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NEWGOV Practitioner Forum

Reshaping European Regulatory Space:

The Evolution of European Networks and Regulatory Agencies

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University College London, David Coen; London School of Economics and Political Science, Mark Thatcher

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Summary

In the last ten years, EU regulation has been transformed. However, in order for regulation to be implemented, appropriate institutions also have to be established. This workshop looks at such institutions, notably for the regulation of markets in network industries. The implementation of public policies always raises questions of discretion and diversity. But, in the case of the EU these questions are particularly difficult because there is a strong tension between the creation of a single European market through centralised EU-level legislation and its decentralised implementation by often diverse and recently-reformed national -level authorities. In addition, there are strong national traditions of protecting domestic firms and economic interests. Thus the institutions for implementing EU legislation are particularly important and the topic of much current debate in Brussels.

This policy workshop began by setting out different possible regulatory network models, before analysing the development of European Networks of Regulators in Telecommunications and Energy from the perspective of business, national regulators and the European Networks central administration. It concluded by looking at current debates and the potential for EU Agency and network plus solutions.

The Practitioner Forum took place on 10 June, 2008, in Brussels at *The Centre*.

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I. Introduction

Regulation lies at the heart of the EU and European integration. Yet it is insufficient just to pass legislation but it must also be correctly and effectively put into practice. Traditional regulatory arrangements whereby EU legislation was implemented by member states with the European Commission and European Court of Justice providing oversight have faced criticisms of inadequacy in the face of the increasing volume of EU regulation, failures to enforce EU law and cross-national differences in implementation. Such problems threaten the achievement of the Single Market in practice. Meanwhile at national level, regulatory structures have been greatly altered by the spread of sector-specific independent regulatory agencies (IRAs), separated from government departments and holding much of the detailed knowledge and responsibility for implementing EU regulation.

In response to these factors, several types of regulatory networks have been created that appear to mark a major change from traditional modes of governance in regulation by using new instruments such as benchmarking and peer review, policy transfer, learning and voluntary accords, by systematic inclusion of private actors in the policy process and by bridging the gap between the national and EU levels of regulation. Thus for instance, EU has established EU-wide networks of national IRAs, such as the European Regulators Group (ERG) for telecommunications, the Committee for European Securities Regulators (CESR) for securities and the European Regulators Group for Electricity and Gas (ERGEG). These have been given functions of coordinating IRAs, advising the Commission and developing norms of implementation. In addition, networks of IRAs outside the formal EU legislative framework have been established, such as the Independent regulators Group (IRG) in telecommunications and the Committee of European Energy Regulators (CEER). Such networks.

However, debates about effective modes of governance for regulation continue. The networks have been criticised as inadequate, notably for failing to reduce barriers to entry or end national differences in implementation of EU law. Current debates in electricity but also telecommunications centre around whether networks should be reformed or replaced with powerful ‘Euro-regulators’.

The workshop allowed practitioners and policy makers from the Commission, IRAs and regulatory networks to discuss with academics from NewGov how regulatory networks perform, the extent to which they have altered governance of regulation and possible reforms. In the light of the regulatory debates on the future of networks and regulatory agencies this workshop provided a welcome and informal (Chatham House) venue for academic and practitioner brainstorming on future institutional developments. More specifically, it allowed us to present results of the past years of research on networks of regulatory agencies and relate them to key current policy debates. Results included:

- a critical analysis of formal position, instruments and resources of agencies
- a study of different institutional choices available to structure regulatory arrangements
- a survey of how participants in the policy process saw the functioning of regulatory networks
- our study of debates among IRAs, EU Commission officials and network officials on the distribution of powers and functions between different institutions.

The forum focussed on three strategic sectors- telecommunications, financial services and energy. Key issues included:

- to what extent have networks of regulators altered the implementation and co-ordination of EU regulation?
- what are the major resources of networks of regulators and what are their main weaknesses?
- what are the informal and formal mechanisms for co-ordinating regulatory policy within the networks?
- what impacts have the networks had on the regulatory functions of NRAs and National governments?
- what are possible reforms to regulatory networks and their respective advantages and disadvantages?
- what would be the different institutional features of ‘Euro-regulators’? What are the advantages and disadvantages of replacing networks with Euro-regulators?
- what role can and should private actors play in implementing EU regulation?

