGEG's mandate was to propose consistent regulatory application of EU directives and establish best regulatory practice across IRAs.⁷¹ Its membership consisted of the 27 national IRAs, while EEA and accession candidates had observer status. The Commission is present at the plenary sessions of ERGEG and runs the secretariat. As in telecommunications, the previous NIRA, the CEER, has continued to co-exist alongside the ERG, together with the Florence and Madrid forums.

Thus the development of regulatory space in energy has seen considerable 'layering' and 'conversion'. New networks such as the ERG and ERGEG have been established alongside existing bodies such as the IRG and CEER. The only body to disappear, FESCO, was converted into CESR. Moreover, those existing bodies were able to limit and shape the new ones, conserving their own role, ensuring much power for their national IRA members and, in alliance with national governments, preventing strong EU-level agencies (ERAs, FERAs or SERs) being established.

Phase 4 Current debates: strengthened European Regulatory Networks versus European Regulatory Agencies or Federal European Regulatory Agencies

In the mid-2000s, the European Commission and ERNs have led vigorous debates about reforming the institutions for coordinating implementation of EU regulation in financial services, energy and telecommunications. The Commission has argued that current arrangements for implementation are inadequate, resulting in a failure to fully introduce the single market. It has pointed to continuing uneven implementation of EU law, the maintenance of entry barriers to national markets, difficulties in cross-border trade due to diverse national standards.⁷² Equally, it has argued that ERNs lack powers and the ability to enforce opening of markets, being constrained to act according to the 'lowest common denominator' among their membership due to the need to obtain consensus.⁷³ For their part, ERNs have themselves initiated debates and/or requested more powers.⁷⁴

Three major institutional options have been debated, but the first two have faced strong opposition from ERNs themselves. One has been the creation of 'Euro-regulators'. Although their exact institutional design has not always been clarified, the main ideas seem to be either European Regulatory Agencies or FERAs. Thus for instance, in the Information Commissioner Vivien Reding declared that "for me, it is clear that the most effective and least bu-

⁶⁹ See EC/2003/54 Electricity directive and EC/2003/55 Gas directive. Commission Press release 12 November 2003.

⁷⁰ Eberlein 2003: 147-150, FT:1.2.2000, Bulmer et al 2007: 131.

⁷¹ Public Utilities Fortnightly 1.2.2004 Cameron 2002: 285-301

⁷² See for instance Commission 2007a for energy, Commission 2006b in telecommunications

⁷³ See for instance criticisms of the ERG for being based on the 'lowest common denominator' by the Information Commissioner- European Voice 22.2.2007 and criticism in energy in Commission 2007a: 8-9

⁷⁴ For instance, CESR 2004 or ERGEG 2006a, 2007a,b.

reaucratic way to achieve a real level playing field for telecom operators across the EU would be by an independent European telecom authority”, perhaps modelled on the European Central Bank, to obtain more ‘efficient’ markets and reduce the ‘patchwork’ of regulation that it claimed was damaging companies and consumers.⁷⁵ In energy, the Commission suggested that one of the two acceptable options was a European agency entrusted with applying EU standards to individual decisions in order to make cross-border trade work in practice.⁷⁶ In securities trading, the European Commission has noted problems of inconsistent regulation and there has been discussion of whether Europe needs a European SEC.⁷⁷

But FERAs have faced fierce opposition from ERNs and national IRAs, as well as some member states. These existing bodies have argued that FERAs are unnecessary and have little support in the industry. They have opposed ‘transferring powers to Brussels’. Thus for instance, in telecommunications, the ERG argued that “national markets will always be better regulated by national regulators”,⁷⁸ while the British communications IRA Ofcom claimed that “a central regulator received little support during the creation of existing rules and we see no reason why it might be appropriate now”.⁷⁹ In securities trading, CESR questioned the need to a European FERA that would be the equivalent of the US SEC.⁸⁰

A second possibility has been greater Commission powers over the decisions of national IRAs in order to ensure greater consistency. Thus for instance, in telecommunications, as part of a review of the 2002 regulatory framework, the EU Commissioner for Information Viviane Reding argued that “Europe does not yet have a satisfactory level of consistency and harmonisation of practices between national regulators” and worried about “serious distortions of competition that arise in the internal market if similar remedies are not applied in similar situations”.⁸¹ She proposed strengthening Commission powers over IRAs, especially for cross-border disputes, extending its powers to issues such as remedies, allowing it to establish common EU guidelines over IRA appeals and even being empowered to issue authorisations (ie licences) that would allow service providers to operate throughout the EU.⁸² But, some national IRAs and ERNs have been sceptical about additional Commission powers, especially in telecommunications.⁸³

Instead, ERNs have pressed for the third option, namely enhancement of their powers. In securities trading, CESR has argued that leaving integration to case law would result in divergence, whereas ‘the market’ wanted regulatory convergence, especially given its ‘transnational’ nature, proposing instead a ‘bottom up’ approach of strengthening CESR.⁸⁴ This could involve CESR having the power to take pan-European decisions or lead a mediation system

⁷⁵ European Voice 12.11.2006, Financial Times 17.11.2006, 17.2.2007.

⁷⁶ Commission 2007a: 8

⁷⁷ See also Hertig and Lee 2003, Lee 2005, CEPS 2005

⁷⁸ FT 17.2.2007; see also European Voice 16.11.2006, 22.2.2007, ,

⁷⁹ FT 17.11.2006

⁸⁰ CESR 2004, Agence Europe 16.11.2005

⁸¹ Agence Europe 14.2.2006, Reding Letter to ERG 22 November 2006

⁸² Commission 2006b: 8-9, Agence Europe 19.2.2007

⁸³ For instance, Ofcom in telecommunications argued that “the balance of powers between the Commission and national regulators is broadly right”- FT 17.11.2006; the ERG opposed ‘uniformity’ in the application of remedies- see ERG 2006a,b.

⁸⁴ Interview, Fabrice Demarigny, Secretary General CESR, FT 16.11.2005, Interview van Leeuwen, chairman CESR and Dutch financial authority FT 22.3.2004, 5.12.2004.

between different national IRAs.⁸⁵ In energy, ERGEG has argued for additional powers ('ERGEG+') as part of a 'European System of Energy Regulation'- with powers to enforce decisions, especially concerning a European- grid, for instance to approve standards, place financial penalties on new pan-European electricity and gas grid organisations, have an enhanced role in advising on legislation and gathering data, and enjoy additional resources.⁸⁶

Debates about change remain ongoing in late 2007 and legislative proposals are being made for telecommunications and energy. However, opposition by the ERNs as well as by member states, appears to be contributing to blockage of FERAs. Instead, ERNs and the Commission appear to be bargaining and creating a mutually beneficial alliance to build on existing institutions. On the one hand, they support or accept an increased Commission role and powers. Thus for instance, in energy, the Commission accepted the possibility of an enhanced ERGEG ('ERGEG+')⁸⁷ In response, ERGEG proposed that it should become a new Regulators Council, led by an Administrative board composed of equal numbers of national representatives and of the Commission. It would be a form of European Agency with extensive powers over implementation.⁸⁸ Equally, it has proposed creating duties on national IRAs to implement EU law, which would potentially greatly increase the Commission's power over IRAs and indeed make it one of their principals.⁸⁹ On the other hand, the new body would continue alongside the existing CEER, bringing together national IRAs in an NIRA.

The Commission proposals in September 2007 largely followed ERGEG's suggestions. Thus they included an Agency for the Cooperation of Energy Regulators. Its functions would be to aid cooperation between national IRAs, advise the Commission and take technical decisions when asked by the Commission on cross-border issues concerned transmission. Although set up as a European agency, national regulators would keep many powers over it. Thus the Agency would have both an Administrative Board, half of whom would be appointed by the Council of Energy ministers and the other half by the Commission, and a Board of Regulators composed of one representative of each national energy IRA. Interestingly, the Commission explicitly acknowledges that a powerful body modeled on the ECB was not being proposed because it would require Treaty amendment.⁹⁰

The European Commission's legislative package also contains proposals to strengthen national IRAs. It would require that energy IRAs be legally and functionally independent not only of suppliers but also of public bodies- ie independence from governments. They should have "legal personality, budgetary autonomy, appropriate human and financial resources and independent management".⁹¹ Equally, they would have new market regulation powers.

Thus the Commission's proposals further centralise and formalize the network of national IRAs but also allow the latter a strong position in that network. Equally, they offer IRAs new resources to be independent of their national governments and to be more powerful. The package illustrates very clearly the mutually beneficial relationship between the Commission and national agencies. Unsurprisingly, ERGEG, representing the national IRAs, welcomed the Commission's proposals.

⁸⁵ CESR 2004, FT 6.12.2004, Agence Europe 16.11.2005

⁸⁶ See ERGEG 2007a: 24-32, 43

⁸⁷ Commission 2007a: 8.

⁸⁸ ERGEG 2007b

⁸⁹ ERGEG 2007c

⁹⁰ European Commission 2007d: p10

⁹¹ European Commission 2007d: p9

In telecommunications, the EU Commissioner Vivian Reding began by suggesting greater European Commission powers over the decisions of IRAs or a European telecommunications Agency.⁹² But by January 2007 she was proposing that the ERG could be greatly strengthened, either becoming a classic European Agency, which would advise the Commission (notably on its ‘Article 7’ powers over national IRAs concerning their enforcement decisions), or a FERA, with its own powers to making binding decisions concerning IRAs and market players, as well as legal personality and being open to challenge before the ECJ.⁹³ The latter option would mark a strong centralisation of powers and also independence from the Commission. In response, the ERG urged much greater cooperation between itself and the Commission over Article 7 actions, and accepted that if it were given greater powers, its governance structures should be altered.⁹⁴ Although discussions are continuing, there seems strong opposition to a FERA.⁹⁵ In securities trading, CESR’s 2004 ‘Himalaya’ document envisaged strengthening its powers, while the Commission’s 2005-10 Action Plan suggested an increased Commission role in monitoring financial services, but neither proposed a European SEC.⁹⁶

Thus current debates about regulatory arrangements seem to involve a further centralisation of powers, but building on existing organisations. Evolution not revolution seems possible, with comprehensive restructuring or administrative simplicity being very difficult. Hence reforms involve simultaneously strengthening existing the ERNs such as CESR and ERGEG and aiding their member IRAs vis-à-vis national governments and firms, while also increasing the role of the Commission. This assertion is now explored in greater detail in section 2.

⁹² See Commission 2006b,

⁹³ European Commission 2006b, 2007c

⁹⁴ ERG 2007

⁹⁵ See FT 24.9.2007 on divisions within the Commission and article by Ofcom’s chief executive FT 31.10.2007.

⁹⁶ CESR 2004 and European Commission 2005.

II. Powers and Functions of ERNs

II.1 Introduction

The above discussion recognised that ERNs are designed to respond to the multiplication of national regulators and their uneven development by co-ordinating implementation of regulators by member states. But at a formal level, the new European networks of regulators remain highly constrained by existing actors. In particular, the European Commission and national regulators maintain many controls over the networks, which lack resources and rights of initiative. Such shadows of government potentially limit the innovative scope of ERNs and raise important questions about their ability to evolve into strong regulatory bodies.⁹⁷ Thus we assess the strength or weakness of the networks and the potential controls of their principals to explain why in theory a double delegation may occur by both national and EU actors. That is to say we assess if they only transfer limited powers and retain many control over ERNs. It also suggests that, since their formal institutional position is weak, if the networks are to have an impact on regulatory governance in Europe, they must either develop informal resources and influence after formal delegation takes place and or gain new powers through new delegations in order to evolve into more powerful regulatory bodies.⁹⁸ However as the section below and table 2 illustrates in formal terms, analysis of the ERNs shows that network governance remains very limited in EU economic regulation.

⁹⁷ See the shadow of hierarchy debates between Sabel and Zeitlin (2007) and Héritier and Lehmkuhl (2008)

⁹⁸ Majone 2005, Thatcher and Coen 2008)

Table 3: Evolution of ERNs

	2005	Today	Proposed changes
ERG	Role, functions & powers	<ul style="list-style-type: none"> - Advise and assist the EC upon request - Provide a platform for NRA cooperation - Its decisions are not-binding 	<ul style="list-style-type: none"> - IRAs committed to take utmost account of ERG decisions - Monitoring mechanism - EECMA: set up as an advisory body. - BERT: greater independence from the EC and greater powers
	Relationship with the EC	<ul style="list-style-type: none"> - EC has observers status - Rules of procedure have to be approved by the EC. 	<ul style="list-style-type: none"> - EECMA: EC has veto powers - BERT: EC obliged to consult BERT and take the 'utmost account of its views'
	Voting rules	<ul style="list-style-type: none"> - Consensus, or - Two-thirds majority if, where consensus cannot be reached and the chairman so decides 	<ul style="list-style-type: none"> - Two-thirds rule is automatically applied - EECMA: Simple majority - BERT: two-thirds majority
	Resources	<ul style="list-style-type: none"> - The secretariat is integrated into DG InfoSoc. 	<ul style="list-style-type: none"> - Creation of a Permanent Secretariat under the IRG - One senior and two junior NRA dees - Maximum annual budget of 0.5 m.
ERREG/CEER	Alternative venues	<ul style="list-style-type: none"> - Cocom, CEPT, ITU, IRG. 	
	Role, functions & powers	<ul style="list-style-type: none"> - Advise and assist the EC upon request or its own initiative - Provide a platform for NRA cooperation - Its decisions are not-binding 	<ul style="list-style-type: none"> - Active role in the drafting of the Energy Liberalisation Package and Competition's Sector Inquiry - ACER: decisions can be made legally binding by the EC - EP and ERGEG suggest that powers should be strengthened and allowed to take binding decisions.
	Relationship with the EC	<ul style="list-style-type: none"> - EC has observer status - Rules of procedure have to be approved by the EC. 	<ul style="list-style-type: none"> - ACER would be able to adopt its own rules of procedure.
	Voting rules	<ul style="list-style-type: none"> - Consensus, and - QMV if this cannot be achieved 	<ul style="list-style-type: none"> - ACER: two-thirds majority. - EP suggests QMV
Resources	<ul style="list-style-type: none"> - The secretariat is run by the EC - One member of staff. 	<ul style="list-style-type: none"> - Two permanent members of staff - ACER: 40-50 staff - annual budget of euro 6-7m, funded by the 	

	2005	Today	Proposed changes	
CESR	Alter-native venues	- Florence and Madrid fora.	- ERGEG regional initiatives. - ERGEG suggests to use comitology to make decisions legally binding	
	Role, functions & powers	- Advise and assist the EC upon request - Stronger reliance on 'soft law' - Introduction of a mediation mechanism, specialized panels - Provide a platform for NRA cooperation - Level 2: help draft secondary legislation - Level 3: non-binding guidelines and standards, monitoring, benchmarking compliance	- ECOFIN requested to improve NRA cooperation - CESR argues that this requires a strengthening of its powers, including the ability to take binding decisions.	
	Relationship with the EC	- EC is not entitled to participate in meetings considered to be confidential. - The adoption of its rules of procedure does not depend on the approval of the EC - EC does not control its financing - Decisions are non-binding	- EC has demanded a greater role	
	Voting rules	- Level 2: Consensus - Level 3: Any dissenting opinions have to be identified	- Level 2: QMV, provided that the Chair considers that there is a split of views or if one or more members ask for a vote. - Level 3: Unanimity is required if one or more members so wishes	
	Resources	- The secretariat has 15 members of staff. - 2.4m annual budget - Funded by membership contributions	- 29 members of staff - 4m annual budget has risen to.	- CESR has demanded additional funding
	Alter-native venues	- ESC, comitology, IOSCO		

II.2 The institutional design of ERNs: composition, functions, powers, resources and rivals

As the above illustrated the CESR, ERGEG and the ERG appear to be good examples of a movement towards network governance. However, analysis of the institutional design reveals the weaknesses of the new ERNs and the strength of their principals, namely the EU Commission and national governments and regulators. The membership of CESR, ERGEG and the ERG is wide and ambiguous, making autonomous action difficult. The three ERNs are given very broad functions but few powers. Their resources are limited and they face rival venues both for coordination and for more traditional government functions of deciding through hierarchy and hard law. A detailed analysis of the institutional design thus reveals limited delegation, many controls and an institutional context that allows policy makers to work through alternative organizations

Composition of ERNs: The membership of ERNs is based on formal representatives from member state NRAs. It differs considerably from informal networks such as the Florence and Madrid forums, which involve private and public actors, including experts and regulatees. The Commission has an important position but its role is ambiguous between a full member and an external ‘overseer. Here, we focus on the ERG, ERGEG and CESR.

