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article:

the future of national telecommunications regulatory authorities

Robert Queck

The article considers the future of telecommunications national regulatory authorities (NRAs) by analysing the way in which the European telecommunications regulatory framework in general and the European Commission's 1999 Review Communication in particular addresses related questions. These comprise the concept of 'regulation', the scope of an NRA's action, its tasks, specific ways of action and related missions, including its dispute settlement functions, cooperation between NRAs as envisaged in the need for a European Regulatory Authority and the setting up of a High Level Communications Group and Communications Committee. The article also examines the organization and functioning of NRAs, maintaining that efficient performance of the various tasks requires obedience to certain principles and the presence of certain characteristics which are outlined prior to more detailed discussion of the issues of the requirement of independence and the possible role and impact of self-regulation.

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This article is a revised version of a presentation given in November 1999, at the Congress marking the 20th Anniversary of CRID with complementary material based on the Communication from the Commission on the 1999 Communications Review. The article mirrors the situation as of February 2000. Some of the positions described have subsequently changed. The paper has been prepared in the context of SSTC, Interuniversity Poles of Attraction (IPA), Phase IV: Research and interdisciplinary assessment on the Information Society: networks, uses and the roles of the State. Thanks for comments are due to Yves Poullet, Paul Nihoul and to the members of the 'Telecommunications Observatory' meeting under the auspices of CRID.

The national regulatory authorities are the cornerstone of the application in the Member States of virtually the entire regulatory package as currently constituted, and will play a major part in framing and applying the revised regulatory framework.

Fifth Implementation Report[1]

The reform of regulators is a critical aspect of regulatory reform in the telecommunications sector. This article concentrates mainly on the institutional issues raised by the European Commission's Communication on a new framework for Electronic Communications Infrastructure Services.[2] Telecommunications sector specific national regulatory authorities (NRAs) are key players in today's European telecommunications regulatory framework. The article addresses a number of questions concerning these NRAs. For instance:

- The meaning of the concept of 'regulator';
- The scope of an NRA's action;
- The future roles of telecommunications sector specific regulatory authorities and especially NRAs;
- The location of regulatory activity;
- The principles that should govern a regulator's action; and
- The characteristics that should distinguish these bodies.

While drawing examples and addressing issues at the member state level, the article pays special attention to the Belgian case.

The concept of national regulatory authority

While the concept of regulator could in general be considered as referring primarily to the activity of rule making, the concept of NRA does not, in the telecommunications sector, mean an institution entrusted with the setting up of the rules (eg institutions like parliaments or government) but is, in principle, used to describe the body in charge of rule implementation and application. Melody asserts that:

The regulator's task is to implement government policy. It ensures performance accountability by the PTO and other industry players to economic and social policy objectives, resolves disputes between competitors and between consumers and operators, monitors changing industry conditions and advises government on developments bearing on policy.[3]

According to the ONP Voice Telephony Directive,[4] 'national regulatory authority means the body or bodies in each Member State entrusted by that Member State with, inter alia, the regulatory functions addressed in this Directive'. These tasks, to be carried out by NRAs as defined by the directives ruling the sector are indeed basically rule application.[5] In this sense the Services Directive provides that 'Member States shall ensure that from 1 July 1991 the granting of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and numbers as well as the surveillance of usage conditions are carried out by a body independent of the telecommunications organizations'.[6]

1. European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Fifth Report on the Implementation of the Telecommunications Regulatory Package, COM(1999) 537, 10.11.1999, p 9.
2. European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a new framework for Electronic Communications infrastructure and associated services – The 1999 Communications Review, COM(1999) 539, 10.11.1999 (hereafter called 1999 Review Communication), especially section 4.8.
3. William H. Melody, 'Telecom reform: progress and prospects', *Telecommunications Policy*, Vol 23, No 1, 1999, pp 12–13.
4. Article 2 (2) (g) of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJ No L 101/24, 01.04.1998.
5. A recent study lists among those functions: monitoring, controlling, making decisions and enforcing the regime pursuant to telecommunications law(s); interpretation of telecommunications law(s) (subject to Appeal) and if necessary development and adoption of (binding) regulations mandated by law; administration of certain functions: licensing, frequency management, number management, tariff regulations, interconnection, etc. (Eurostrategies, Cullen International, *Final Report on the possible Added Value of European Regulatory Authority for Telecommunications*, ECSC-EC-EAEC, Brussels-Luxembourg, 1999, p 11).
6. Article 7 of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ No L 192/10, 24.07.1990, as modified by Article 1 (7) of Commission Directive 96/19/EC of 13 March 1996 amending Commission Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ No L 74/13, 22.03.96.

There are nevertheless a small number of cases where, notably because of the general character of the envisaged measure and of the wide discretion given to the NRA by the legal framework, some of its tasks could be considered as rule making rather than rule application. Under this sense fall Articles 8 (1) of the ONP Leased Lines Directive,[7] and 13 (1) of the ONP Voice Telephony Directive providing that the NRAs lay down the procedures whereby they decide on requests to refuse, interrupt or restrict provision of leased lines or voice telephony networks and services.[8]