II. Summary of the presentations

II.1. Andrew Tarrant, BT Group

Andrew Tarrant presented a business perspective of regulatory networks, starting with several general comments on these networks and their differences and similarities with regulatory agencies. He emphasizes the fact that regulatory networks are only informal bodies without the ability to make binding decisions and have resources only to the extent that members make them available. European regulatory agencies, by contrast, have their own resources and are formalized bodies. Their membership can be similar or identical. Although the Commission often tends to rubber stamp decisions of agencies, the role of the Commission in agencies is nonetheless important, he maintained. Absent its empowerment, there would be scope for agencies to simply agree to disagree and fail to act. According to Tarrant, agencies are typically created either where there is little in the way of state owned companies or where the activity of the agency will not impinge directly on economic interests. To support this claim, he cited the example of the railroad sector, where an agency deals with safety issues and national regulators, organized in a very loose network, deciding on access issues. In telecoms, as in many areas where networks of regulators are set up to deliver a European harmonisation framework, there is substantial state ownership of previous de facto monopoly operators as well, Tarrant continued. While the ERG in the telecoms sector has been very good at producing papers that focussed on key implementation issues facing national regulators, he criticized that its recommendations tended to be rather bland, reflecting the lowest-common denominator approach of the organization. In theory, ERG takes decisions on a three-quarter majority basis but unanimity or near unanimity appears to be the normal practice.

The ERG’s detailed best practice remedy and the newly adopted monitoring exercise should, however, be considered as an important step forward, he proclaimed. While these changes could be interpreted to mean that there is no need for any Commission involvement, Tarrant suspected that the changes were only possible under the shadow of the Commission’s threat to create a new agency. Moreover, he questioned the effectiveness and rigorousness of the new monitoring mechanism by referring to the experiences he made with BT. Operating in many

national markets where regulators claims to have implemented best practice, BT had to find out that the absence of enforcement and monitoring mechanisms (which should be part of the remedy) means either that nothing happens in practice and no regulated product is actually made available (roughly 25% of cases) or that it is made available on terms which are not compliant with the regulation (majority of cases). Moreover, he expressed his worries about the recent internal ERG self-monitoring exercise in which all the national regulators concluded they had all implemented best practice with respect to wholesale broadband access, which according to Tarrant is simply not the case in reality.

Therefore, he welcomed the current review of the legislative framework and the European Parliament's proposed amendment of the Commission's proposals to create a European regulatory agency in particular. According to the proposal, the Commission would gain the power to veto and suggest amendments to regulatory obligations proposed by an agency formed of national regulators. He suggested that this could bind the national regulators and the Commission to good technocratic decision-making. Nonetheless, the proposal has an important weakness, Tarrant argued, which lies in the fact that there is no obligation on the agency to give a reasoned opinion when departing from the Commission's views about the behaviour of individual national regulators. Moreover, he criticized the absence of a mechanism that requires the proposed agency to act at all. He suggested a mechanism whereby the Commission's original proposals are adopted, where BERT fails to take a decision.

II.2. Fay Geitona, ERGEG

Fay Geitona reported on ERGEG and CEER, the European regulatory networks in the gas and electricity sector. She began by clarifying the relationship between these two organizations. Apparently, both organizations share the objectives of improving cooperation between national regulators and facilitating the creation of a single market for gas in electricity. But while CEER was established by national regulators themselves, ERGEG was later instituted by the European Commission as an advisory organization with the intention of putting regulatory cooperation on a more formalized footing. While CEER is funded entirely by national regulators, the Commission reimburses travel expenses for ERGEG. In practice, the two organizations work in parallel with the CEER secretariat providing administrative support for ERGEG's activities.

In order to achieve a truly internal energy market, she claimed, the current framework does not go far enough and called for a European regulatory agency. Challenges like the creation of a European grid, ensuring efficiency of investments and guaranteeing the security of EU-wide network operation require regulatory oversight at EU-level and could barely be tackled at member state level. Geitona criticized the following points: First, that ERGEG can only advise the Commission. Secondly, that ERGEG's Guidelines of Good Practice remain voluntary, unless made binding through comitology. Third, that several implementation rules, such as congestions management, tarification, and third party access services, are not yet adopted. This problem is aggravated by the poor competencies and weak capacities of national regulators. According to Geitona, the recent monitoring exercises have demonstrated that the current framework has failed.