The ERG consists of representatives of IRAs from the twenty-five EU member States. However, eligibility soon posed difficulties with respect to the degree of independence required for membership. The original 2002 Decision stated that the ERG “shall be composed of the heads of each relevant national regulatory authority in each Member State or their Representatives”. (Commission 2002: article 4) but also that it should be a group of independent national regulatory Authorities” (Article 1). The preamble made reference to ensuring sufficient separation from suppliers, especially if a member state had publicly-owned suppliers.⁹⁹ This raised important issues of whether an IRA was sufficiently independent from publicly-owned suppliers. The ambiguity was ended, at least in formal terms, by a new decision in 2004 (Commission 2004) that simply stated that eligible IRAs would be listed in an Annex and kept under review by the Commission. Nevertheless, this decision allowed the Commission considerable scope for further intervention to decide the ERG’s membership.

The ERG also has observers from EU Accession/ Candidate States and EEA States. In 2005, ERG granted observer status to Turkey and Croatia as EU accession countries. In addition, the Commission sits as an observer at the ERG. Its representatives are able to remain in the ERG whilst confidential issues are discussed. Although the Commission is represented on the ERG, it also works ‘jointly’ with the latter, as for example, when they issued a joint paper on anti-monopoly remedies. So the Commission appears to be both a partner with the ERG and a quasi member, as well as being one of its formal principals.

CESR is composed of one senior member from each member state’s competent authority in the securities field, with EEA representatives as observers. The identification of ‘competent authorities’ with the requisite degree of independence was a problem for CESR as it was for ERG. As at 2002, countries such as France, Finland, and Ireland all lacked a single NRA for

99 Commission 2002: Preamble s2: “In accordance with the Framework Directive, Member States must guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services must also ensure effective structural separation of the regulatory function from activities associated with ownership or control.

the entire financial sector, with responsibilities being split between different bodies¹⁰⁰. The Commission is an observer at CESR, but “it shall be present at meetings of the Committee and shall designate a high-level representative to participate in all its debates”, except when the Committee discusses confidential matters relating to individuals and firms in the context of improving cooperation among European Regulators¹⁰¹.

ERGEG is composed of the heads of the national IRAs established pursuant to Directives 2003/54/EC and 2003/55/EC, according to which Member States are supposed to institute regulatory authorities for the gas and electricity market (Commission 2003: Article 2). Today, ERGEG counts the 27 EU IRAs as well as the IRAs of Iceland and Norway among its members. Candidate countries have formal observer status. The Commission is also present at ERGEG meetings and is supposed to designate a high-level representative to participate in all its debates. According to Article 5 of the Decision whereby ERGEG is established the Commission is given the power to declare meetings confidential, which means that only members of the Group may be present at meetings.

Functions and powers of ERNs: The functions given to ERNs are very broad and strongly linked to the Commission, at least according to the EU Decisions that create them. Thus for instance, the Commission Decision establishing CESR defined its role as “to advise the Commission, either at the Commission's request, within a time limit which the Commission may lay down according to the urgency of the matter, or on the Committee's own initiative, in particular for the preparation of draft implementing measures in the field of securities” [Art.2]. More specifically, CESR was required to consult extensively with market participants, consumers, and end-users, to present an annual report to the Commission, which would also be sent to the Parliament and Council. This role was expanded in CESR's Charter to cover other tasks such as reviewing of implementation and application of Community legislation, the issuing of guidelines, recommendations and standards for its members to introduce in their regulatory practices on a voluntary basis, and the development of effective operational network mechanisms to enhance day-to-day consistent supervision and enforcement of the Single Market for financial services.

CESR was given roles within EU legislation on financial services. The ‘Lamfalussy process’ sets out a four level procedure which moves from the definition of the overarching regulatory framework through to its enforcement. The first stage follows standard EU procedure with the Commission making legislative proposals based on stakeholder consultation which are subsequently adopted through the co-decision process by the Council and European Parliament. This stage also sets out the implementing powers of the Commission. Level two concerns the adoption of implementing legislation laying down technical details for the framework principles agreed at level one. Here, the comitology procedure is used, with votes being taken by qualified majority at the European Securities Committee (ESC). The European Parliament is also consulted on the draft implementing measures and is given one month to pass a resolution on the final legislation where it considers the Commission to have exceeded its implementing powers. Level three is focused on the consistent implementation of Community legislation across the Member States. Here, comparisons of national regulatory practices are made and recommendations for common standards are proposed. The final level concerns the monitoring of compliance of Member State laws with Community legislation. Where necessary, the Commission can pursue legal action through the European Court in cases where compliance is lacking.

¹⁰⁰ p.8, CESR, 2002, CESR Annual Report 2001-2002

¹⁰¹ Article 3.1, CESR, 2002, CESR Charter

CESR's involvement in this process relates specifically to the second and third levels. But, its roles are mainly to provide advice and help to establish non-binding norms, a form of 'soft law'. Moreover, its position is heavily dependent on other actors in the policy process, especially the Commission. Thus although CESR has been given a mandate by the Commission to prepare technical advice in the form of implementing measures which it does based on its own formal consultation procedure, level two legislation is adopted through formal EU comitology procedures. These involve the ESC, consisting of representatives from member states, acting through EU legal procedures. At level 3, CESR is responsible for leading the coordination activities. It can issue non-binding common guidelines and standards aimed at facilitating the interpretation and facilitation of Community legislation. In addition, it can conduct benchmarking exercises aimed at gauging Member State compliance with such standards. This is, in many ways, a complementary albeit softer activity to the Commission's compliance tests at level four. It underlines that CESR can have influence through the creation of norms or 'soft law'. But, overall, whilst CESR has been given a clear mandate within the Lamfalussy legislative process, it can shape Directives at level two only insofar as it can influence the Commission, and risks being constrained by the European Securities Committee. Thus CESR's major roles are advisory and coordination of implementation of Community regulation.

Similarly, the role of the ERG is to "advise and assist the Commission in consolidating the internal market for electronic communications networks and services", and to "provide an interface between national regulatory authorities and the Commission". (Commission 2002, article 3). It too was asked to "consult extensively and at an early stage with market participants, consumers and end-users in an open and transparent manner". (Commission 2002: Article 6). However, its mandate is even less wide than CESR's in relation to the definition of implementing measures, as there is no well-specified equivalent to the Lamfalussy process for telecommunications legislation.

ERGEG has a slightly wider mandate than the ERG in that it does not depend on an invitation from the Commission to give advice. According to the Decision through which it was established "The Group, at its own initiative or at the request of the Commission, shall advise and assist the Commission in consolidating the internal energy market."¹⁰²

The powers of ERNs are often limited. Thus for instance, ERG and ERGEG decisions are not binding on their members. Even deciding their own rules of procedure required considerable agreement among member states and lacked autonomy from the Commission: these should be adopted by consensus or in the absence of consensus, by a two-thirds majority vote, one vote being expressed per Member State, subject to the approval of the Commission (Commission 2002: Article 5 & Commission 2003: Article 3). CESR enjoyed marginally greater powers over its own internal functioning in that the Decision creating it allowed to adopt its own rules of procedure and organise its own operational arrangements.

Moreover, the ERNs' decision-making abilities are severely constrained by consensual voting rules. According to its 2001 charter, CESR was required to identify any dissenting opinions of individual members when delivering its advice in response to a mandate from the Commission. (CESR 2001: Article 5.6).¹⁰³ For the execution of its other tasks the CESR work by consensus (Article 5.7). According to the ERG's 2003 Rules of Procedure, its decisions are nor-

¹⁰² European Commission Decision (2003/796/EC), Article 1(1): http://www.erg.eu.int/doc/legislation/erg_establish_decision_en.pdf.

¹⁰³ CESR, 2001, Charter of the Committee of European Securities Regulators.

mally and preferably reached by consensus amongst all members (ERG 2003: Article 4.1).¹⁰⁴ On an exceptional basis, however, where consensus cannot be reached, the ERG's chairman may determine that matters are decided by two thirds majority voting. Dissenting views have to be published on the Group's web-site as soon as possible after the meeting (ERG 2003: Article 4.2). In practice, however, decisions were almost always taken by consensus. ERGEG's voting rules are slightly more progressive. Although members of the group are expected to use their best efforts in order to reach consensus (ERGEG 2005, Article 6.1), decisions shall automatically be taken by Qualified Majority Voting (Article 6.4) and not upon the initiative of the chair, as stipulated by the ERG's rules of procedure.¹⁰⁵ The votes are weighted in accordance with the voting principles of the Council (Article 6.5).

In 2006, however, both CESR and the ERG have taken steps to move away from consensual decision-making. In its new charter, CESR introduced Qualified Majority Voting when delivering advice to the European Commission, provided that the Chair considers that there is a split of views or if one or more members ask for a vote. Any dissenting opinions have to be included in the final advice (CESR 2006: Article 5.6).¹⁰⁶

For Level 3 work, explicitly requested from CESR by Community legislation or directly related to Community legislation, unanimity is required if one or more members so wishes. (CESR 2006: Article 5.7). All other decisions are still to be taken by consensus (CESR 2006: Article 5.5). In November 2007, the European Commission demanded Qualified Majority Voting for all CESR decisions.¹⁰⁷

In order to accelerate decision-making and to fend off criticism about its alleged 'lowest common denominator' nature,¹⁰⁸ the ERG agreed in 2006 that decisions should automatically be taken by a vote where consensus cannot be reached.¹⁰⁹ This is meant to take political pressure of the shoulders of chair, whose decision it used to be to call for a vote, and thereby make voting more practicable. In order to bypass the Commission, the new voting rules were adopted as 'working practices' and not as official Rules of Procedure, which would have required a Commission approval.

The change of its voting rules can be seen as part of a wider development, where the ERG appears to be trying to expand its functions and powers through informal measures and independent from the Commission. The ERG's members have, for instance, committed to take utmost account of the ERG's principles of implementation and best practices, although the ERG does not formal have the powers to take binding decisions.¹¹⁰ Moreover, the ERG insti-

¹⁰⁴ ERG, 2003, Rules of Procedure: http://www.erg.eu.int/doc/work_progr_2003/erg_03_07_rules_of_procedure_clean.pdf

¹⁰⁵ ERGEG, 2005, Rules of Procedure: http://www.ergreg.org/portal/page/portal/ERGEG_HOME/ERGEG_DOCS/ERGEG_DOCUMENTS_NEW/INTERNALRULES/ERGEG_RULES-OF-PROCEDURE_05-10-05.PDF.

¹⁰⁶ CESR, 2006, Charter of the Committee of European Securities Regulators.

¹⁰⁷ European Commission, *Communication from the Commission on the Review of the Lamfalussy Process* (COM/2007/0727 final) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0727:FIN:EN:PDF>

¹⁰⁸ See for instance criticisms of the ERG for being based on the 'lowest common denominator' by the Information Commissioner- European Voice 22.2.2007

¹⁰⁹ ERG, 2006, Annual Review: http://www.erg.eu.int/doc/work_progr_2006/erg_07_14_annual_report_2006.pdf, p. 10

¹¹⁰ ERG, 2006, *Statement on the Development of the ERG*, ERG (06) 51

tuted a compliance monitoring mechanism in 2007. These developments appear to show that IRAs have taken active steps to improve the effectiveness of their ERN. However, the question is whether these changes are based on the IRAs' own initiative or whether they were only possible under the shadow of the Commission's threat to create a new regulatory agency. In any case, it is still too early to evaluate the impact of the new voting rules and to assess the effectiveness of the new monitoring mechanism.

Thus ERNs face ambitious aims and are asked to consult widely and cover broad fields. Yet they lack formal powers to impose decisions on their members and indeed even to organize their own internal arrangements. Nevertheless, they appear to play an active role in shaping the regulatory space. Upon invitation from the Commission, the ERG and ERGEG actively participated in the Commission's review of the regulatory framework for electronic communications and services and the Third Energy Liberalisation Package.¹¹¹ ERGEG's group's chair, Sir John Mogg, is even supposed to have masterminded the Commission's proposal.

Resources of ERNs: The material resources of ERNs are decided by their members and the European Commission. ERNs are small organizations in terms of staffing and spending. Thus for instance, CESR secretariat, based in Paris, started with 7 staff plus a secretary general, although this had grown to 15 by 2005. It also has a small budget, which led to comments from Baron Lamfalussy, that CESR lacked sufficient staff to make sure that the new regulatory framework worked properly¹¹². In 2002-3, the budget for CESR was increased by a third, apparently due to a willingness by members to contribute more and by 2005 it spent 2.4m euros and had 15 members of staff (CESR Annual Report 2005: 77). In 2008 the secretariat's annual budget has risen to 2.5m and now employs 29 members of staff.¹¹³ Despite these changes CESR is still small even relative to the Commission, let alone national IRAs and especially regulated firms.

The ERG and ERGEG have even fewer resources of their own. According to the Decision through which it is established, the ERG is meant to have a general secretariat that is funded by the Commission and integrated in the services of DG Information Society and Media (ERG Annual Reports 2003, 2005). After the general secretariat had failed to fulfil the thankless task of reporting to both the Commission and the national regulators, however, its budget was eventually cut by the Commission (Groebble at workshop?!). Therefore, the telecoms IRAs decided in 2006 to establish an independent, permanent secretariat, supporting the ERG chair.¹¹⁴ The ERG bypassed the Commission by relying on the IRG (Independent Regulators Group), which had worked in parallel to the ERG and which is, as its name suggests, independent from the Commission. The secretariat is now hosted and funded by the IRG, which was set up as a legal entity under Belgium law for that purpose.¹¹⁵ The secretariat began to operate in September 2007, with one senior and two junior IRA secondees and a maximum annual budget of 0.5 million.