One consequence of the adoption of the 1999 Review Communication proposals would be increased responsibilities and discretion for the NRA leading to the boundary between rule making and rule application becoming increasingly blurred. This would in particular result from the application of the principle that effective enforcement of legal measures is best when closest to the activities regulated, and from the overall need to keep the regulatory framework sufficiently flexible in order to be able to take into account market developments and, especially, progress in the effective establishment of a competitive market.[9] One means for the application of these principles would be the increased use of flexibility clauses (sunset clauses ie provisions allowing NRAs to lift existing obligations once the underlying objectives are met or a target date is reached, as well as forbearance ie provisions allowing NRAs to refrain from imposing obligations as long as the underlying objectives are met), going broadly beyond the cases foreseen today by the annex of the ONP Framework Directive,[10] by Article 10 (4), para 2 of the ONP Leased Lines Directive and by Article 17 (6) of the ONP Voice Telephony Directive with regard to requirements for cost oriented tariffs, as well as by Article 7 (1), para 2 of the ONP Voice Telephony Directive with regard to provision of public pay phones. Furthermore, Article 8 (1) and (2) of the ONP Interconnection Directive foresee a flexibility clause in favour of member states and regarding accounting separation.[11] The new Framework Directive as proposed by the 1999 Review Communication would specify criteria for the implementation of such flexibility clauses by NRAs.[12]

The importance of the issue lies on the one hand in the fact that the increased powers of NRAs will call for an effective coordination of their decisions and interpretations in order to avoid fragmentation of the internal market.13 On the other hand, the transfer of rule making powers to NRAs raises questions as to their democratic legitimacy, especially in consideration of one of their major characteristics: independence.

Another blurring of boundaries, of a more formal nature, may result from the fact that, when listing the tasks of NRAs European telecommunications directives (eg Article 2 (1) (b) of the Licensing Directive)[14] do not, in principle, provide for a single NRA, and the tasks to be carried out may be distributed among more than one body.[15]

7. Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, OJ No L 165/27, 19.06.1992 as modified by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, OJ No L 295/23, 29.10.1997. See also Commission Decision 98/80/EC of 7 January 1998 on amendment of Annex II to Council Directive 92/44/EEC, OJ NO L 14/27, 20.1.1998.
8. For other examples see Paul Nihoul: *Droit européen des télécommunications – organisation des marchés*, De Boeck & Larcier, Brussels, 1999, pp 241–242.
9. 1999 Review Communication, pp 13–15.
10. Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ No L 192/1, 24.07.1990 as modified by Directive 97/51/EC, *op cit*, Ref 7. It should nevertheless be noted, that its Annex, pt. 3, may be considered as normal rule application rather than as a real flexibility clause. Indeed it provides that 'where an organisation no longer has significant market power in the relevant market, the requirement for cost orientation may be set aside by the competent national regulatory authority'.
11. Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ NO L 199/32, 26.07.1997, modified by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection, OJ No L 268/37, 3.10.1998.
12. 1999 Review Communication, p 17.
13. 1999 Review Communication, pp 15, 55.
14. Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services, OJ No L 117/15, 07.05.1997. See also Article 5 (a) (1) of the ONP Framework Directive.
15. *Ibid.*

In most Member States these functions are shared between the independent national regulator and the relevant Ministry, and in some cases a separate body for spectrum aspects'.[16]

This calls especially for transparency if, in addition to their own specific regulatory powers, this minister is, like in Belgium, the senior official of the NRA, in order that 'where the tasks assigned to the national regulatory authority in Community legislation are undertaken by more than one body, Member States shall ensure that the tasks to be undertaken by each body are made public'.[17] Even more so, distribution of tasks among several bodies requires safeguards for the avoidance of delays and duplication of decision making.[18]

From telecommunications to electronic communications regulatory authority

The 1999 Review Communication proposes the separation of transport and content regulation, while recognizing the links between them, and the adoption of a more horizontal approach to all transport network infrastructure and associated services, irrespective of the types of services carried.[19] The new regulatory framework proposed by the Communication would therefore cover all electronic communications infrastructures (eg fixed and mobile telecommunications networks, cable TV networks, terrestrial broadcast networks as well as facilities such as application program interfaces, which control access to services) and associated services (ie communications and access services). Broadcasting or information society services delivered over communications infrastructure and content as such are not covered.[20] This approach is confirmed by the Commission in its 'Principles and guidelines for the Community's audiovisual policy in the digital age'.[21] The scope of telecommunications regulatory authorities would, in consequence, be extended to the entirety of electronic communications infrastructures and associated services and it could hence be appropriate to rebaptize them, once the reform is adopted, eg 'electronic communications regulatory authorities'.

This approach has already been adopted by the Satellites Directive.[22] Its recital (17) states that 'the provision of satellite network services for the conveyance of radio and television programmes is a telecommunications service … The content of satellite broadcasting services … will continue to be subject to specific rules …'. Other directives, like the ONP Framework Directive in its Article 2 (3), nonetheless exclude radio and television broadcasting from the definition of telecommunications services, without differentiating between technical and content related aspects. As technological convergence implies that specific (telecommunications or broadcasting) services may be carried over different competing networks[23] and do no longer qualify a specific network exclusively as broadcasting or telecommunications infrastructure, the approach proposed by the 1999 Review Communication appears to us as the right one.

As pointed out in a DG XIII Discussion Document, attention should nevertheless be paid to the recognition of

16. 1999 Review Communication, p 58.
17. Article 5 (a) (1) of the ONP Framework Directive (1997).
18. Problems with regard to this issue have been noted in some member states by the Fifth Implementation Report, pp 9–11, 32. See also 1999 Review Communication, p 58.
19. 1999 Review Communication, p 6.
20. *Idem*, p 4. See especially the list of definitions. See also p 21.
21. European Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Principles and guidelines for the Community's audiovisual policy in the digital age, COM(1999) 657, 14.12.1999, especially pp 10–11.
22. Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ No L 268/15, 19.10.1994.
23. European Commission, *op cit*, Ref 21, footnote 17.
24. Section 2.2. The links between content and infrastructure, DG XIII Discussion Document, The 1999 Review: regulatory principles, 21 May 2000, http://www.ispo.cec.be/infosoc/telecompolicy/en/comm-en.htm.

the links between transport and content regulation[24]: eg 'under the so-called "must carry rule", rights granted … to certain broadcasters for the provision of content, result in obligations for cable television networks to carry certain programmes'. This could generate problems with regard to transmission capacity available. Another example of the need for collaboration between the different authorities concerned is the existence of vertically integrated operators. Furthermore, it should be mentioned that national implementation of the Commission's approach may raise issues of constitutionality regarding the distribution of competencies in countries where different levels of powers are involved. In Belgium, for example, the Federal State is responsible for telecommunications, while the Flemish, French and German-speaking communities are responsible for broadcasting (including the majority of technical aspects).