Therefore, she welcomed the Commission's proposals to create a European regulatory agency as an opportunity to close the regulatory gap that the regulatory networks have failed to close. Nevertheless, she expressed her concerns, that the proposal may not go far enough. ACER, the proposed agency, would have the power to (1.) decide on the regulatory regime for infrastructure connecting at least two Member States, (2.) grant exemptions where the infrastructure concerned is located in the territory of more than one Member State, (3.) approve invest-

ment plans and (4.) monitor the development of technical codes by the European transmission system operators. Concerning the last aspect, Geitona criticized that ACER's ability to engage in the development and monitoring of these codes is severely constrained by the Meroni doctrine. She pointed out that because of that doctrine 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. Geitona warned that this could undermine legal certainty and market integration.

Therefore, Geitona suggested an alternative system whereby ACER would first prepare strategic guidelines, which the transmission network operators are to translate into codes. After having reviewed these codes, ACER would then submit them to the Commission to make them binding through comitology. Moreover, she argued that to improve the regulatory framework, competences of national regulators have to be enhanced and the balance between the roles and powers of ACER, the Commission and the European network of Transmission system operators has to be improved. In line with that goal, ACER should be given a stronger role, particularly in the adoption process of codes.

Finally, Geitona welcomed the amendments proposed by the European Parliament's ITRE Committee, which would improve the independence and powers of the agency. According to these amendments, the agency would be able to take binding decisions on cross-border issues and to impose financial penalties on transmission system operators. Nevertheless, she expressed her concerns about the fact that, according to this proposals, codes would still be voluntary at first, only becoming legally binding after comitology and provided that the transmission system operators have failed to implement a network code. Since the plenary has not voted on ITRE's report in the first reading yet and because the co-decision procedure may still bring two more readings, however, Geitona was optimistic that the exact provisions of the parliament's position might still change. The same goes for the Council, she said, as there is still an Energy Council and a European Council to come. The Council had suggested making the network codes binding after extensive consultations of all stakeholders. In detail this would mean that ENTSO would submit network codes to ACER, who would then provides a justified opinion to ENTSO and submit the codes to the Commission, recommending them to be adopted.

II.3. Annegret Groebel, BNetzA

Annegret Groebel provided the national regulator's perspective of European regulatory networks. The German regulator began by clarifying the overlapping role of the two regulatory networks in telecoms: ERG and IRG. Both organizations operate on the same principles to make sure that national regulators do things similarly. IRG and ERG also meet back to back. According to Groebel the main difference between the two organizations lies in the fact that the ERG was established by and reports to the European Commission and that the IRG, as suggested by the name, is completely independent from the Commission. This independence from the Commission, Groebel maintained, played an important role in the establishment of the recently instituted chair's secretariat. Initially, ERG was meant to have a general secretariat that was funded by the Commission and integrated into DG InfoSoc. After the general secretariat failed to fulfil the thankless task of reporting to both the Commission and the national regulators, Groebel explained, its budget was eventually cut by the Commission. Therefore, the national regulators decided in 2006 to establish an independent permanent secretariat, supporting the ERG chair. The secretariat is hosted and funded by the IRG, which was set up as a legal entity under Belgium law for that purpose.

ERG is meant to advise and assist the Commission in developing the internal market and to ensure the consistent application of the European regulatory framework. ERG provides a platform through which national regulators can disseminate best practices and share their experiences of implementing the regulatory framework and of responding to market and technological developments. Although ERG lacks the power to take binding decisions, Groeble emphasized that its members have committed to take utmost account of the principles of implementation and best practices (PiBs) set by the ERG. According to Groeble, the success of ERG's work lies in the fact that it does not try to set legal norms but focuses on establishing why particular ways of implementation work well and whether they could be used as best practices in other countries. In contrast to Tarrant, she drew a positive conclusion from the recently introduced self-monitoring exercise, emphasizing the high degree of compliance with ERG common position by national regulators.