It can be assumed that the ERG's move to create an independent secretariat was inspired by ERGEG. While the Commission only reimburses travel expenses for ERGEG (Commission 2003: Article 3), the independent CEER is funded by membership contributions. Therefore,

: http://erg.eu.int/doc/whatsnew/erg_06_%2051_statement_erg_development_final.pdf.

¹¹¹ ERGEG 2006 annual report.

¹¹² Financial Times 13.3.02

¹¹³ CESR, 2006, Annual Report

¹¹⁴ http://www.erg.eu.int/doc/work_prog_2007/erg_08_09_annual_report_2007.pdf p. 4.

¹¹⁵ http://www.erg.eu.int/doc/meeting/erg_20_plenary_debrief_present_chair_23_02_07.pdf

IRAs set up a secretariat under the CEER, which was formally established as a legal body under Belgian law in 2003 for that purpose as well. The new secretariat provides administrative support to both organizations and today counts seven members of staff.¹¹⁶

Alternative decision-making venues: ERNs face several rivals for the functions of decision making, even at the EU level. The most important are the formally established EU committees. Thus for instance, in securities, the European securities committee (ESC) has significant powers over EU legislation. Like CESR, it was set up by a Commission Decision (Commission 2001) after lengthy discussions involving national governments, and the European Parliament. It is composed of representatives of EU member states, thereby integrating national governments. It acts as an advisory committee to the Commission on both policy issues and draft legislation; this mandate is considerably more precise than CESR's broad and undefined advisory function. In addition, in the so-called 'Level 2' of the Lamfalussy procedures, when broad directives are being proposed by the Commission, it acts as a normal EU committee- ie one that operates under the comitology procedure and whose approval is needed for Commission proposals to be passed without going to the full council of ministers (see Bergstrom et al 2004). Thus the ESC's procedures form part of well-established EU comitology and it has legal powers over legislation.

A similar situation exists in telecommunications, with the existence of the Communications Committee (Cocom), also set up by Commission decision (European Parliament and Council 2002). It is composed of representatives of member states and acts both as an advisory Committee and a regulatory committee in accordance with general Comitology procedures. In addition, it provides a platform for an exchange of information on market developments and regulatory activities.

CESR, ERGEG and the ERG also face well-established European and international organisations that operate through inter-governmental processes, notably consensus and the absence of powers to impose decisions on members. In telecommunications, there is the CEPT, created in 1959, extending beyond the EU to all European states. It has played an important role in standard setting as well as bringing together representatives from national administrations and traditionally, also operators. Then there is the ITU (International Telecommunications Union), which has members across the world. In securities trading, there is also IOSCO, founded in 1984, which is composed of securities regulators from around the world and seeks to set international standards, notably via 'MOUs' (memoranda of understanding). Its members cover more than 90% of the world's securities markets and include the US.

Finally, there are rival informal networks of regulators whose existence may result in institutional competition and venue shopping by those regulatees that can operate in a multi level policy process. In particular, in telecommunications, the Independent Regulators' Group, established in 1997 as a group of European National Telecommunications Regulatory Authorities, continues to exist alongside the ERG. In the energy sector this is mirrored by the coexistence of the informal CEER. These bodies have the advantage (for IRAs) that the Commission is not a member and that they are run by IRAs themselves. Their mere presence raises questions over the level of confidence in the independence of the ERG and ERGEG with which they compete.

Similarly, CESR's power (specifically at level 2) is constrained by the ESC which is legally responsible for passing delegated legislation that details broad level one directives. In electricity and gas, there are also the Florence and Madrid forums, that include private sector partici-

¹¹⁶ http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_ABOUT

pants, although the Commission is also closely involved. Here, the role of the Committee of European Energy Regulators may potentially be eclipsed by the European Regulators Group for Energy and Gas.

Thus national governments, IRAs and the European Commission all have alternative venues for coordination to CESR and the ERG. The two networks are in competition for resources, attention and power with other networks or committees that have their own distinct institutional advantages, such as greater formal powers or the ability to work without the Commission.

II.3 Towards FERAs in energy and telecoms: ACER, EECMA and BERT

Proposals for FERAs

In September 2007, the Commission proposed an Agency for the Cooperation of Electricity Regulators (ACER), arguing that ERGEG's tasks could be done better by an agency.¹¹⁷ In October of that same year, it proposed the creation of a European Electronic Communications Market Authority (EECMA).¹¹⁸ Commissioner Reding justified this step by saying that "we have now reached the legal limits of the present regulatory framework".¹¹⁹ She claims to have given a lot of thought to whether the ERG could be further strengthened under existing rules but concluded that the ERG has "failed, in spite of many efforts and good intentions," to find concrete, cross-border regulatory solutions.¹²⁰

The two proposals are just going through the Article 251 codecision procedure. While the ITRE committee has already adopted their reports on the two proposals in the beginning of June 2008, the plenary vote is not expected until the end of July. With two more parliamentary readings possible and not very unlikely, considering the intensity of the debate, nothing conclusive can be said about this process yet.

Composition of FERAs

In their composition ACER and EECMA resemble the structure of Federal European Regulatory Agencies. The Commission's proposals foresee an almost identical structure for ACER and EECMA. Both have a Board of Regulators, responsible for all regulatory matters and decisions, an Administrative Board that is responsible for all administrative and budgetary matters, a Director who is responsible for the day-to-day management and a Board of Appeal. The Boards of Regulators resemble the ERG and ERGEG in terms of membership. In contrast to the ERG and ERGEG, however, ACER would take decisions by a two-thirds majority (Commission 2007a for ACER: Article 11.3) and EECMA would take decisions by simple majority (Commission 2007b for EECMA: Article 27.4), with each member having one vote. Moreover, they are able to adopt their own rules of procedure, without Commission approval (Commission 2007a: Article 11.4 & Commission 2007b: Article 27.5). ACER's and EECMA's Administrative Boards have 12 members, six of which are appointed by the Council and the Commission each (Commission 2007a: Article 10 & Commission 2007b: Article 25.1). The Director of both agencies is chosen from a shortlist adopted by the Commission

¹¹⁷ European Commission, 2007a, *Proposal for a Regulation establishing an Agency for the Cooperation of Energy Regulators*. COM(2007) 530 final.

¹¹⁸ European Commission, 2007b, *Proposal for a Regulation establishing the European Electronic Communications Market Authority*, COM(2007)699 final.

¹¹⁹ *Communications Daily*, 14.12. 2007

¹²⁰ *Communications Daily*, 14.12. 2007

and appointed by the Administrative Board, after consulting the Regulatory Board (Commission 2007a: Article 13.2 & Commission 2007b: Article 29.2).

ITRE Rapporteur Chichester's final report suggests a stronger and more independent role for the ACER's Board of Regulators. The Director is still appointed by Administrative Board, but on the basis of a list of at least 2 names nominated by the Board of Regulators, rather than the Commission. The Administrative Board is suggested to have five members in total, with two each nominated by the Commission and Council and one member nominated by the European Parliament. Instead of two-thirds majorities, the ITRE committee suggests qualified majority voting in the Board of Regulators, with votes being weighted as they are in the Council. Del Castillo's report on EECMA proposes to replace the Administrative Board by the Board of Regulators.

II.4 Functions and powers of proposed new bodies

Like the ERG and ERGEG, ACER and EECMA are supposed to advise the Commission as well as IRAs and provide a platform for the cooperation of IRAs and dissemination of regulatory best practices.

In addition to that ACER is proposed to have decision-making powers on exemption requests concerning infrastructure assets of European interest and the ability to decide on the regulatory regime applicable to infrastructure within the territory of more than one Member State (Art 7 and 8).¹²¹ Moreover, the Agency would be able to take binding decisions on individual technical issues, when these are granted to the Agency under specific Guidelines adopted pursuant to the gas and electricity Directives and adopted through comitology (Article 7). The Commission also proposed to vest ACER with the task of overseeing the cooperation between transmission system operators in the European Network of Transmission System Operators (ENTSO) and monitoring ENTSO's development and implementation of voluntary, technical codes (Article 6). Therefore, ACER would have a much wider mandate than ERGEG.

According to the Commission's proposal EECMA is also vested with more functions and powers than the ERG. First of all, EECMA would be able to issue opinions in all matters regarding electronic communications on its *own* initiative and would *not* be dependent upon the request of the Commission like the ERG (Commission 2007b: Article 3). There is, however, no obligation on the Commission to consult with the ERG. Secondly, EECMA is given broad powers in the implementation of the regulatory framework (Article 4). Thirdly, EECMA would be closely involved in the so-called 'Article 7 procedure' of the proposed Framework Directive.¹²² Under this procedure, which is meant to improve regulatory consistency, EECMA is supposed to assist the Commission in monitoring and validating draft remedies that are notified by individual IRAs. In practice this would mean that EECMA will provide expert opinions to the Commission and the Commission will be required to take careful account of this opinion. The Commission is, however, not obliged to follow this opinion. According to the proposal, the Commission would also gain the power to veto any decision or regulatory obligations proposed by EECMA and to suggest amendments.

¹²¹ as provided for in Article 7(4)(a) of Regulation (EC) No 1228/2003 and Article 22(3)(a) of Directive 2003/55/EC.

¹²² European Commission, 2007, Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services, COM(2007)697 rev1.

While the introduction of ACER and EECMA would significantly improve the powers of the ERNs, provided that the agencies could because of their composition still be described as ERNs, the Commission's influence is increased just as much. Anticipating criticism by regulators and the parliament the Commission referred to the Meroni doctrine, suggesting that ACER's powers could not possibly be strengthened. It warned that "the option of setting up a single European regulator is premature at this stage and is likely to encounter strong resistance from a number of Member States and stakeholders."¹²³

MEPs accused the Commission of hiding behind the Meroni judgement. Claude Turmes, for instance, argues that it is "ridiculous" to come up with an ECJ ruling from 1958 in order to justify the ACER's limited powers.¹²⁴ Renato Brunetta (EPP-ED, Italy) the initial parliamentary rapporteur on the regulation on the ACER, called on the Commission to go back to its legal service and come up with an alternative way to give the ACER more powers.¹²⁵ Therefore, Chichester, who succeeded Brunetta as rapporteur when he returned to Italy after the recent elections, proposed a new article 8 that strengthens the accountability and transparency of the agency.¹²⁶ This would giving ACER more powers, it is suggested, without violating the Meroni doctrine. According to Chichester's final report, which was formally adopted by the ITRE committee at the beginning of June 2008, the agency would be able to take binding decisions on cross-border issues and to impose financial penalties on non-compliant transmission system operators. It is also given the power to approve network codes, developed by ENTSO. These codes would still remain voluntary. Subsequently, however, they could become legally binding through Comitology, provided that transmission system operators have failed to implement network codes. In order to prevent institutional paralysis and uncertainty for the market, the report suggests the introduction of a time-limit. If the agency fails to make a decision within that time limit its powers fall back to the Commission.

ERGEG and IRAs expressed concerns that ACER may not have enough powers to effectively fulfil its mandate, arguing that it "must be more than a simple advisory body".¹²⁷ According to ERGEG's current chair, Sir John Mogg, the "Agency should have a much stronger role in initiating, reviewing and approving the draft measures by TSOs so as to ensure that public interest concerns are fully met and a sound climate is established for investment."¹²⁸ With regards to the parliament's proposed amendments, ERGEG pointed out that codes would have to be strictly voluntary in the first instance. Only where ACER disagrees with the transmission system operators that have drafted a given code, can a comitology process be initiated through which the amended code be made binding. Therefore, ERGEG suggests a few amendments itself, which are claimed to be consistent with Meroni and that would significantly improve ACER's decision-making powers. The agency is suggested to prepare strategic guidelines, which ENTSO is to translate into network codes. After having reviewed these

¹²³ EurActiv, 25.01. 2008

¹²⁴ European Report, 28.01. 2008

¹²⁵ European Report, 28.03. 2008

¹²⁶ European Parliament, 2008, Report on the proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators (COM(2007)0530 – C6-0318/2007 – 2007/0197(COD)), Committee on Industry, Research and Energy, Rapporteur: Giles Chichester, Brussels, 4.6.2008.

¹²⁷ EurActiv, 25.01.2008

¹²⁸ ERGEG press release: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/PRESS_RELEASES/2007/PR-07-11_MadridSupportsAgency_17-10-2007_Final.doc

codes, ACER would then submit them to the Commission to make them binding through comitology.¹²⁹

The Council has suggested a similar solution but is still mainly preoccupied with the issue of network unbundling. The Third Energy Package, to which the ACER proposal belongs, is currently proceeding through co-decision. After the EP's ITRE committee has accepted rapporteur Chichester's report in early June, a first vote in the EP's plenary and political agreement in the Energy Council are expected in July.

With regards to EECMA, the ITRE committee proposed BERT (Body of European Regulators in Telecom) instead of EECMA.¹³⁰ MEPs were critical about the EECMA's limited powers and the strong influence of the Commission. Catherine Trautmann (PES) criticized "I didn't notice any independence in relation to the Commission, but I did notice distance in relation to national authorities."¹³¹ Therefore, BERT would act as an independent expert advisor to the Commission and the EC will be obliged to consult BERT and take the 'utmost account of its views'. The Commission's veto powers are also limited to decisions where BERT has given consent by simple majority, thereby excluding decisions in relation to the 'Article 7 procedure'. Moreover, BERT is meant to establish a compliance programme to track and identify unjustified actions by NRAs.¹³²

The ERG and IRAs criticizes that this would undermine the very independence which the Commission is concerned to protect. While the proposal may strengthen NRAs against national governments, they would lose independence from the Commission. Ofcom's Richard, who spoke in front of the ITRE Committee, argued that the Commission's proposals would break the balance of power between member states and the Commission, in the latter's favour.¹³³

Resources of proposed new bodies

The proposed bodies would be vested with significantly more resources than the ERNs. According to the Commission's proposal, EECMA would start off with 134 staff and an annual budget of euro 10m in the first year, raising to 28 in the third year. The size of this budget is partially explained by the fact that ENISA (European Network and Information Security Agency) is integrated into EECMA. It would be funded through the community budget. To increase the agency's independence from the Commission, BERT would be co-funded by the IRAs (1/3) and the community budget (2/3). BERT is also meant to have much less, but enough staff to ensure its independence.

ACER is proposed to have 40 to 50 members of staff and an annual budget of euro 6-7 million, covered by the community budget, IRAs' fees and voluntary contributions and dona-

¹²⁹ ERGEG press release, 21.02. 2008: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/PRESS_RELEASES/2008/FS-08-01_CEER-ERGEG_EnergyAgency_2008-02-20.pdf

¹³⁰ European Parliament, 2008, Draft report on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)), Committee on Industry, Research and Energy, Rapporteur: Pilar del Castillo Vera, Brussels: 17.4.2008.

¹³¹ European Report, 10.03.2008

¹³² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-404.717+01+DOC+PDF+V0//EN&language=EN>

¹³³ European Report, 10.03.2008

tions. The ITRE report suggests that ACER's financial independence has to be further increased but does not specify how.