Tasks, ways of action and missions

Shaping the sector

The functions an NRA has to ensure, while carrying out its regulatory activity, may be categorized in several ways. Under today's regulatory framework, an NRA may indeed be considered as having five tasks while performing rule application and implementation:

- first, it has to organize and structure the market by interpreting and applying the rules in a proactive way upon their designated subjects (operators, users) and this through the imposition of specific obligations and behaviour, or through permitting particular behaviour (eg authorizing market access);
- second, it has to control the application of the rules by their designated subjects and their respect of their obligations;
- third, it intervenes in dispute settlement;
- fourth, it monitors and assesses market development, demand as well as supply. Doing so allows an NRA to fulfil its other tasks (eg by making it possible to define those operators having significant market power or to control whether universal service is provided in an appropriate way) but enables it also to provide useful input to rule makers; and
- fifth, it ensures a European and international dimension by collaborating with other NRAs on specific cases having a transborder dimension or by participating in European or international committees and organizations.

In carrying out its tasks, sector specific (tele)communications regulation and regulators adopt a specific way of action. We could say, that under sector specific regulation a proactive approach is adopted, aimed at shaping and organizing the sector.[25] Competition rules and competition authorities, on the other hand, would act in a more repressive, controlling way, adopting more the role of policeman, aiming to prevent and stop certain behaviour which adversely affects competition. It should nevertheless be added that this distinction is particularly true with regard to cases of abuse of dominant positions (article 82 of the EC Treaty). In the context of procedures under article 81 of the EC Treaty or in merger cases the European Commission, acting as competition authority, increasingly tends towards pursue a proactive approach by setting conditions or obtaining undertakings from the parties to the transaction.

25. Obligations imposed may therefore in general be considered rather as 'obligations to do' (eg provide access and information, ask for an individual authorization). Obligations imposed may nevertheless also imply an abstention (eg not to discriminate).

Its specific approach enables sector specific regulation and regulators implementing this regulation to pursue other policy objectives and related missions than just the maintenance of competition, basic function and aim of competition rules. Among these objectives may be listed the organization of the (tele)communications sector's transition towards effective competition.[26] Besides this first objective, sector specific regulation and regulators are designed to meet general policy objectives such as ensuring users' rights,[27] either by guaranteeing the provision of specific services (eg universal service or a minimum set of leased lines and, in general, ensuring the interoperability of certain services for all users)[28] or by the introduction of consumer protection measures. Another general policy objective of sector specific regulation is to contribute to the emergence of a single market through application of EU harmonization measures.[29] It could be mentioned in this context that the Fifth Implementation Report underlines the importance of ensuring that 'NRAs use their powers ... in a proactive manner, for example to stimulate competitive markets and ensure the fair and proper development of a harmonized European telecommunications market'.[30]

According to the 1999 Review Communication, while regulation primarily designed to manage the transition to competition would be progressively reduced as markets become fully competitive, regulation designed to meet other policy objectives and especially general interest objectives will remain in place,[31] to the extent 'that policy objectives cannot be achieved by competition only'[32] (eg the concept of universal service aiming to ensure provision of basic services to uneconomic customers).[33] In this context, the 1999 Review Communication recalls that as far as public interest objectives, such as protection of minors and human dignity, are concerned, open and competitive markets cannot contribute.[34]

In general, and even with regard to issues which could be linked to the emergence of competition, sector specific regulators might remain necessary once effective competition exists, to the extent that their typically proactive and structuring approach would remain important for specific issues (eg management and allocation of scarce resources needed by possible new competitors in order to enter a market, even if this market were, in general, already competitive). In this context, an examination should also be made of the extent to which only the more passive functions, such as monitoring or control, would be retained in the long term for sector specific regulators, in some cases eventually complemented with some reserve powers (for a limited period of time). Universal service is an example where the overall principle would be that of reliance on its provision by the market, but under the supervision of the NRA, in charge to inform for example the Parliament if new features should be foreseen as universal service. Furthermore, this NRA could, (for a limited period of time) intervene in case of market failure or in general manage a Universal Service Funds.[35]

One might finally envisage a number of sector specific requirements being removed in the long term in favour of horizontal regulations, other than competition rules, and especially consumer protection rules.[36]

26. See for example Article 9 (1) and (3) of the ONP Interconnection Directive.
27. See 1999 Review Communication, especially section 4.5.
28. Article 3 of the ONP Voice Telephony Directive, Article 7 of the ONP Leased Lines Directive and Article 3 (2) of the ONP Interconnection Directive.
29. On the objectives pursued by sector specific telecommunications regulation, see Robert Queck, Philippe Defraigne, 'Réflexions sur la notion de 'puissance sur le marché' en droit des télécommunications: concept autonome ou chimère?', in Etienne Montero (ed), *Droit des technologies de l'information: regards prospectifs*, Cahiers du CRID No 16, Bruylant, Brussels, 1999, pp 335–70. See also 1999 Review Communication, pp 11–13.
30. Fifth Implementation Report, p 9. For nuances, see p 11.
31. 1999 Review Communication, pp 3,13. On the relationship between sector specific regulation and competition law, see also 1999 Review Communication, pp 19–20, 29, 30, 35, 41, 47, 52–55.
32. Jean-Eric de Cockborne, 'The 1999 communications review: improving Europe's competitive position, *info*, Vol 1, No 6, December 1999, p 478.
33. 1999 Review Communication, p 41.
34. 1999 Review Communication, Ref 5. These objectives are anyway rather content-related and therefore not really covered by the 1999 Review.
35. See, for example, para 17–22 of the German Telekommunikationsgesetz (TKG), 25 July 1996, BGBl. I p 1120.
36. 1999 Review Communication, pp 13, 16, 45.