Groeble argued that although there may be cross border problems in the energy sector, there are no such problems in telecoms because markets are still largely national. She admitted that international roaming and pan-European VoIP might constitute the only exceptions but pointed out that the former issue was resolved by the 2007 international roaming regulation and that the latter was already taken care of by the 2007 ERG common position. Therefore, she considered the Commission's complaints about the lack of regulatory consistency in telecoms as completely overstated. She acknowledged that unjustified differences in regulation across the EU will generate unnecessary costs for operators and will affect investment choices, but argued that a flexible approach is required, taking national circumstances into account. Therefore, Groeble argued that the telecoms sector requires a bottom-up process of regulatory harmonization, which does not mean uniformity but applying the same regulatory principles but taking adequate account of the specific market circumstances. She called this approach 'targeted harmonization', which should be preferred over the one-size fits none approach suggested by the Commission. National regulators should have the flexibility to address the specific market circumstances. Moreover, the German regulator emphasized the necessity to distinguish between services with a pan-European potential and a significant cross-border dimension, where a high degree of uniformity is required, like VoIP and roaming and services which are largely national and therefore do not require a European-wide approach. According to the Groeble, networks of independent national regulators are the best way to reach harmonisation as they can take national circumstances into account, limiting regulation to the extent necessary to address those competition problems identified through market analysis. Moreover, the flexibility of the current regulatory framework allows for rapid adaptations to changing market conditions.

Considering the specific regulatory requirements in telecoms, Groeble argued, the Commission's proposal for a new agency and Commission veto powers over the agency's decisions is therefore not in line with the principles of proportionality and subsidiary. She suggested, that the existing regulatory networks should be strengthened instead. With regards to the ITRE committee's suggested amendments, Groeble generally welcomed the explicit obligation on the Commission to consult with the agency and to take utmost account of its views but criticized the proposed funding structure. She expressed her concerns that funding the agency through the community budget (1/3) and Member States (2/3) might jeopardize the independence of the agency.

II.4. Fernand Sauer

Fernand Sauer reported from his experience of first establishing the Agency for the Evaluation of Medicinal Products and then heading it as its director as well as his involvement in the

authoring of the European Commission white paper on European agencies. With regards to the white paper, Sauer emphasized the role of the Meroni doctrine. Although the doctrine did not appear to play a role in the early stages of the discussions, he stated, it was concluded that the design of agencies could only depart from the Meroni doctrine where the agency's powers are purely discretionary, Sauer said.

Concerning the creation of the Agency for the Evaluation of Medicinal Products, Sauer stated, that one of the main problems was that impartial expert advice was difficult to come by as 95 percent of research and development in this field was conducted by the private sector. Academic researchers rarely have the means or expertise to advice on the risks of medicinal products. Therefore, there was no choice but to rely on industry experts. A second problem related to the creation of the European agency was that pre-market approval of medicinal products in many national markets was strongly affected by corruption. Therefore, there was fierce political opposition to the creation of the agency in many countries. In 2003, however, the SARS epidemic opened a window of opportunity that made it possible to overcome this initial opposition. The agency was adopted within ten month. Although it does not have any regulatory powers per se, Sauer claimed, its opinions bear considerable weight because of the expertise upon which they are based. So far, the Commission has followed all of the agencies opinions.

The experience of directing an agency, Sauer declared, had taught him the crucial importance of the cultural aspects. The success of the agency depends on the functioning of multiculturalism and the creation of an "excellence rather than a blame culture".

II.5. Dr Manuel Szapiro, European Commission

Manuel Szapiro presented the European Commission's white paper on European regulatory agencies. Szapiro began his presentation with a brief overview of the diverse structures and functions of the 29 European agencies, pointing towards the basic distinction between 'traditional' or 'regulatory' agencies on the one hand and 'executive' agencies on the other. Executive agencies have a much clearer framework in the European Union's institutional framework and were created only recently, making an evaluation of their impact difficult. The white paper focuses on regulatory agencies, Szapiro explained, because there is a need for clarification and a common approach. Regulatory agencies are each responsible for regulation in their own basic sector and are generally funded by the EU budget. The agencies are very divers. Some of the recently established ones are quite similar to some of the regulatory networks. There are, however, no general rules governing their creation and operation.

According to the Commission representative, regulatory agencies have made a significant and useful contribution to the effective operation of the EU. They have proven particularly relevant in fields of shared competences, Shapiro argued, where the establishment of agencies can make possible a pooling of powers at EU level which would be resisted if centred on the Commission itself. Because of the Meroni doctrine, however, agencies do not have the power to adopt general regulatory measures but are limited to taking individual purely expertise-based decisions. Despite the technical nature of their work, there is serious issue of accountability. Therefore, the Commission is normally represented in the agencies boards, as is the European parliament in five cases. However, the varied role structure and profile of the agencies makes the system untransparent and raises doubts about their accountability and legitimacy. Therefore, Szapiro called for a common framework of governance. The agencies' accountability and legitimacy could be significantly improved, he stated, by clarifying and standardising the agencies' tasks, structure and working methods, the process of establishing and ending agencies, their communication strategies and their accountability and relationship with other institutions.