II.5 Conclusion to Part 2

Reforms of European regulatory space have not been undertaken in a comprehensive manner. On the contrary, they have been evolutionary, passing through a number of stages. Early stages saw much decentralisation of implementation, with only limited coordination. But there has been increasingly institutionalised modes of coordinating national organisations, with current discussions of strengthened ERNs, and in some sectors, European regulatory agencies have been created, some with executive powers of taking decisions. There have been discussions of federal regulatory agencies, which would have responsibilities for making decisions binding on market players and national authorities. The stream of proposals for reform suggests powerful forces for coordination continue. Analysis of three key sectors- financial services, telecommunications and energy- has revealed how each stage has influenced later stages, as new organisational forms have been built on old ones, offering examples of conversion and layering. Existing organisations have both provided impetus for change and limited the scope for abrupt shifts. Hence European regulatory space has developed in an evolutionary manner. In that development, ERNs play a central part, both as part of the development and influencing current debates. The second part of this report focus on the institutional position of ERNs, while the third part examines how they operate in practice.

III. An attitudinal survey of NRAs

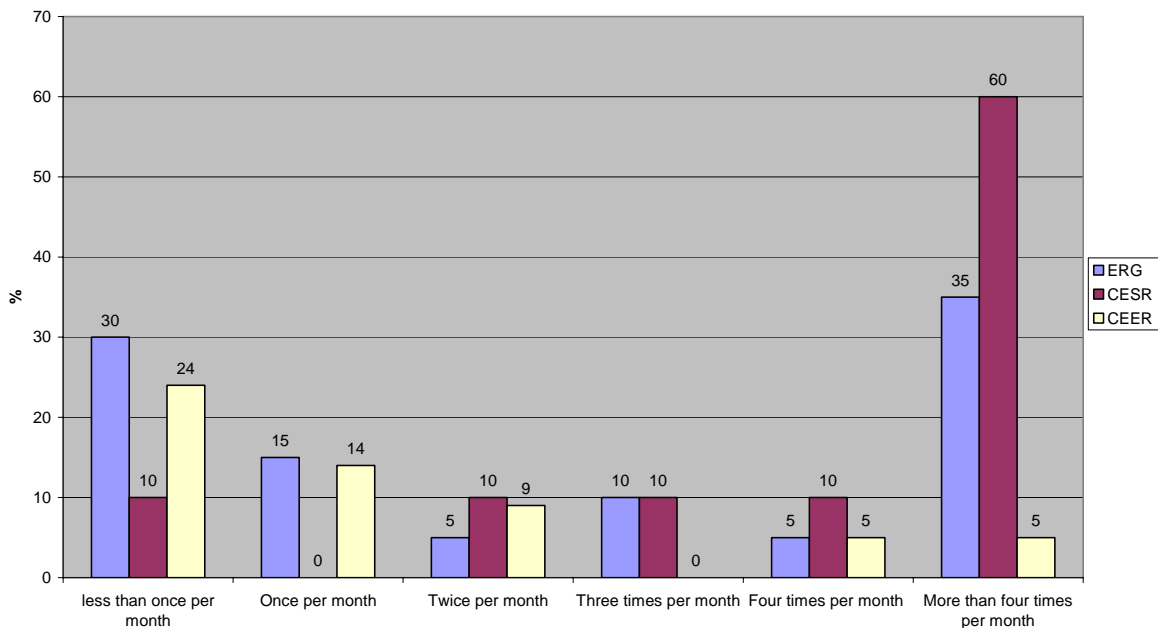
III.1 Introduction

In terms of universe of respondents; the survey was addressed to the European Affairs directors of the NRAs who participated regularly in the ERG, CEER, and CESR meeting. The questionnaire phase of the project commenced at the start of January 2007 and was finally completed in March 2008. The long period of the survey was partly due to practical issues of gaining mailing lists and support from the respective ERNs, but was also slowed due to the political debates surrounding regulation in the telecommunications and energy sectors during much of 2007/2008. In order to maximize responses, it was decided to use an on-line questionnaire format which was run through the UCL website at the following address: www.ucl.ac.uk/spp/newgov. After the initial mail out, the recipients were reminded to complete the survey by calls and e-mails. Finally in late 2007 the ERNs Secretariats sent out finally reminders to their members. The final n for the survey was ERG, CEER, and CESR. This gave us a total completion rate of.

III.2 Analysis of Data

Figure III.2.1

4. How often does your organisation engage with the CEER/ERG/CESR secretariat?

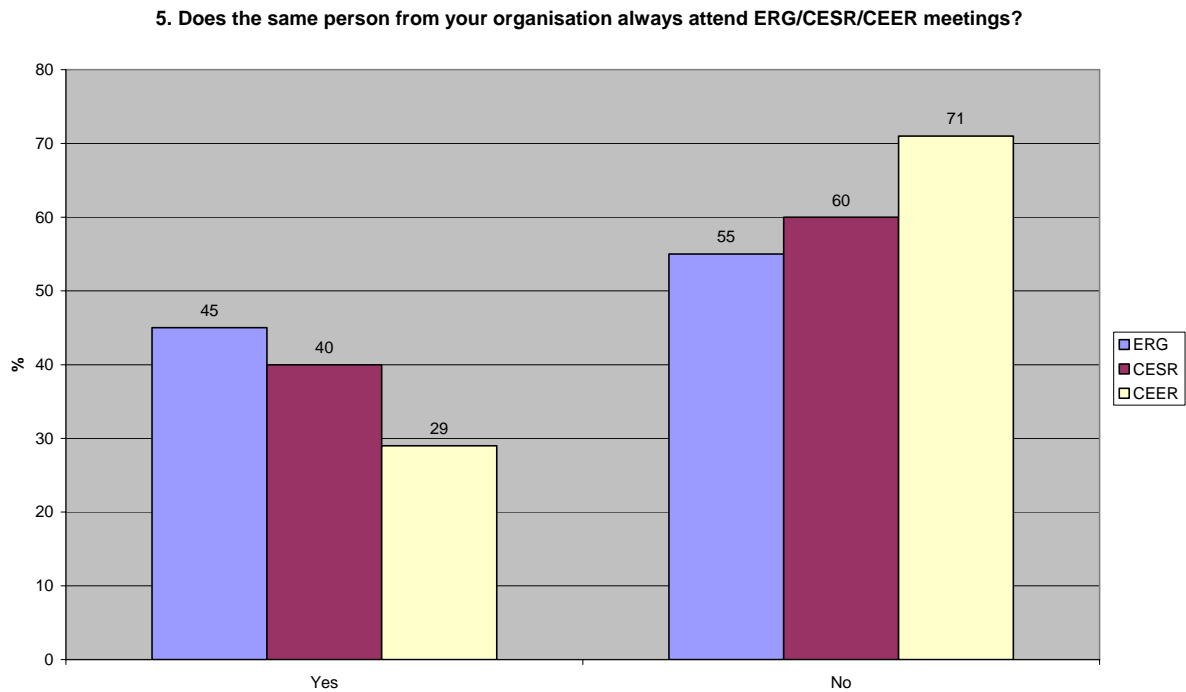


ERG: n=20; CEER: n=20; CESR n=10

The data suggest that NRAs have accepted ERNs as a new form of governance, in which they invest considerable time (and possibly resources), especially in telecoms and securities. The fact that the CEER receives comparatively less attention from NRAs may be explained by the coexistence of alternative fora such as Florence and Madrid process on the one hand, and the fact that energy markets are relatively less connected and interdependent and therefore do not require the same extent of supra/international cooperation on the other. However, with the new proposals for the creation of an EGEG+ or Energy Regulator we would expect participation to increase.

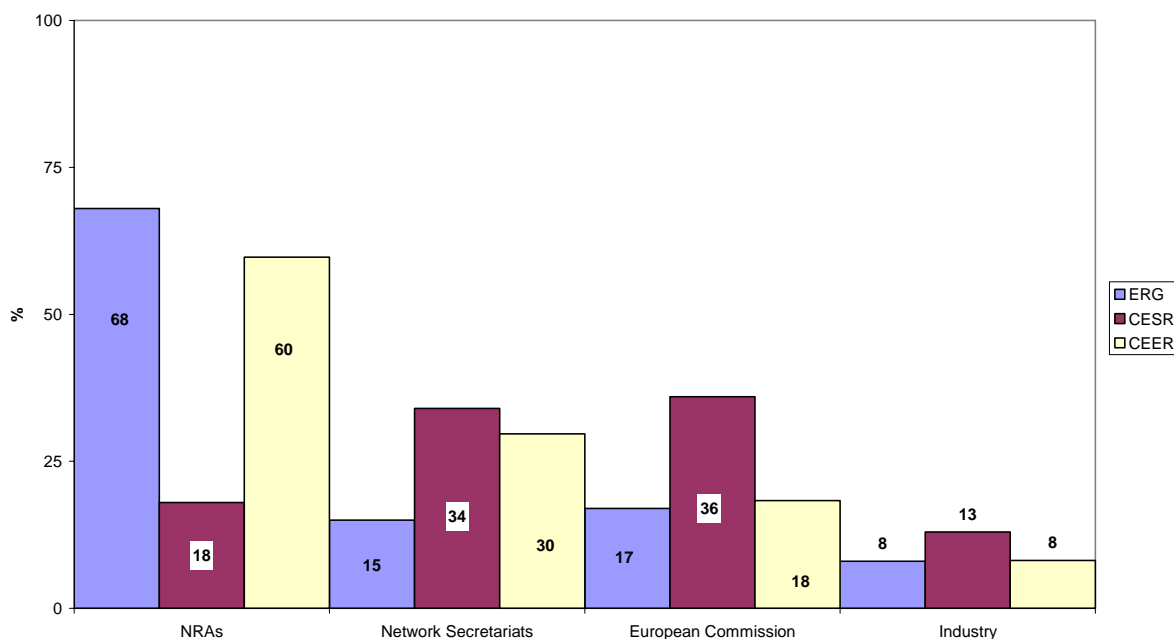
The U-shaped distribution of responses, especially in telecoms, may be explained by the fact that some NRAs are just not sufficiently staffed to participate even though they might wish to do.

Figure III.2.2



ERG: n=20; CEER: n=20; CESR n=10

The results here are ambiguous. It could either be that NRAs don't always delegate the same person because they do not value the ERN, or that they do value it and therefore always send specialized experts. The range of yes/no results may also be a function of the size as the larger NRAs have the resources to send specialists to the ERN technical meetings while the smaller NRAs will only have a small EU team and limited expertise.

Figure III.2.3**7. Which organisation is primarily responsible for initiating the work programme?**

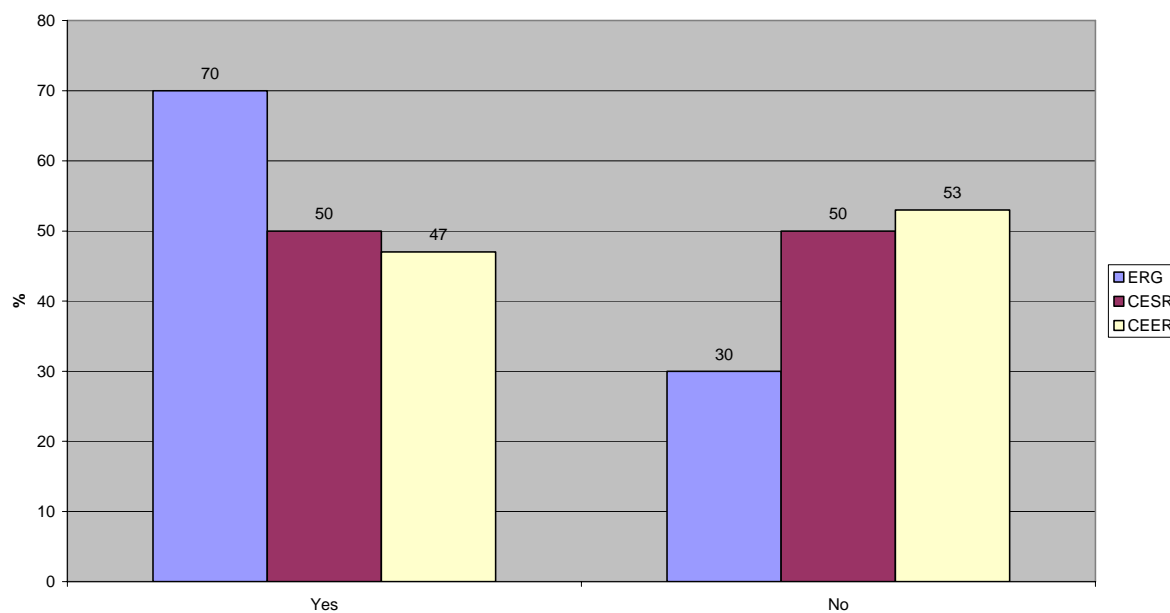
ERG: n=15; CEER: n=17; CESR n=10

The figures suggest that ERNs in telecoms and energy are primarily driven by NRAs.

However, In the securities sector the situation looks a bit different because of the Lamfalussy process. At level 2 all legislation is initiated by the European Commission, which asks CESR to draw up technical advice for the implementing measures on the basis of a clear mandate. This could explain why 38% of the respondents say that the Commission is responsible for creating new work programs. At level 3, CESR expected to lead regulation: in order to ensure a common and uniform implementation of EU legislation, CESR shall produce administrative guidelines, interpretative recommendations, common standards, peer reviews, comparisons of regulatory practice to improve consistent application and enforcement of the legislation or the standards concerned.

Figure III.2.4

8. Have the policy issues discussed at CEER already been debated among policy makers within your country?

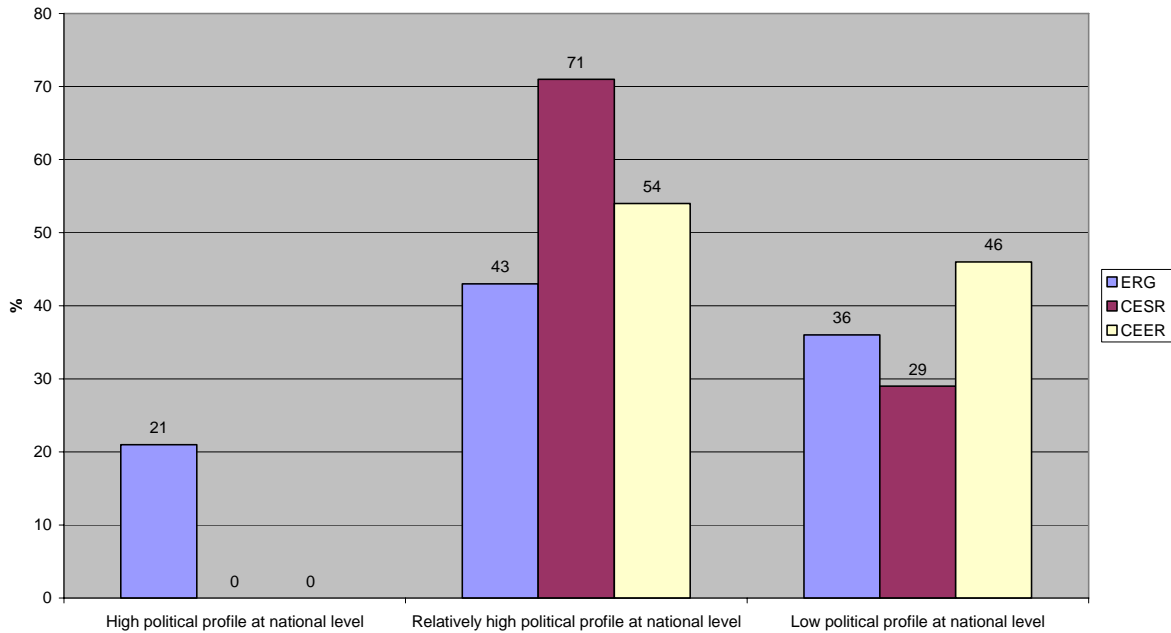


ERG: n=17; CEER: n=18; CESR n=10

The different results for ERG, CESR and CEER could be explained by the degree of internationalisation. The regulation of telecoms obviously has a strong cross-border dimension which requires the pooling of resources at a supra/international level. In securities, the ERN may be less present in national discussions because markets are still more divided along national lines than in telecoms. Therefore, the need for supra/international cooperation among NRAs is less pronounced. Energy markets are still very fragmented. In the case of electricity, for instance, there is only very modest cross border trade because of a lack of interconnectors between national power grids. Hence, it is not surprising that the ERN plays a comparatively weaker role in the national discourse.