Dispute settlement

Among other rule application tasks NRAs are, entrusted by various directives with dispute settlement functions,[37] either leading to a decision[38] or merely as conciliation.[39] These powers are exercised by NRAs in addition to those of the normal courts. The competencies of the courts remain untouched.[40] The rationale behind the alternative so created is the need for rapid decisions (or conciliations) by bodies possessing sector specific know how and the fact that the directives seem to assume that one may, for this purpose, not just rely on common courts. In the words of the ONP Voice Telephony Directive, 'easily accessible and in principle inexpensive procedures shall be available at a national level to resolve … disputes in a fair, transparent and timely manner'.[41]

The 1999 Review Communication underlines the necessity to require member states to 'ensure that simple and inexpensive complaint handling and dispute settlement procedures exist for users and consumers, other than via national courts'.[42] The body implementing these procedures could be the normal (tele)communications sector specific NRA. It could also be another sector specific or even a generic body (eg an ombudsman – while the latter acts however only as conciliator).[43] This recalls Article 26 (1) of the ONP Voice Telephony Directive which foresees the 'right to bring cases before the national regulatory authority or another independent body'.

While the intervention of an NRA or ombudsman as conciliator appears to be useful, I hesitate to fully support the creation of a dispute resolution body with the power to decide, other than the normal courts or arbitrators. The first inconvenience seems to be the multiplication of authorities. Indeed, the coexistence of telecommunications dispute resolution mechanisms alongside normal courts creates a problem of transparency and possible conflict between contradictory decisions of authorities which are all competent within their specific legal jurisdiction. Another inconvenience of an NRA's dispute resolution power is that it might raise, in continental law countries like Belgium, issues of consistency with the national constitution, with regard to the competencies such a 'non-court' body could have. Under the Belgian Constitution,[44] only disputes concerning so called 'political rights' (eg competition law related questions) may be treated by special jurisdictional authorities while disputes having as their object 'civil rights' (eg in principle those generated by contracts) are the exclusive competence of the courts. With regard to the Belgian example, these questions would be addressed in the context of a complaint introduced before the administrative court section of the Belgian Council of State.[45]

The comments concerning constitutionality are even emphasized by considerations related to infringments to the principle of separation of executive and judicial powers, especially when the same body combines the majority of powers foreseen by directives, including dispute resolution. There might indeed be concerns that this body (and its members) would act as an executive as well as a judicial body.[46] For example, it would intervene first, in application

37. For an inventory of bodies dealing with dispute resolution in the telecommunications sector, see The European Telecommunications Platform (ETP): *Inventory of Dispute Resolution Mechanisms: What are the Choices for the Telecommunication Sector?*, ETP(98)107, ETP, Brussels, 1998, pp 83 + VII.
38. See for example Articles 9 (5) and 11 of the ONP Interconnection Directive, Articles 13 (1) and 26 (1) of the ONP Voice Telephony Directive.
39. See for example Article 12 (1)-(3) of the ONP Leased Lines Directive.
40. See for example Article 13 (1) *in fine* of the ONP Voice Telephony Directive or Article 12 (b) of the ONP Leased Lines Directive. See also European Commission, Notice on the application of the competition rules to access agreements in the telecommunications sector: Framework, relevant markets and principles, OJ No C265/2, 22.08.1998, pt 11.
41. Article 26 (1).
42. 1999 Review Communication, p 46. See also pp 12, 15. With regard to access issues, see pp 29, 31, 37.
43. 1999 Review Communication, p 46.
44. Constitution coordonnée du 17 février 1994, *Moniteur belge*, 17 February 1994, Articles 144 and 145.
45. Complaint for annulment submitted January 2000 by Belgacom against an 'Arrêté royal du 4 octobre 1999 organisant la procédure devant la Chambre pour l'interconnexion, les lignes louées, l'accès spécial et les utilisations partagées, ainsi que le fonctionnement de celle-ci' (Belgian Official Journal 24.11.1999). This 'Chamber' is a dispute resolution body vested with decisional powers and constituted on a case by case basis within the NRA, the Belgian Institute of Postal Services and Telecommunications (BIPT).
46. In this context the Belgian Council of State wrote, on the possibility to appoint members of the BIPT as arbitrators for disputes arising between telecommunications operators, 'these physical persons may not be chosen within the BIPT by reason of the fact that BIPT carries out a regulatory function of the telecommunications market, so that they do not have the impartiality required in order to carry out judicial action' (translation) Doc parl (B), Chambre, Session 1997/1998, 1265/1, p 168.

of Article 9 (3) of the ONP Interconnection Directive in an interconnection negotiation between two parties, and could be called afterwards to resolve, according to Article 9 (5) of the same Directive, a dispute which has arisen between these two organizations concerning the same interconnection. The problem could be considered as being of limited scope in practice due to the existence of procedures for appealing against NRA decisions. It could be avoided by entrusting, with the dispute settlement role, a body other than the usual NRA.

