

## Reshaping European Regulatory Space

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In the last twenty years, EU regulation has been transformed. However, in order for regulation to be implemented, appropriate institutions also have to be established. This policy brief 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. Thus the institutions for implementing EU legislation are particularly important. This policy brief begins

by setting out different possible models, before analysing the development of such institutions. It concludes by looking at current debates.

### 1. Institutional choices for structuring a European regulatory space

We set out below seven major stylised models of administrative arrangements to coordinate the implementation of EU regulation based on based on five factors that structure the regulatory space:

- the principals- i.e. the actors who formally delegate powers over implementation (if any);
- the participants in decisions about implementation;
- the allocation of powers and responsibilities for implementation of EU legislation;
- possible mechanisms of implementation;
- the actors which have controls over those responsible for implementation decisions.

### 2. The Development of a European regulatory space

From the 1980s onwards, new European administrative structures have been 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. We identify 4 phases:

#### 2.1 Phase 1 EU-Supervised National Implementation

In the late 1980s and 1990s, the EU began to pass sector-specific legislation in network industries. EU legislation placed the duty of 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 inde-

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pendent 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.

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

In the 1990s, concerns emerged about the 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. Variation in the forms of NRAs created problems of co-ordination throughout the EU and 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.

One possible response could have been to

greatly centralise regulatory powers. But no European agencies were established due to opposition by member states and new IRAs. Instead, two forms of more centralised coordination emerged in the late 1990s. One was the development of informal sectoral governance groups, notably the Florence Forum for electricity in 1998, followed by the Madrid Forum for gas in 1999. The creation of these forums was led by the Commission. The Commission, politicians, and industry saw them as low cost institutional design options thanks to their low political saliency. 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 a year in Florence and Madrid and had no permanent secretariat.

The second form of coordination was the emergence of 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 but was also encouraged by the Commission. Each saw advantages: for the new national IRAs, they were a means of cooperating with other European IRAs,

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

Type of coordination	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 benchmarking	None since no formal delegation
Informal networks of National IRAs (NIRAs)	None- no formal delegation	IRAs	None formally	No legally binding measures; learning, and benchmarking	None since no formal delegation
European Networks of Regulators (ERNs)	EU Commission and national governments and regulators, using EU legislation	Designated national regulators (e.g. IRAs) and Commission)	National IRAs, with guidelines set by ERN	Advice to Commission on legislation; setting guidelines, learning and benchmarking	Commission and national regulators
European Regulatory Agency (ERA)	EU Commission and national governments and regulators using EU secondary legislation	Designated national regulators , Commission and sometimes European Parliament	Commission or NRA, except for ‘technical’ decisions	Specific Decisions, advice to Commission approval or veto; setting formal guidelines; 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; taking decisions in individual cases within its domain; 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; 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

expanding their role and learning about how to respond to EU regulation without being controlled by the Commission; for the Commission, they constituted a step forward towards greater integration. In securities trading, French and Italian regulators initiated the creation of an informal network of regulators called FESCO (Forum of European Securities Commissions). In telecommunications, a similar group of IRAs was created in 1997, the IRG (Independent Regulators Group). In energy, Committee of European Energy Regulators, (CEER) was created in 2000.

### 2.3 Phase 3 European Regulatory Networks

Between the late 1990s and 2002, 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.

Although proposals for federal European agencies (also termed 'Euro-regulators'), which would have involved considerable centralisation were discussed, they were rejected due to opposition both by national governments, NIRAs and national IRAs. Instead, European Regulatory Networks were created- for instance, CESR (Committee of European Securities Regulators), the ERG (European Regulators Group) for telecommunications, and ERGEG (the European Regulators Group for Electricity and Gas).

These ERNs were relatively weak in formal institutional terms (Coen and Thatcher 2008). Their main functions were to advise the Commission on new legislation and sometimes to issue guidelines for the implementation of EU legislation. They lacked the power to take decisions or impose them over their own members,

and operated with only a small secretariat.

These institutional choices reflected battles among several groups of actors- the Commission, IRAs, national governments, the European Parliament and industry representatives. In particular, the Commission feared both inconsistent implementation and the development of federal European regulatory agencies that would rival its own position. It sought greater centralisation of powers 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. 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.

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 or in a process of close layering, where they have the same membership and secretariat (the main difference being Commission attendance of ERN meetings but not ones held by the NIRAs such as the IRG in telecommunications).

## 3. Current debates

In the mid-2000s, the European Commission and ERNs have led vigorous debates about reforming the institutions for coordinating implementation of EU regulation. The Commission has argued that current arrangements for im-

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plementation are inadequate. It has pointed to continuing uneven implementation of EU law, the maintenance of market entry barriers and difficulties in cross-border trade due to diverse national standards. It has also argued that ERNs lack the power and the ability to enforce the opening of markets, being constrained to act according to the ‘lowest common denominator’ among their membership due to the need to obtain consensus. For their part, ERNs have themselves initiated debates and/or requested more powers.

Three major institutional options have been debated, but the first two have faced strong opposition from ERNs themselves, IRAs and governments, namely the creation of strong ‘Euro-regulators’ and greater Commission powers over the decisions of IRAs in order to ensure consistency.

The third possibility has been to award greater powers and resources to the ERNs. Unsurprisingly, the ERNs themselves have been pressing for this option. Debates about change are ongoing in early 2008 and legislative proposals made in the Autumn of 2007 for telecommunications and energy are still being discussed. ERNs and the Commission appear to be bargaining and creating a mutually beneficial alliance to build on existing institutions. On the one hand, ERNs support or accept an increased role and greater powers for the Commission. On the other hand, the Commission is seeking to provide national IRAs with greater powers and resources, hence increasing their independence, especially from national governments. Thus Commission proposals in Autumn included an Agency for the Cooperation of Energy Regulators and a European Electronic Communications Market Authority. Although set up as European agencies, national regulators would retain many powers over them due to an Administrative Board, half of which would be appointed by Council and the other half by the Commission, and a Board of Regulators composed of one representative of each national IRA. Interestingly, the Commission explicitly acknowledges that a powerful body modelled on the ECB was not being proposed because it would require Treaty amendment. At the same time, the European Commission’s legislative package also contains proposals to strengthen national IRAs. It would require that 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”. Equally, they would have new market regulation powers.

Current debates about regulatory arrangements seem to involve a further centralisation of powers, building on existing organisations. Evolution not revolution seems possible, with comprehensive restructuring or administrative simplicity being 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. The result would be both evolutionary change and also greater complexity, as the new authorities would be additional to existing networks of national IRAs and would have complex oversight arrangements with dual boards composed of nominees of the Commission, IRAs, and the Council.

Reshaping institutions for implementing EU regulation remains controversial and at the core of debates about the future of the EU. One reason is that without successful implementation, the EU will lose credibility and become an impotent legislation-producing organisation. However, debates over regulatory space involve crucial institutional questions about the allocation of powers between different actors. Behind such debates lie the crucial question of what institutional and political form the EU should adopt- inter-governmental, supra-national or networked polity.

### Further reading

This policy brief is based on research carried out within the NEWGOV project no. 6 on “After Delegation: Regulatory Agencies and Network Governance”. The project examines independent regulatory agencies (IRAs) in two key domains: telecommunications; financial services. Both have seen the development of trans-European networks and linkages, and are economically, politically and socially large strategic domains. It analyses the development and participants of these trans-European networks and assesses the alternative EU regulatory institutional solutions.

Further information can be found on the NEWGOV Website in the [special section](#) of project no. 6.