Figure III.2.5

9. Do policy issues discussed at the CEER/ERG/CESR usually have a:

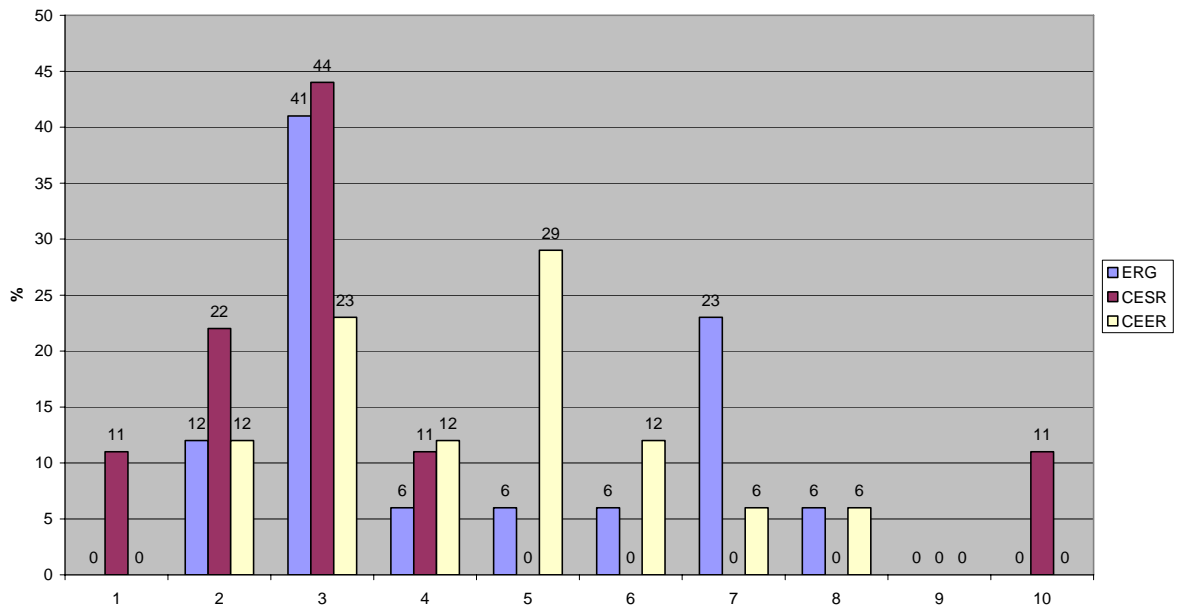


ERG: n=14; CEER: n=12; CESR n=7

Considering the technical nature of the NRA’s work, it is somewhat surprising that the majority of respondents have said that the issues discussed in the ERNs have a relatively high or even high political profile at national level. This could be explained by the fact that the issues discussed at ERNs often concern the regulation of former national champions. But it does illustrate that the NRAs are aware of their national constituencies/stakeholders even when dealing with the ERN – see figure 10 below.

Figure III.2.6

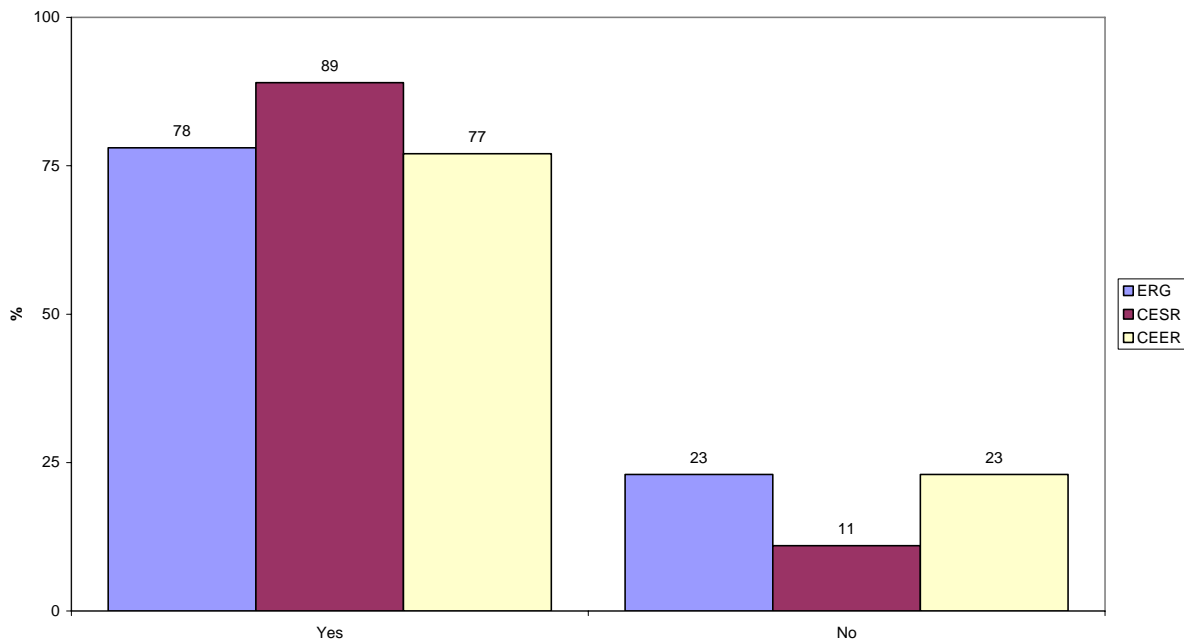
10. On a scale of 1-10, what level of consensus exists within your country on issues discussed at CEER?



ERG: n=17; CEER: n=16; CESR n=9

Figure III.2.7

11. Do some NRAs lead the majority of discussions?



ERG: n=13; CEER: n=16; CESR n=9

Considering the fact that NRAs are unequally staffed and that not all NRAs share the same level of technological expertise on different issues, it is not surprising that some NRAs lead

the majority of discussions in the ERNs – also see question 12. This may not be desirable for a number of political and economic reasons. However, this problem could only be alleviated by either strengthening weaker NRAs through a central budget or by strengthening the secretariats of the ERNs themselves.

Table III.2.1 If yes, please list the countries which lead discussions in the following policy areas

ERG								
#	Wholesale broadband access	VoIP	International roaming	Local loop unbundling	Regulatory accounting systems	Mobile termination rates	Fixed termination rates	Transparency and information for consumers
1	France		UK	Germany				
2	France	Germany	United Kingdom	United Kingdom	Italy	France	Italy	Portugal
3	Germany	Finland, Germany	UK, Germany, Denmark			Sweden	Germany, France	
4	F, NL, UK	F,NL	UK	GE	CH, I	S	GE	P
5	Ofcom, ARCEP, BNetzA	Ofcom, FICORA	Ofcom	BNetzA, ARCEP	AG-COM	ARCEP	AG-COM	ANACOM
6	France	Finland	UK	France	Italy	Sweden	Italy	Portugal

CESR

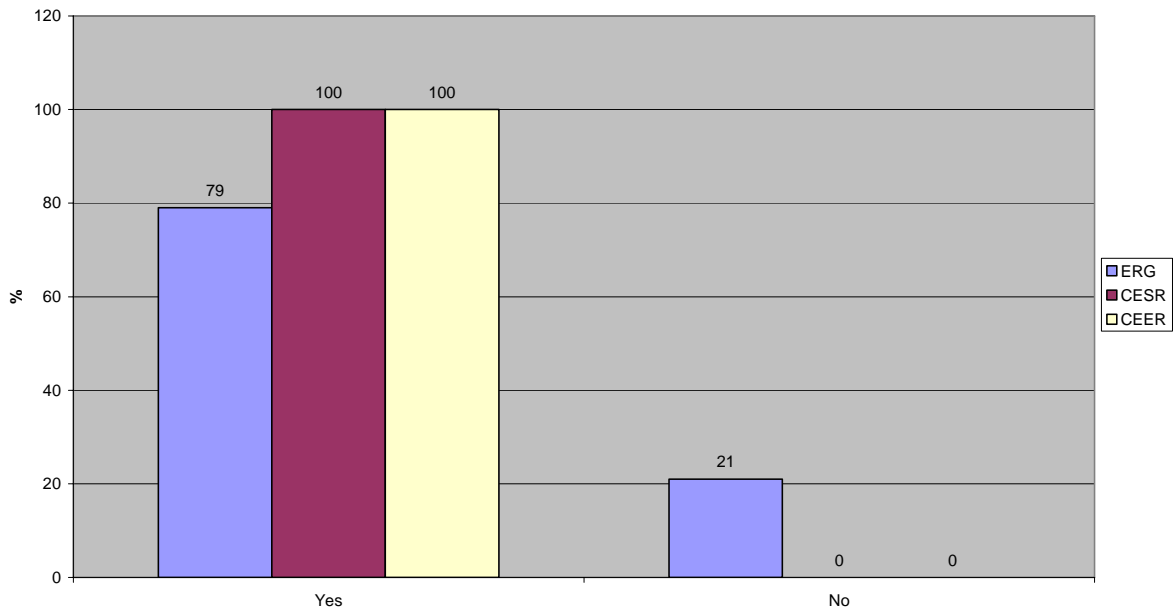
MiFID	Transparency	Prospectus	UCITS	Clearing settlement	Mediation
France		UK	Germany		
France	Germany	United Kingdom	United Kingdom	Italy	France
Germany	Finland, Germany	UK, Germany, Denmark			Sweden
F, NL, UK	F,NL	UK	GE	CH, I	S
Ofcom, ARCEP, BNetzA	Ofcom, FICORA	Ofcom	BNetzA, ARCEP	AGCOM	ARCEP
France	Finland	UK	France	Italy	Sweden

CEER

#	Electricity	Gas	Single energy market	Institution building	Information exchange and benchmarking
1	UK, Germany, France, Finland, Austria	UK, Austria, Greece, Italy	UK, France, Italy	France, Austria, Italy, Portugal	UK, Austria, Germany, France
2	ofgem UK, E-connection Austria, Finland	ofgem UK, E-connection Austria,	ofgem UK, E-connection Austria,	ofgem UK, E-connection Austria,	ofgem UK, E-connection Austria,
3	Finland	Austria	UK	UK	Austria
4	Finland	Austria	Austria, Denmark		Germany, Austria
5	Ofgem	Ofgem, e-control	Ofgem	Board	e-control, BNetzA
6	UK, France, Denmark	UK, Germany	Spain, Italy	Austria	
7		Austria			Germany
8	France, Germany, UK	Netherlands, UK, France, Germany, Austria			
9	UK, Finland, France, Italy, Portugal	UK, France, Austria, Italy	UK, France, Italy, Austria, Germany, Portugal	UK, France, Italy	Austria, Germany,
10	France, Germany, Poland	France, Germany, Poland	Nordic countries, Great-Britain		Austria

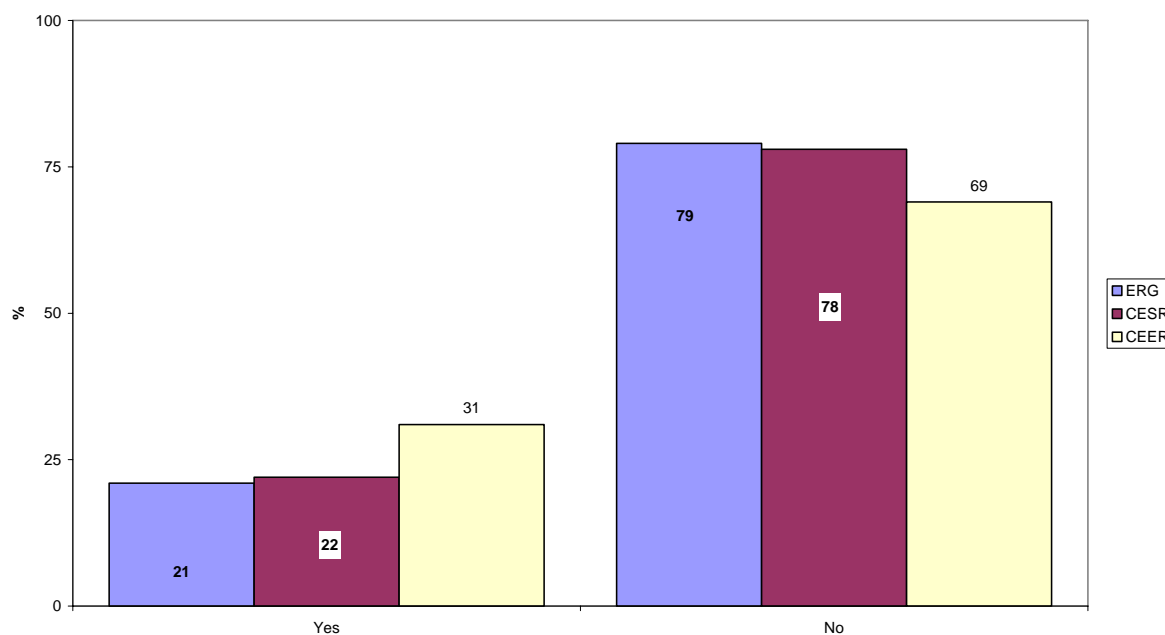
Figure III.2.8

13. Does your organisation discuss the positions you will take in the CEER/ERG/CESR meetings beforehand?



ERG: n=14; CEER: n=17; CESR n=10

The figures again appear to reflect the importance that NRAs attribute to ERNs. They cast some doubt on the commonly raised argument by some NRAs that the ERNs are purely technical bodies which are not concerned with ‘power politics’. If this was the case, it is hard to see the necessity to discuss positions beforehand as NRAs should be able to live with any given decision taken in the ERNs.