Even if these difficulties with regard to national constitutions could possibly be overcome, the problems mentioned here are a further example of the more fundamental question, that is, the way in which sector specific European (tele)communications regulation fits into the general legal systems of member states.

There are also concerns about the speed of decision taking and the presence of technical know how, which have been used as key arguments in favour of the creation of 'non-court' dispute resolution procedures. Concerning the speed of decision making, it must be noted that directives foresee tight deadlines imposed upon NRAs acting as dispute resolution bodies.[47] Despite this, these deadlines may turn out to be much longer, as Article 5 (a) (3) of the ONP Framework Directive also foresees that, 'Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved'.[48] Indeed, as pointed out by the Fifth Implementation Report, 'in some Member States, the procedures for appealing against decisions by the regulator may create lengthy delays … or have suspensory effect …'.[49] The exact meaning and method of appeals application against NRA decisions also raise questions, and are today the subject of a reference for a preliminary ruling by the Court of Justice of the European Communities by the Verwaltungsgerichtshof (Austria) in November 1999.[50] The considerations regarding the need for appeal procedures could be applied mutatis mutandis to the decisions of other non-court dispute resolution bodies.

It must be added that common courts may offer fast procedures. In this way, under Belgian law, an action demanding the cessation of infringements (in particular any behaviour going against honest practices in commercial matters) against the law of 14 July 1991 on commercial practices and on the information and protection of consumers[51] introduced before the president of the commercial court[52] may take, appeal included, six months at best but usually about one year.

With regard to the need for specific know how, there is no doubt about the complexity of technological and market evolutions characterizing the sector. Bringing the necessary expertise into dispute resolution decisions does not, however, necessarily require equipping NRAs with special dispute resolution powers or the creation of other specialized bodies. It is indeed possible to entrust the (tele)communications NRA with an expert function before the courts or to create specialized chambers within those courts most concerned (eg commercial courts).

47. See for example the deadline of 6 month imposed by article 9 (5) of the ONP Interconnection Directive.
48. See also 1999 Review Communication, p 17 as well as Licensing Directive, Articles 5(3) and 5(4).
49. Fifth Implementation Report, p 11, 32.
50. Court of Justice, Case C-462/99: Reference for a preliminary ruling by the Verwaltungsgerichtshof (Austria) by order of 24 November 1999 in the appeal brought by Connect Austria Gesellschaft für Telekommunikation GmbH against the Telekom-Control-Kommission (intervening party: Mobilkom Austria Aktiengesellschaft), OJ No C 47/20, 19.02.2000.
51. Belgian Official Journal 29.08.1991.
52. *Ibid.* See, especially, Articles 93–100.

Localization: at European and/or at member state level

Context and key issues

One of the key words of the 1999 Review Communication is cooperation between NRAs. An NRA may not consider just its limited home market and national regulatory framework. There are several reasons for this. On the one hand, the fact that with progress in establishing the internal market, the number of transnational and trans-European operators and applications is increasing. These situations, which go beyond the geographical scope of the competencies of one specific NRA, may be addressed through collaboration between the different national authorities concerned or by the creation of a European regulatory authority.

On the other hand, the fact that market development and legal and administrative traditions are still significantly different in member states,[53] combined with the principle that 'primary responsibility for achieving objectives set out in sector-specific Community legislation should rest with the independent national regulators',[54] and with the 'increased delegation of decision-making to NRAs'[55] (eg by applying flexibility clauses), taken together call for ensuring consistency of member state interpretation with Community directives and for increased coordination of NRAs' interpretation and decisions in order to avoid fragmentation of the internal market.[56] These issues are addressed below through comments on a European Regulatory Authority and on the institutional arrangements proposed by the 1999 Review Communication in its section 4.8.1.

A European regulatory authority?

The idea of a European regulatory authority for the telecommunications sector (ERA) – which should now rather be a European regulatory authority for electronic communications infrastructure and associated services – was proposed by the 1994 Bangemann Group Report.[57] Without defining in depth the remissions of such an authority, the report nevertheless proposed that it should for example regulate those operations which, because of their Community-wide nature, need to be addressed at the European level such as licensing, network interconnection and if necessary, management of scarce resources or provide advice to member states regulatory authorities on general issues. The idea of an ERA was taken up by the ONP Interconnection Directive and by the ONP Framework Directive, which both mandated the European Commission to investigate, in a report delivered not later than 31 December 1999, 'the added value of the setting up of a European Regulatory Authority to carry out those tasks which would prove to be better undertaken at Community level'.[58] In order to perform this reporting task, the 1999 Review Communication (especially its sections 2.5 and 4.8) builds on a study finalized in 1999 and based on a broad survey of players in the telecommunications sector.[59] The study followed two earlier reports dealing at least partially with the issue of the establishment of an ERA.[60,61]

The first question to be asked relates to the overall legal possibility of creating a European regulatory authority under

53. 1999 Review Communication, p 12 and Fifth Implementation Report, p 32.
54. 1999 Review Communication, p 15.
55. 1999 Review Communication, p 55.
56. 1999 Review Communication, pp 15, 55, 58. One could call this issue a need to avoid dis-harmonization on the basis of harmonization directives.
57. High Level Group on the Information Society ('Bangemann Group'), *Europe and the Global Information Society: Recommendations to the European Council*, 26.05.1994, p 13.
58. Article 22 (2) of the ONP Interconnection Directive and Article 8 of the ONP Framework Directive.
59. Eurostrategies, Cullen International, *op cit*, Ref 5.
60. Forrester Norall & Sutton, *The Institutional Framework for the Regulation of Telecommunications and the Application of the EC Competition Rules*, ECSC-EC-EAEC, Brussels-Luxembourg, 1996, especially pp 51–82.
61. NERA, Denton Hall, *Issues Associated with the Creation of a European Regulatory Authority for Telecommunications*, ECSC-EC-EAEC, Brussels-Luxembourg, 1997, p 122.