Because the proposed inter-institutional agreement has not been able to make progress, it will be withdrawn by the Commission. Instead, Szapiro stated that the Commission has invited the Council of Ministers and the European Parliament to an inter-institutional dialogue to come up with a general framework for regulatory agencies. The Commission also intends to set up an inter-institutional working group.

Annex 1: Programme

12.00 – 13.00	Lunch Buffet
13.00 – 13.15	<u>Introduction to Issues</u> <i>Martin Porter</i> (The Centre) and <i>David Coen</i> (University College London)
13.15 – 14.30	<u>National Perspectives to European Networks of Regulators</u> National regulators perspectives <i>David Coen</i> (University College London) and <i>Mark Thatcher</i> (London School of Economics and Political Science) A business perspective <i>Andrew Tarrant</i> , Head of Government Affairs BT A National Regulatory perspective <i>Annegret Groebel</i> , BNetzA.de
14.30 – 14.45	Tea/Coffee
14.45 – 16.00	<u>European Networks of Regulators Perspective</u> The Energy Sector <i>Fay Geitona</i> , Secretary General of European Regulators Group for Electricity and Gas (ERGEG)
16.00 – 16.15	Tea/Coffee
16.15 – 17.30	<u>A European Agencies Perspective</u> European Network plus to European Agency: A Commission Perspective <i>Fernand Sauer</i> , Director General Honoraire European Commission. European Regulatory Agencies Models <i>Manuel Szapiro</i> , Secretariat-General, European Commission (<i>tbc</i>)
17.30	Reception

Annex 2: Speakers

- Dr David Coen, UCL & Dr Mark Thatcher, LSE
- Mr Andrew Tarrant, Head of Government Affairs BT
- Ms Fay Geitona, Secretary General of ERGEG
- Dr Annegret Groebel, BNetzA
- Mr Fernand Sauer, Director General European Commission. Author of the white paper on European Agencies, and ex Director of the Agency for the Evaluation of Medicinal Products
- Dr Manuel Szapiro, Secretariat General, European Commission

Annex 3: List of Participants

Kenneth Armstrong	Queen Mary University
David Aubin	Uni Louvain
Alina Belskaia	StatoilHydro EU Affairs Office
Corinna Bonati	Deutsche Bahn AG
David Coen	UCL
Michele Dastin	US Mission to the EU
Kalman Dezseri	Institute for World Economics, Budapest
Giulia Castellucci	Bayer CropScience SA-NV
Roberto Francia	Assoelettrica
Fay Geitona	ERGEG
Sarah Greenwood	Symantec
Annegret Groebel	BNetzA
Lisa Gromoglasova	Catholic University Leuven
Julio Guzman	Administrator, European Parliament
Joseph Huggard	The Weinberg Group LCC
Nicolas Jabko	CERI, Fondation National des Sciences Politiques
Angelika Joos	Merck Sharp & Dohme
Eduardo Lanza	Telefonica SA
Christoph Luykx	Intel
Despina Manousos	Office of Nikos Cakalis, MEP
Emmanuelle Mathieu	Uni Louvain
Niclas Meyer	LSE
Daniel Muether	BNetzA
Jaymeen Patel	Telefonica O2 Europe
Yolande Peeters	Du Pont de Nemours
Martin Porter	The Centre
Jörgen Samuelsson	Permanent Representation of Sweden to the EU
Fernand Sauer	European Commission
Merijn Schik	DG INFOSOC, European Commission
Lorna Schrefler	University of Exeter, Centre for Regulatory Governance
Chia Seiler	ERG Secretariat
Michael Shotter	Cabinet of Commissioner Vivian Reding
Kalliopi Spyridaki	SAS
Gregg Svingen	The Centre

Manuel Szapiro	Secretariat General, European Commission
Andrew Tarrent	BT Group
Mark Thatcher	LSE
Peter Timmerman	EGMONT – The Royal Institute for International Relations
Ljudmila Tozon	Permanent Representation of the Republic of Slovenia to the EU
Tatu Touminen	Permanent Representation of the Finland to the EU
Frank Vibert	European Policy Forum, UK
Adrian Whitchurch	BT Group

And further participants from *The Centre*.