Figure III.2.9**14. Are Enduring Country Alliances Common?**

ERG: n=14; CEER: n=16; CESR n=9

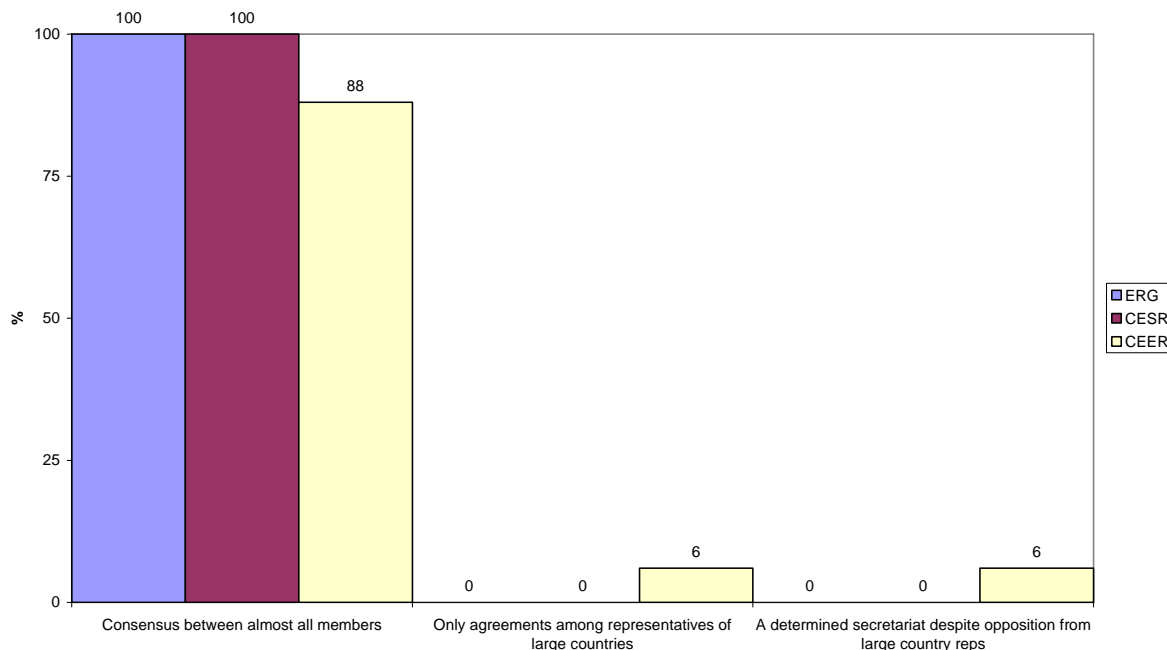
The responses to this question suggest that ERNs represent new form European governance, which is not led by intergovernmental bargaining and traditional country alliances.

A senior official of national telecoms regulator (Ofcom) stated in an interview in January 2008, that when groups of NRAs get together and cooperate more closely, they do so because they share similar technical problems or constitutional constraints, as is the case with the German speaking countries. Classical country alliances such as the 'club med' or the 'Franco-German engine' do not exist at ERG level, it was stated.

In the energy sector the results are less pronounced, which may be because of the limited transportability of the products at stake. Hence, cooperation is determined by geographic proximity. Therefore, enduring country alliances, such as among the Scandinavian or Iberian countries, can be expected to be more common.

Figure III.2.10

16. Network decisions require



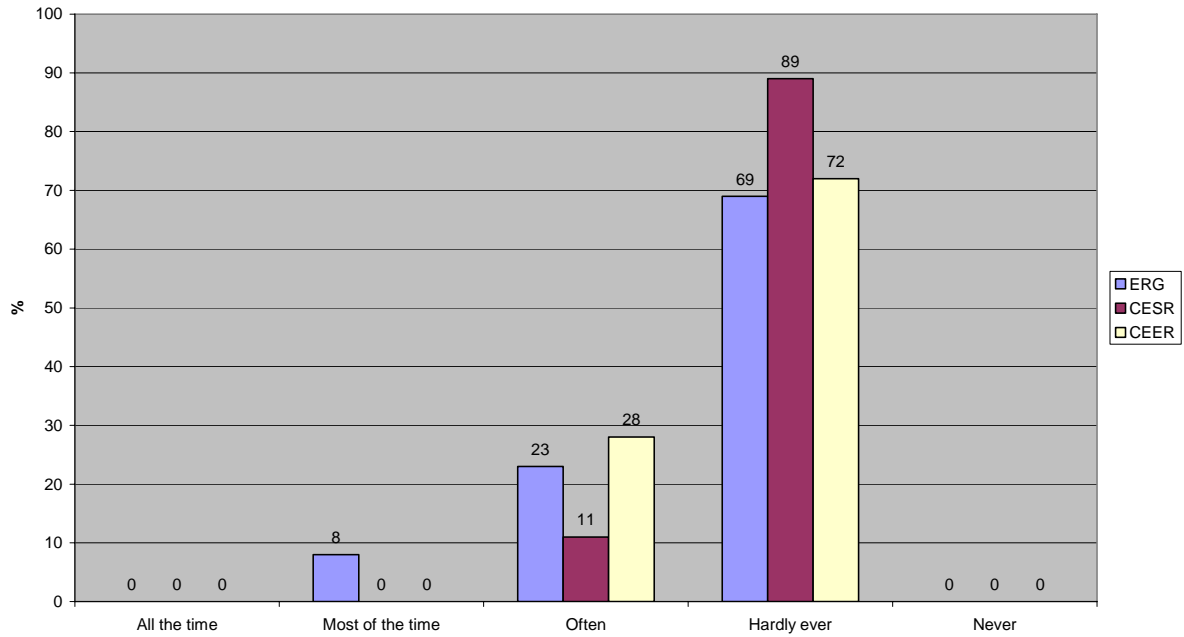
ERG: n=13; CEER: n=16; CESR n=10

At first sight, the responses to this question appear to confirm the Commission’s claims that lowest-common denominator decision-making predominates in ERNs. This stands in contrast to interviews by national regulators who underlined that ERN decision-making is only led by technical concerns, where agreement upon a solution is reached because it is technologically superior to alternative solutions.

With regards to the ERG, it is interesting to note that its decision-making rules have recently been changed to two-thirds majority voting, enforced by the chair. According to a national telecoms regulator, these rules had to be called ‘voting practices’ because the Commission refused to accept a change in the ERG’s official rules of procedure. The fact that 100% of the respondents stated that decisions are nevertheless taken by unanimity, either shows that these ‘voting practices’ are not applied in practice, or that NRAs are just very keen to avoid being part of the losing ‘third’.

Figure III.2.11

17. How often do CEER/ERG/CESR positions differ from your existing positions?

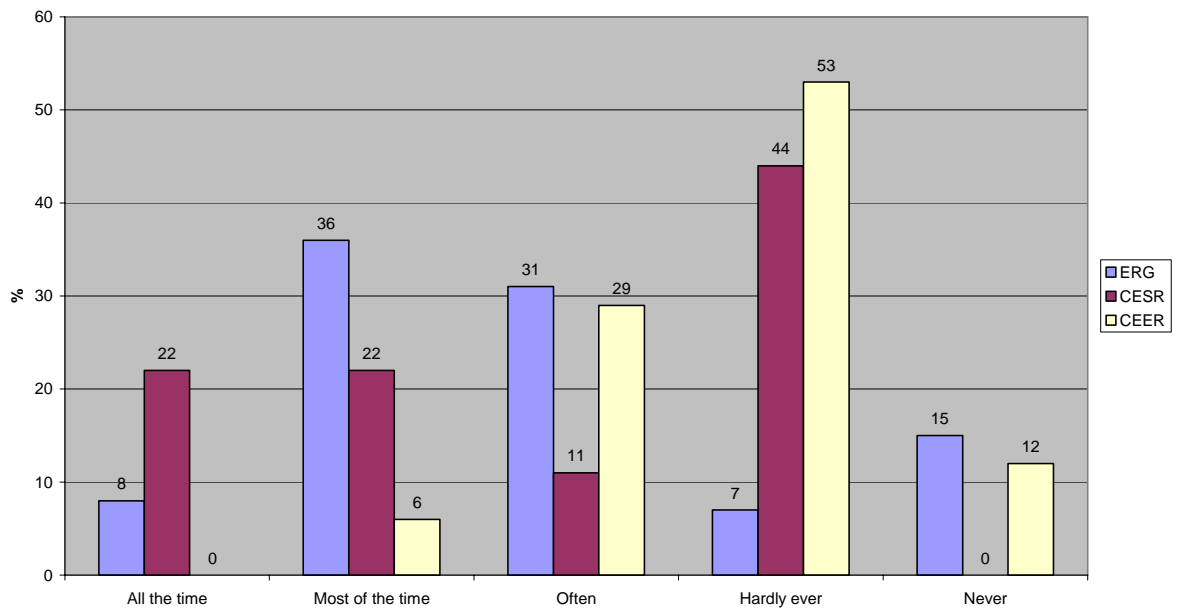


ERG: n=13; CEER: n=17; CESR n=9

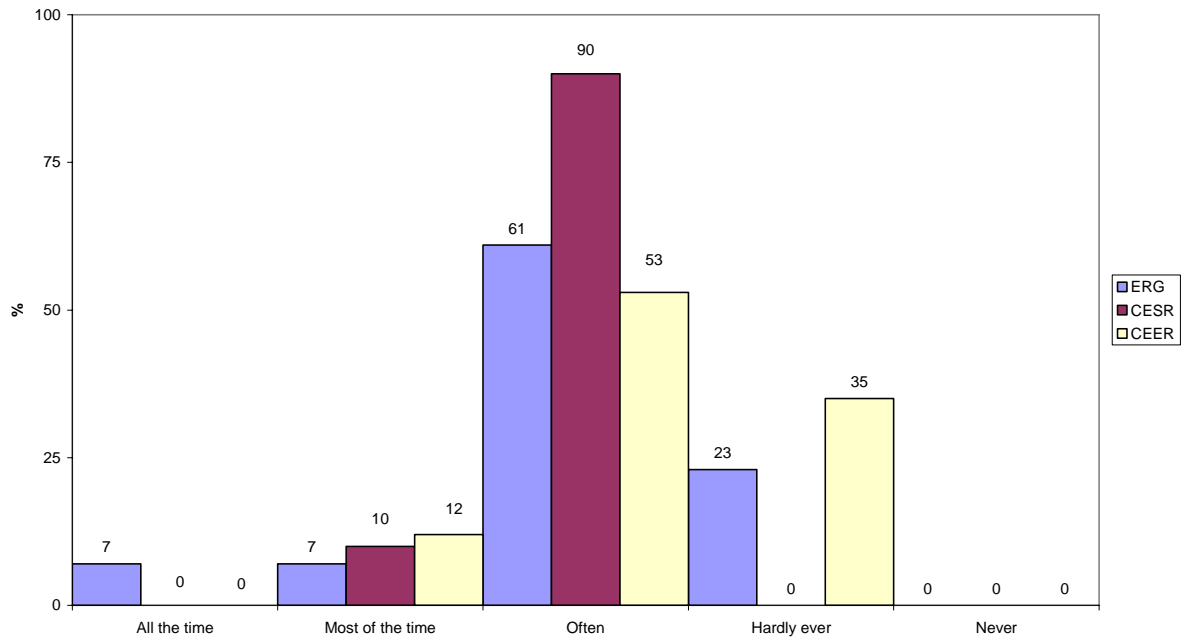
Same logic as the previous question.

Figure III.2.12

18. When they have done so, have your national policies been altered to meet CEER/ERG/CESR proposals?



ERG: n=13; CEER: n=16; CESR n=9

Figure III.2.13**19. Extent to which networks contribute to finding regulatory solutions**

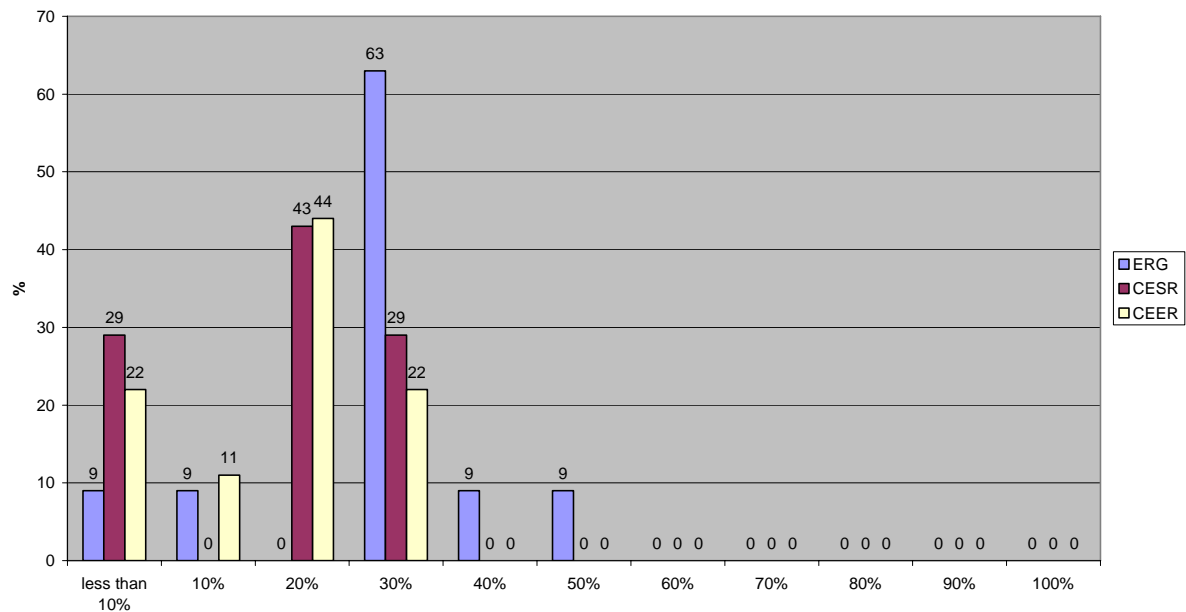
ERG: n=13; CEER: n=16; CESR n=10

In securities 100%, in telecoms 77%, and in energy 65% of all respondents stated that our three ERNs contribute to the finding regulatory solutions often, most of the time, or even all the time. This suggests that ERNs constitute a new form of governance that functions through cooperation and that foster regulatory learning among NRAs.

The fact that this is less pronounced in the energy sector, could be explained by (a.) the existence of alternative ERNs/fora, such as the Florence and Madrid process, and (b.) the greater degree of fragmentation of the European energy market. Because there are less cross-border regulatory problems, there is also a smaller need for cross-border cooperation.

Figure III.2.14

20. What percentage of CEER/ERG/CESR positions differ significantly from those of the European Commission representative?