the current EC Treaty. In this way 'any attempt to create a new regulatory body with a policy function or an appellate role would require a Treaty amendment… Legally it would be possible under the Treaty to create a body… with an essentially 'managerial' or 'operational' role".[62] According to case law of the Court of Justice,[63] the powers delegated to the ERA should be strictly and clearly defined executive powers and not imply a wide margin of discretion for the delegate, as this would allow him or her to replace the delegator's choices, which would involve a transfer of responsibilities.[64] The NERA study notes that 'the distinction between constrained discretion and policy making power is sometimes difficult to draw'.[65] In this sense an ERA could administer spectrum auctioning rules but not be vested with the general power to allocate spectrum in the 'public interest'.[66] Furthermore, stepping in to determine interconnection terms in cases where the operators cannot agree, would be considered by the NERA study as 'executive powers', while deciding in general whether operators should be required to allow interconnection would not, and therefore require Treaty amendment.[67]

Even if legally possible, the 1999 Review Communication is not in favour of a European regulatory authority.[68] Indeed, addressing the issue in its pages 9 and 10, it states that, 'the Commission considers at this stage that the creation of a European regulatory authority would not provide sufficient added value to justify the likely costs… The issues identified (by the Eurostrategies/Cullen International study), that might be better dealt with at EU level, can be addressed through adaptation and improvement of existing structures' and do not need a separate, new authority. The Communication lists among those issues 'competition, development of a pan-European market, interconnection and significant market power, and enforcement'.[69] The Communication continues by saying that the issues on which dissatisfaction with the functioning of NRAs has been expressed (eg in interconnection, licensing, competition, consumer protection, frequency management and number assignment'), also do not appear to justify the establishment of a new agency:

The existing regulatory framework already requires Member States to implement appeal mechanisms against NRA decisions at national level, and the Commission considers that the primary aim should therefore be to improve the consistency of NRA actions and the effectiveness of corrective mechanisms available.

However, there are issues with regard to which a European regulatory authority could be considered as not just value-adding, but even as being the most practical (and maybe only) solution (regardless of whether one would consider the related competences to require an EC Treaty amendment or not).[70] This is the case in issues such as the definition of a specific organization's significant market power with regard to transnational activities covering more than one member state. In these cases the problem is not so much to coordinate NRA application of the triggers associated with significant market power in their respective member states,[71] but to cope with the fact that the geographical market to be considered may extend beyond one Member State and does not allow an approach limited to a specific member state. This problem remains, especially if under the 1999 Review the geographical market is no

62. *Ibid*, p 117.
63. See especially ECJ Judgements of 13 June 1958, Cases 9/56 and 10/56, *Meroni v High Authority*, [1958 January–July] ECR 9 and 51.
64. *Ibid*, especially pp 43–44, 81–82. See Forrester Norall & Sutton, *op cit*, Ref 60, pp 60–61; NERA, Denton Hall, *op cit*, Ref 61, pp 53-55.
65. *Ibid*, p 55.
66. *Ibid*. For other examples see in general pp 61–64.
67. *Ibid*, pp 62, 117–18.
68. 1999 Review Communication, pp 9–11, 55.
69. See also Eurostrategies, Cullen International, *op cit,* Ref 5, p 34, 37–38, 74–75, 81.
70. See also: Damien Gerardin, 'L'ouverture à la concurrence des entreprises de réseau – analyse des principaux enjeux du processus de libéralisation', *Cahiers de droit européen*, 1999, No 1–2, p 47; Thomas Kiessling and Yves Blondeel, 'The EU regulatory framework in telecommunications: a critical analysis', *Telecommunications Policy*, Vol 22, No 7, 1998, p 591; and John Worthy and Rohan Kariyawasam, 'A pan-European Telecommunications regulator?, *Telecommunications Policy*, Vol 22, No 1, 1998, pp 1–7.
71. This case is considered by the 1999 Review Communication in p 54 and in general in section 4.8.1.

longer ex ante linked by legislation to the territory of a specific member state.[72] The granting of frequencies for pan-European satellite services may be another example. Beyond their transnational dimension, the situations just mentioned share two other characteristics. They need a decision implying legal consequences, and this decision is the result of the day to day execution of a regulatory activity. The Commission may take binding decisions applying Community Directives. We are nevertheless not sure that such decisions, taken on a proposal by the High Level Communications Group or by the Radio Spectrum Policy Expert Group, and in consideration of the opinion of the Communications Committee delivered under the regulatory procedure,[73] would be the appropriate tool to manage these cases. Furthermore, one might wonder whether acting this way would in fact turn the Commission itself into a European regulatory authority.

High Level Communications Group and Communications Committee

The 1999 Review Communication ascertains that 'improvement of existing institutional arrangements … will be more effective than setting up a completely new European regulatory institution'.[74] These arrangements would at first consist in the setting up of a High Level Communications Group (HLCG). Its main task would be to assist 'the Commission in maximizing uniform application of national measures adopted under the regulatory framework laid down in Community legislation'.[75] The HLCG would therefore act as consensus builder between NRAs, cooperate with bodies at European level (consumer and industry representatives, standards bodies, advisory groups, etc) as well as provide input (eg suggestions for measures, positions on problems brought to its attention, expertise in the drawing up of guidelines on market definitions, etc) to the European Commission. Furthermore, the Commission would be assisted in a more formal way by a Communications Committee (COCOM), created under the 'Comitology Rules',[76] replacing existing committees (ONP Committee, Licensing Committee) and acting as advisory (ie for cases of opinion on drafts of non-binding Commission measures) or as regulatory (ie for cases of opinion on drafts of binding measures) committee. The HLCG would be composed of the Commission and the NRAs. The COCOM would include the Commission and member state representatives.

Some comments should be made concerning the HLCG, and this firstly with regard to the general HLCG task of contributing to a consistent and coordinated implementation of Community measures by member states and with regard to its specific task of 'adopting agreed NRA positions on the detailed application of Community legislation, with a view to facilitating pan-European services'.[77]

From a legal perspective, while taking member states' (and their NRAs') 'primary responsibility for achieving objectives set out in sector-specific Community legislation'[78] into account, it is in the end up to the European Commission (under the control of the European Court of Justice), should the occasion arise assisted by the COCOM, to ensure general implementation of Community legislation and to decide whether an interpretation adopted by a member state is consistent with EC directives or not.[79] It is therefore also up to the Commission to draft, assisted by the COCOM in its regulatory capacity and without prejudice to the powers

72. 1999 Review Communication, p 54.
73. 1999 Review Communication, p 56.
74. 1999 Review Communication, p 55.
75. 1999 Review Communication, p 57. According to its page 56 (and footnote 83), the HLCG would take over from the current High Level Regulators Group. However, while the latter is just established by a Council Resolution, the HLCG would be based upon a Directive.
76. Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ No L 184/23, 17.07.1999. See also OJ No C 203/1, 17.07.1999.
77. 1999 Review Communication, p 57.
78. 1999 Review Communication, p 15. See also Article 10 EC Treaty.
79. See Articles 211 and 202 of the EC Treaty. Nevertheless, with regard to implementation, 'the Council may also reserve the right, in specific cases, to exercise directly implementing powers itself' and in these cases not confer these powers on the Commission (EC Treaty, Article 202, 3rd indent).

of the Council (and of the European Parliament) under article 5 of the Comitology Rules, binding 'Commission Decisions to require certain actions to be undertaken, eg to ensure harmonised application of Community law in a specific area',[80] or to launch infringment procedures.[81] The power to decide in these matters could not be delegated to the HLCG as it would give them too much discretion (with regard to Commission's enforcement powers) or undue subdelegation (with regard to implementation powers delegated to the Commission by Council and Parliament directives).[82]

Even if (uniform) 'enforcement of Community legislation is the responsibility of the Commission under the EC Treaty',[83] and even if the 'last word' with regard to consistent implementation remains with the Commission, the High Level Communications Group may nevertheless play a valuable role with regard to ensuring consistent and coordinated interpretation and application of EC directives. The experience gathered with the Working Party on the Protection of Individuals with regard to the Processing of Personal Data[84] (hereafter Article 29 Group) may serve as example. This group was created by the Data Protection Directive[85] alongside a normal Comitology Committee,[86] such as the proposed Communications Committee. The HLCG may become an appropriate forum for coordination, relying on 'consensus building processes among European regulators in which all interested parties are able to state their views'.[87] Indeed the NRAs sitting in the High Level Group will do this not as representatives of their member state of origin, and may therefore adopt a view centred on the (community wide) interest of the sector, without, at least in principle,[88] having as one task the defence of national positions in the context of Commission implementation measures, as would be the case for the members of the Communications Committee.[89] This greater freedom of positions of the HLCG would remain, even if the NRA were also, as is the case today for some member states, to sit in the Communications Committee. Furthermore, the fact of not being constituted under the Comitology Rules gives more freedom to the HLCG in the organization of its work. Finally, even if agreed NRA positions were not to be considered as having a binding legal effect on a member state's NRA, they could have in fact a high 'moral binding' effect, as has been proved in the context of recommendations of the Article 29 Group. Even more so, one could imagine NRAs engaging to respect the common positions, subject to the Commission's power to reject them as not being a consistent interpretation of Community legislation.

It should be noted that cooperation between NRAs (coordination of positions within the HLCG as well as collaboration in cases brought before them) might especially require modification of national rules concerning confidentiality of information received, in order to allow an NRA to communicate complete information regarding a specific issue to other NRAs.[90]

Among the possible activities of the HLCG, the 1999 Review Communication mentions 'monitoring and

80. 1999 Review Communication, p 56.
81. Article 226 EC Treaty. In this context it appears worthwhile to investigate whether the Commission's task would not be facilitated by the application of measures concerning provision of information on national draft rules (in a broad sense) such as those foreseen by the Directive laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services, today not applicable to telecommunications and broadcasting services (Article 1 (2), Article 1 (5) and Annex V of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998, OJ No L 204/37, 21.07.1998 as modified by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ No L 217/18, 5.08.1998).
82. See Forrester Norall & Sutton, *op cit*, Ref 60, pp 60–61, 77.
83. 1999 Review Communication, p 10.
84. On the Working Party, see Cullen International, A Business Guide to Changes in European Data Protection Legislation, Kluwer Law International, The Hague, 1999, pp 111–13.
85. Articles 29 and 30 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1994 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ No L 281/31, 23.11.1995.
86. Article 31 of the Data Protection Directive.
87. 1999 Review Communication, p 55.
88. One might indeed object that this discretion would, in practice, not stand if members of the NRA were national civil servants.
89. Indeed, Comitology Committees may be considered as an opportunity for Council to keep indirectly a certain interference possibility in the execution of implementation powers delegated to the Commission (Thomas Oppermann, Europarecht, 2, Auflage, Verlag C.H. Beck, Munich, 1999, pp 139–40).
90. On this issue, see Forrester Norall & Sutton, *op cit*, Ref 60, pp 23–30.