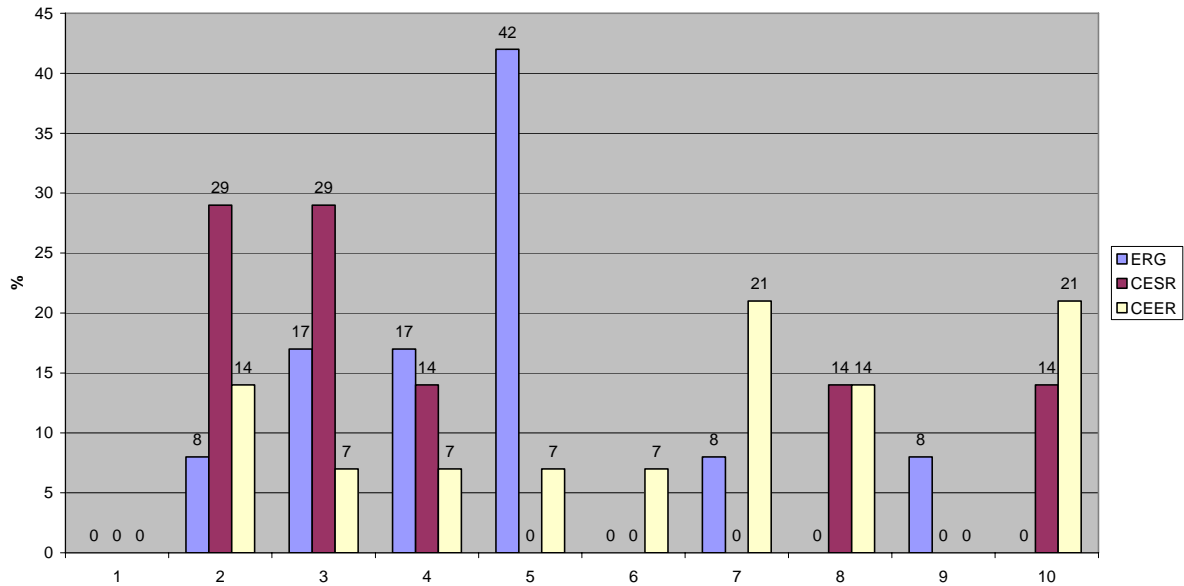


ERG: n=11; CEER: n=9; CESR n=7

Considering diverging institutional (self-) interests of the both the Commission and the ERNs these results are somewhat surprising. On the other hand, this suggests a high level of prior coordination with the Commission. One interviewee from a national telecoms regulator stated that the Commissions has threatened the ERG that if the ERG was to start work on a given issue it, the Commission, was not going to consider the ERG’s suggestions. In such cases the ERG did not have any choice but to move on to different issues. This comment suggests that many contentious issues are eliminated before they could create an open conflict between the Commission and ERNs. The fact that the ERG members’ responses suggest a higher degree of conflict between the ERN and the Commission than in other sectors needs to be linked to the strategies and higher degree of conflict between Commissioner Reding and the ERG.

Figure III.2.15

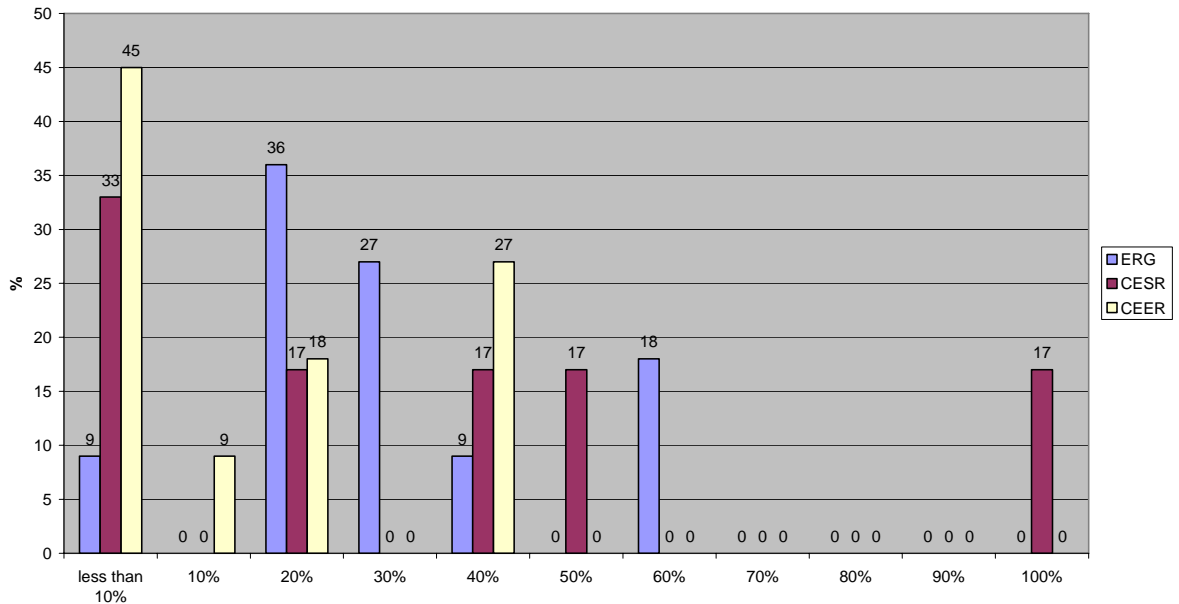
22. To what extent does the European Commission representative influence the outcomes of discussions at CEER/ERG/CESR? Please indicate on a scale of 1-10, where 1 = very high level of influence and 10 = very low level of influence.



ERG: n=12; CEER: n=14; CESR n=7

Figure III.2.16

23. On what percentage of the CEER/ERG/CESR's proposals does industry lobby CEER/ERG/CESR directly?



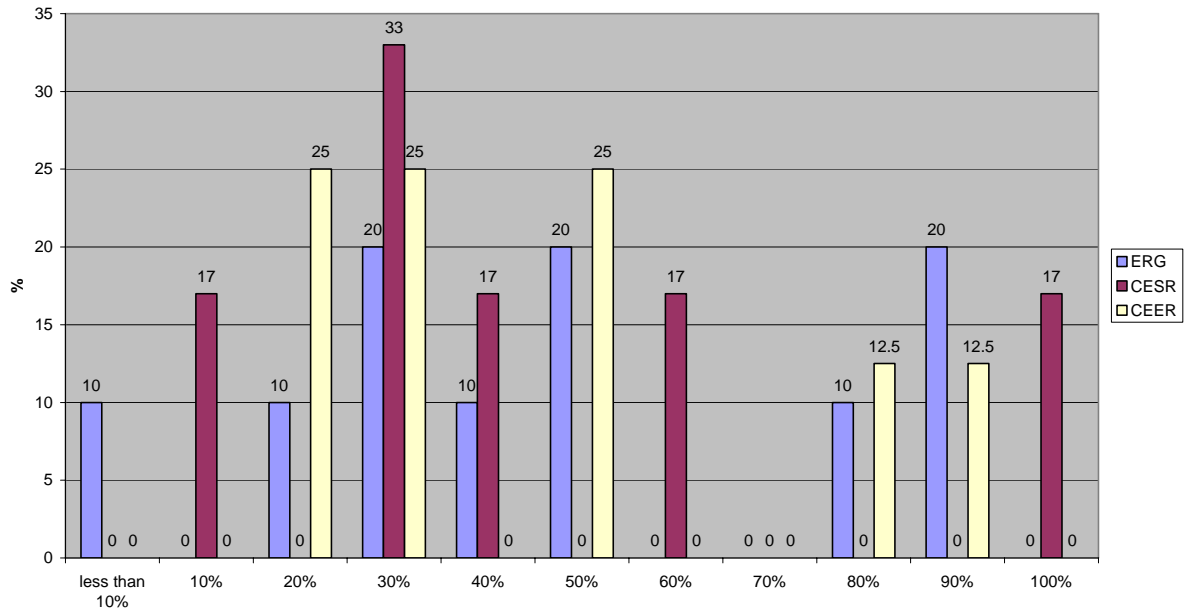
ERG: n=11; CEER: n=10; CESR n=6

In energy 100%, in telecoms 82%, and in securities 83% of all respondents stated that only one half or less of ERN proposals are lobbied by industry. This was confirmed by interviews

with firms that suggest that their preference is to make representation to their NRA and the Commission – where they have good channels of influence see question 24. Industry does not consider ERNs as influential enough to direct considerable resources to, and thus general only engages in consultation requests. - Rather than direct lobbying of secretariat.

Figure III.2.17

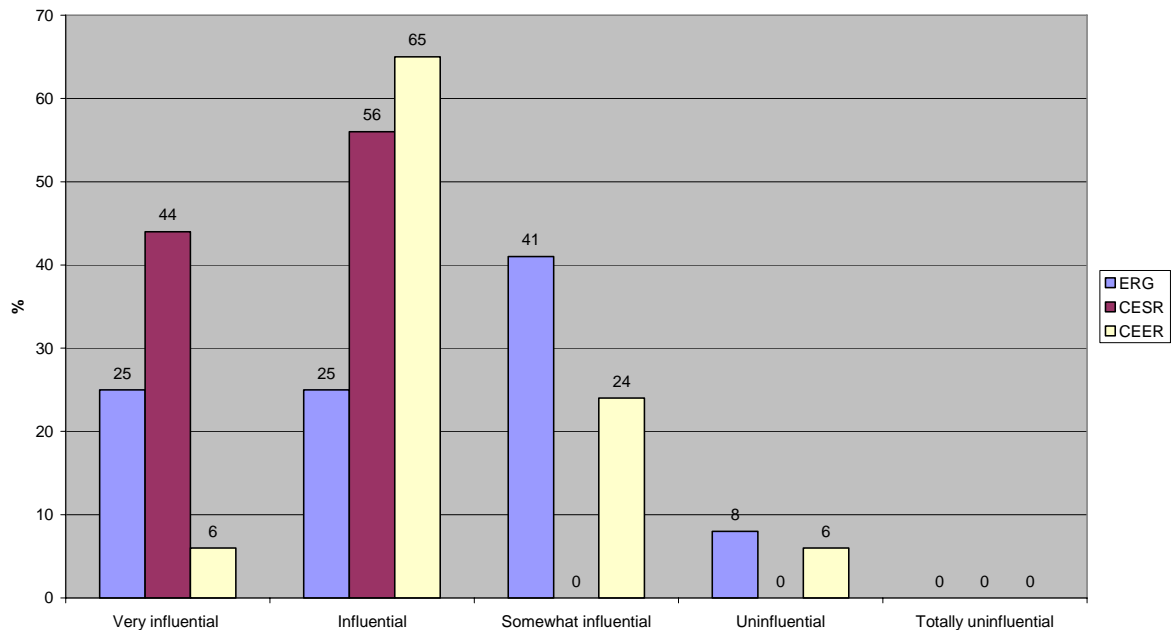
24. On what percentage of the CEER/ERG/CESR's proposals does industry lobby the European Commission?



ERG: n=10; CEER: n=8; CESR n=6

Figure III.2.18

25. Concerning the formulation of regulation in your sector, do you see CEER/ERG/CESR as:

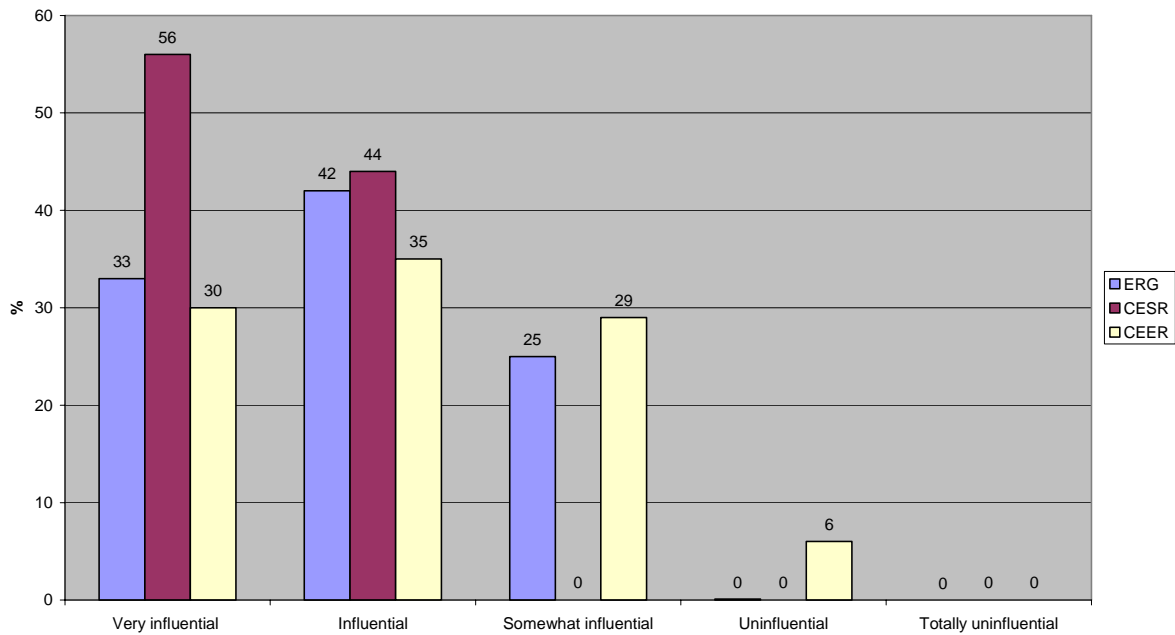


ERG: n=12; CEER: n=16; CESR n=9

Once again, this graph reflects the NRAs' trust in the capacity of the ERNs. The fact that the national securities regulators consider their ERN to be more important for the formulation of regulation in their sector is not surprising, as CESR is entrusted with considerably greater resources than the other ERNs and because its role in the legislative process is far more institutionalized thanks to the Lamfalussy process. The fact that energy regulators consider their ERN to be comparatively less important may be explained by the coexistence the Florence and Madrid processes.

Figure III.2.19

26. Concerning the harmonization of regulation in your sector, do you see CEER/ERG/CESR as:

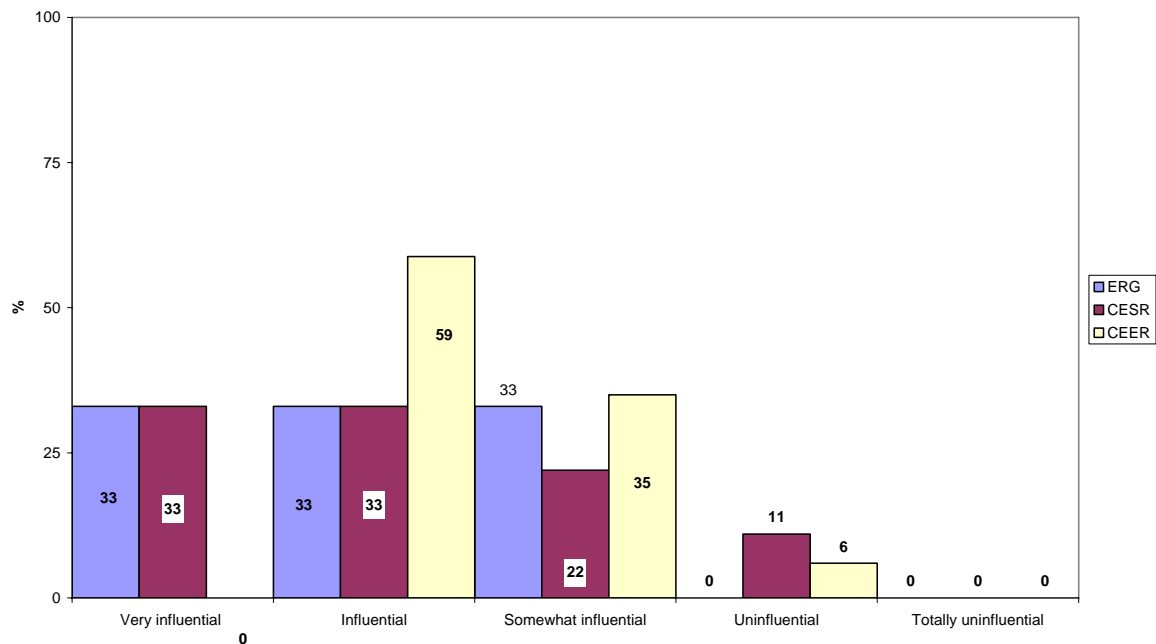


ERG: n=12; CEER: n=16; CESR n=9

Once again, responses underline the NRAs’ trust in the capacity of their ERNs and stands in contrast to criticisms by the Commission that they fail to contribute to the harmonization of regulation.

Figure III.2.20

27. Degree of Influence Regarding Implementation of Regulation

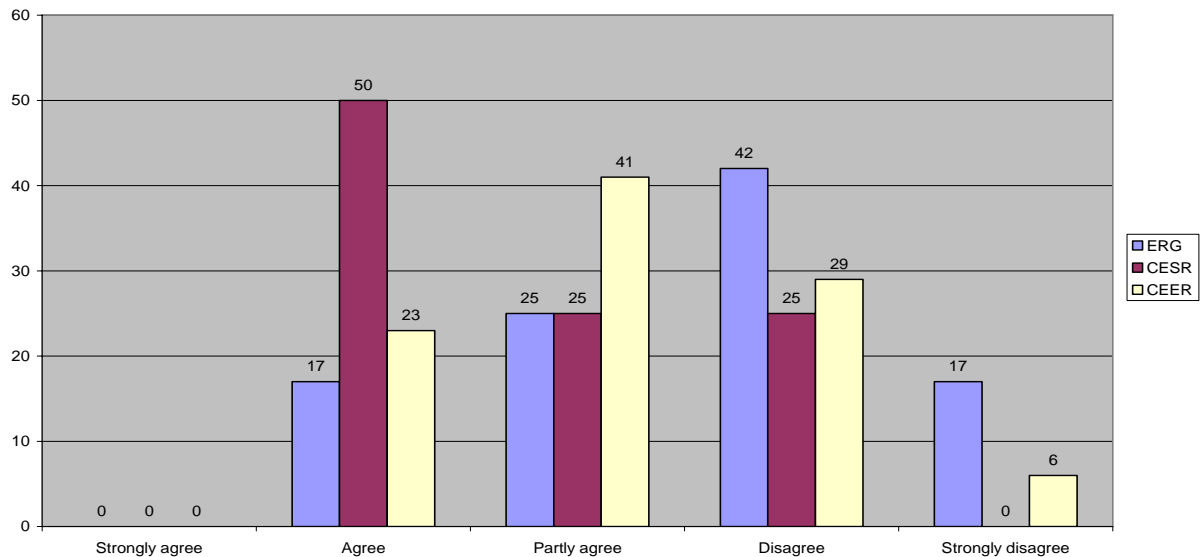


ERG: n=12; CEER: n=16; CESR n=9

See above.

Figure III.2.21

28a. The creation of ERG/CESR/CEER has shifted influence over the regulatory structure away from the national governments

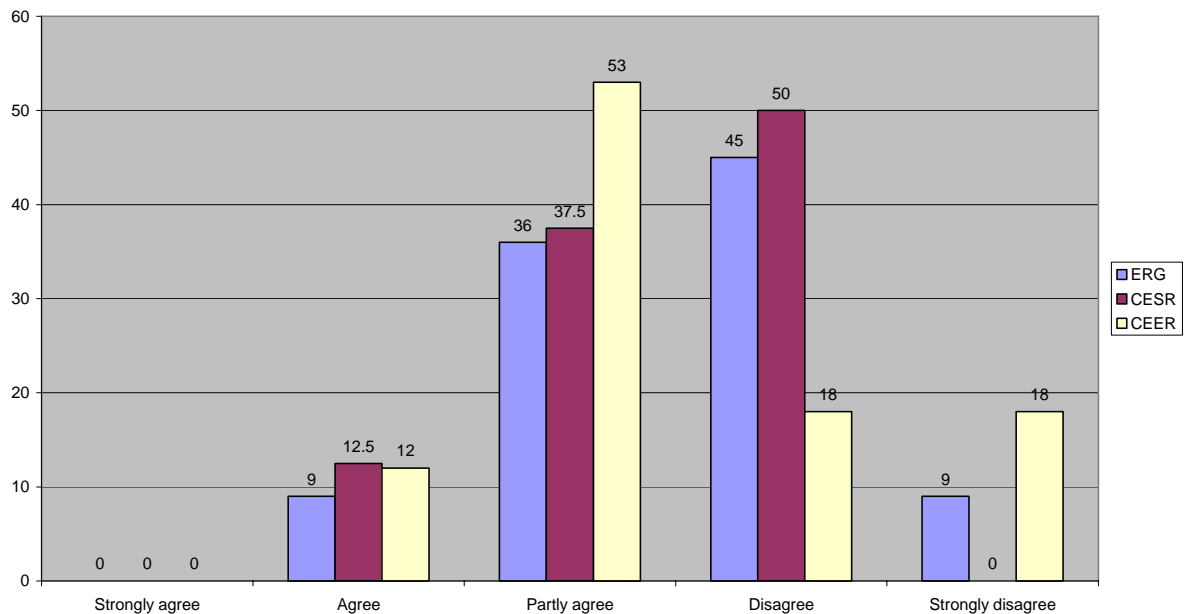


ERG: n=12; CEER: n=16; CESR n=8

This graph indicates the complexity of supranational institutions, some NRAs see the ERNs as a clear regulatory opportunity to distance themselves from national political masters, while others see the ERN as a means to gain resources and expertise to manage the sector. Thus small or politically weak NRAs have tended to favour a stronger and more influential ERNs. At the same time, others see ERNs as a threat to their autonomy and independence and are reluctant to delegate power or competency to them.

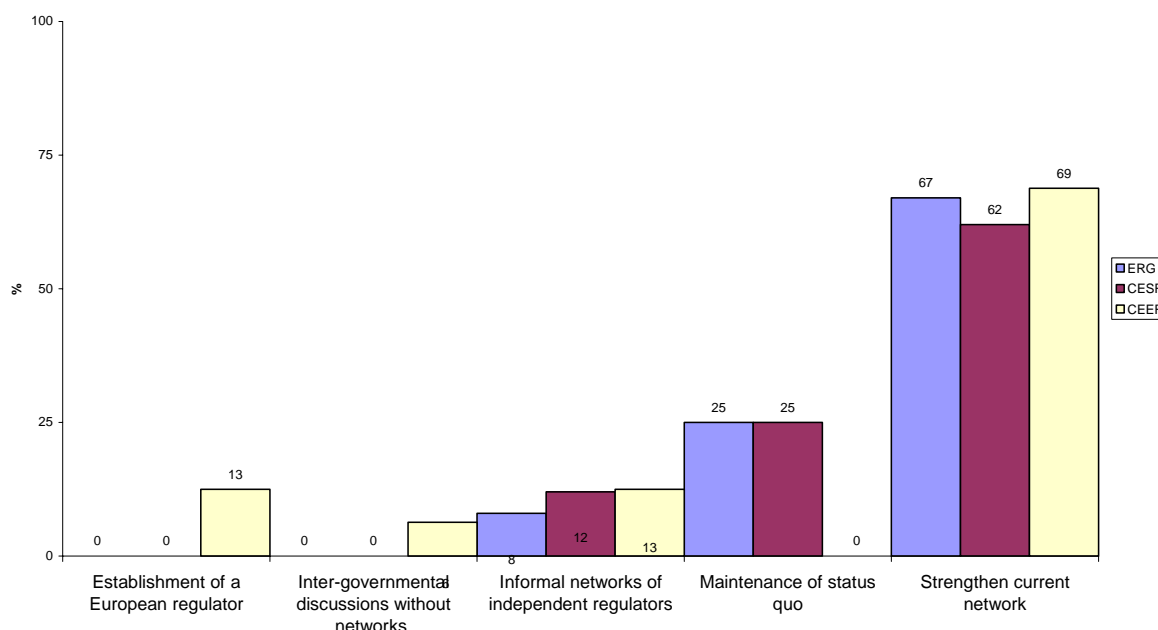
Figure III.2.22

28b. The creation of ERG/CESR/CEER has shifted influence over the regulatory structure away from the European Commission



ERG: n=11; CEER: n=16; CESR n=8

The emergence of the ERNs has thus far not reduced the significance of the European Commission in the EU regulatory process. In fact, in some cases the ERN has provided the European Commission with an opportunity to reassert its right of initiative and veto on remedies. The role of the Commission in the new ERN plus and or European Regulators is the focus of much current political debate in member states and the European Parliament.

Figure III.2.23**29. Which Situation Would be Preferable?**

ERG: n=12; CEER: n=15; CESR n=8

It is clear from the general survey that the powers and functions of the ERNs need to be strengthened and that at present they have failed to co-ordinate regulatory solutions or improve implementation. As a result, most NRAs prefer the creation of a new ERN with greater powers, as this would minimize their loss of autonomy and does not require treaty changes. However, while there is limited support of the creation of new European Regulatory bodies (See WEP paper 2008 for a detailed discussion of the options and rationale for each) there is also limited support of the failing status quo or a return to ad hoc discussion between NRAs.

III.3 Overall view

The survey is the first systematic study of European regulatory networks, their powers, functions and coordinatory issues. In looking at the ERNs role the survey has explored a major EU public policy tension between centralized ruling making and the decentralized implementation of the single markets. In exploring the preferences and attitudes of NRAs it is clear that there is a double delegation occurring from the European Commission and NRAs to the new ERNs, however the willingness to delegate and the degree of delegation has varied across time, sectors and countries (see Coen and Thatcher 2008). However, there is also a realization that ERNs can help with the formulation of regulatory solutions, harmonization and transposition of directives. Thus, there is also a recognition that ERNs need to evolve and develop new resources and institutional capacity. In terms of institutional developments, NRAs favour the development of the existing ERNs, but with continuing checks and balances at member state and Commission level.

IV. Project Conclusion

European institutions for implementing EU regulation have been greatly reformed since the 1980s. Initially, responsibilities lay with national authorities, especially governments, with supervision at the EU level by the Commission and European Court of Justice. But from the 1990s onwards, they have been altered. New network forms of governance have been attempted. One was forums including national authorities, suppliers, the European Commission and sectoral experts. Another were informal networks of national independent regulatory authorities. A further form was formalised European regulatory networks (ERNS). These networks thus form part of an overall pattern of development and attempts at new forms of governance to deal with the tensions arising from EU-level regulation and legislation but national implementation.

Development has taken place in an evolutionary manner. Hence for example, in securities regulation, the ERN (CESR) replaced the network of national independent regulatory authorities FESCO; in energy and telecommunications, current discussions of enhanced centralisation are dominated by strengthening existing ERNs; the Commission has received powers to deal directly with IRAs, altering its role as supervisor of member states to second principal of nationally-created IRAs. Often layering has also taken place, as new organisations are added to existing ones, which survive reforms. Thus for instance, ERNs in telecommunications and energy have been grafted onto a regime with informal networks of national IRAs and forums. Instead of streamlining, reforms have resulted in a cluttered European regulatory space filled with several types of bodies (Commission, forums, NIRAs, ERNs, ERAs) all with responsibilities for implementation of EU legislation.

Several reasons for this evolutionary development are revealed by process tracing of specific sectors. Existing organisations often make proposals, which usually involve their development and enhancement. Thus for instance, in securities regulation, the informal NIRA (FESCO) put forward the detailed plans that led to an ERN (CESR), while ERNs have suggested that they be given extra powers. On the other hand, existing bodies resist loss of powers or the creation of powerful rivals. Thus ERNs have strongly opposed the establishment of FERAs or ERAs. Existing bodies are often well-placed in struggles over institutional restructuring: they (or their members) have great expertise, whereas the Commission is small and has limited personnel; existing bodies have links to other actors such as national governments and industry. Thus once in place, a regulatory organisation limits radical changes and provides incentives to build on existing institutions.

However, existing organisations have not prevented change. On the contrary, increasing centralisation of powers has taken place, as EU-wide bodies have been created, their status has become more formalised and their powers enhanced (compare for instance, the largely informal and powerless forums and NIRAs with current discussions of enhanced ERNs). Each stage of reform has been followed by criticisms and hence debates about further reforms, pointing to processes of disappointment and learning, as policy makers have accepted or desired further centralisation of powers. Moreover, proposals for federal European regulatory agencies have regularly returned to the table, suggesting both demand for radical change and inadequacies of alternatives. Hence evolutionary change has also resulted in centralisation and institutionalisation.

An essential feature of evolutionary change is that new forms of governance face many institutional constraints. Although ERNs face complex tasks in coordinating diverse national IRAs, they have been delegated relatively few powers. Moreover, they face significant controls over their decisions and have to co-exist with other institutionally-powerful actors, nota-

bly the European Commission and national regulators. The acceptance of the creation of ERNs by other actors such as the Commission, IRAs and national governments can be linked to the limited institutional resources and strong constraints that these ERNs face. Equally, it is unsurprising that pressures for further reforms of coordination continue and that ERNs press for greater powers.

In practice, members of ERNs, namely national IRAs, have found them useful. They engage regulatory with ERNs. have discussed significant issues within ERNs. They have found that ERNs have aided finding regulatory solutions. They believe ERNs to be influential but not found that ERNs impose responses on them, although some national IRAs may act as leaders within ERNs. But they also recognise that ERNs have not eliminated the influence of existing actors such as the European Commission. They seek further strengthening of ERNs. Thus ERNs in practice as well as in formal institutional terms, form part of evolutionary development, aiding existing actors such as IRAs, adding to existing actors and representing additional coordinating capacities rather than a rupture with previous arrangements.

A strong case has been made that European integration and institutionalisation are driven by functional demands, notably by large cross-border firms in alliance with EU-level organisations.¹³⁴ Our analysis suggests that at theoretical level, studies of European governance also need to take into account the ‘supply side’ of European institutions and endogenous forces for change as one set of organisations are put in place and leads to pressures for further changes. It shows that even if there are strong demand-side pressures for centralisation of regulation, existing institutional arrangements and organisations limit and shape the supply of new institutions. The outcome is evolutionary change both in formal institutional terms and in practice, as new arrangements are established that build on existing ones and protect or aid existing actors. The result is that strong tensions persist between achieving a single European market and the institutions for implementation of EU regulation, and hence debates about radical change coexist with a fragmented, cluttered and complex European regulatory space that evolves gradually rather than is radically reshaped.

¹³⁴ See Sandholtz and Stone Sweet 1998, Stone Sweet, Sandholtz and Fligstein 2001.

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