publicising the activities of NRAs throughout the Community, in particular national consultations on specific regulatory issues and subsequent NRA decisions'.[91] With regard to ensuring harmonized application of Community measures, this activity could explicitly be completed with an alarm bell function in case of noted emergence of significant discrepancies between positions of different NRAs. This task would be similar to the one envisaged for Article 29 Group in cases where 'divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States'.[92]

According to the 1999 Review Communication, another specific activity of the HLCG could be 'endorsing codes of practice, for use in Member States, on issues related to the application of Community legislation. Such codes of practice could be drawn up by the High Level Communications Group or by other interested parties'.[93] It should be mentioned that the endorsing of a code of practice by the HLCG would, similar to that which is the case in the context of Article 29 Group,[94] not render the code as such mandatory. It could just provide a presumption of conformity with the relevant directives, as translated into national measures.[95] In principle, a national judge could therefore accept behaviour that is in conformity with the code as being consistent with the requirements of the directives concerned, although the judge remains free to not do so.

The Commission also foresees, that the HLCG should be active in 'resolving disputes between consumers and operators, where there is a cross-border dimension, building upon the procedures already established at national level and at EU level for co-ordination of NRA actions'.[96] Beyond the general comments made above with regard to NRA involvement in dispute resolution with regard to non-binding conciliation, the HLCG, as an assembly of NRAs, could play an interesting role. In this case, one could apply a procedure similar to that of the ONP Committee Working Group, envisaged under Article 26(2) of the ONP Voice Telephony Directive.[97]

With regard to using the HLCG for dispute resolution by a binding decision, we foresee many more problems. Indeed, the example given by the 1999 Review Communication,[98] Article 17 of the ONP Interconnection Directive, considers 'resolution of interconnection disputes between organizations operating under authorisations granted by different Member States, where such dispute does not fall within the responsibility of a single national regulatory authority'. The dispute is, in this case, solved by the NRA 'of the Member State that has granted the authorisation of the organisation against which the complaint is made' (or in case of concurrent disputes by coordinated efforts of the concerned NRAs). In these kind of cases it is up to the NRA(s) concerned to make a decision. They may do this by meeting in the framework of the HLCG, but this group, or a working group of the HLCG, could not take the decision in their place. Indeed, one might think that, by reason of the wide discretion and independence required, 'it is not possible, without an amendment of the EC Treaty, to use a European Regulatory Authority *(and one could, with regard to this dispute resolution power consider the HLCG as such)* as a formal appelate tribunal with the power to make binding decisions. However, a more limited … role in dispute resolution, through conciliation … is possible.[99]

91. 1999 Review Communication, p 57.
92. Article 30 (2) of the Data Protection Directive.
93. 1999 Review Communication, p 57.
94. Articles 27 (3) and 30 (1) (d) of the Data Protection Directive.
95. See Article 27 (3) of the Data Protection Directive.
96. 1999 Review Communication, p 57.
97. A similar procedure is foreseen by Article 12 of the ONP Leased Lines Directive.
98. 1999 Review Communication, Ref 84.
99. NERA, Denton Hall, *op cit*, Ref 61, p 65.

Organization and functioning

Principles and characteristics

Efficient performance by the NRA of its tasks requires compliance with certain principles and the presence of certain characteristics. Before discussing two specific issues more thoroughly (independence and the question of the possible role of self-regulation), some of these principles and characteristics are outlined. Most of these (like the requirement for independence[100] or the obligation to provide NRAs with the necessary means to carry out their tasks[101]) are already foreseen in today's regulatory framework and also assessed in the Fifth Implementation Report.[102] In this context, the 1999 Review Communication calls for a better application of the principles envisaged, especially with regard to the principle that all bodies concerned by regulatory activities (eg NRA, ministry, competition authority, etc) should coordinate their efforts in a transparent and efficient way[103] (eg avoid delays and duplication of decision making).

Besides coordination, there is a need for NRAs to be provided with pre-defined, clear policy lines and objectives, as well as with clearly specified competences. The NRA should act according to the principles of proportionality, non-discrimination and transparency. The latter principle may need to be balanced with the requirement for confidentiality of business strategy-related information. The NRA should both inform and be informed, which would, among other things, require overcoming the problem of assymetry of information with regard to the incumbent operator, who is today still simultaneously the main organization to be controlled and the provider of essential information.[104] Information may be obtained through the exercise of the NRA's control powers, through formal or informal contacts with operators and users (eg by organizing hearings and consultations), as well as through information received by other regulatory authorities. The NRA should be coherent in its decisions and, in consequence, predictable. This characteristic could be an argument for independence from short term political interests. These decisions should be taken in a timely manner, be reasoned and be subject to appeal procedures.

An NRA should be provided with the means necessary for carrying out its tasks. With regard to powers, this means that it is not only entrusted with the tasks foreseen by European directives, but that it also has the powers needed to enforce its decisions and, finally, that it is willing to entirely fulfil its tasks and use its powers, for example, in order to terminate 'counter-productive' behaviour by incumbents[105] (eg trying to delay access by protracting negotiations, failing to provide relevant information). With regard to financing, this means that the NRA must have its own resources (eg licence fees covering adminstrative costs), sufficient to free it from the vagaries of a budget decided by third parties. With regard to staff, an NRA should have a knowledgeable and sufficient staff, without creating dinosaurs reluctant to apply sunset clauses that might reduce the necessity of a fully staffed NRA. This could imply flexible arrangements allowing the hiring of personnel for specific tasks and limited periods, at competitive salaries. However the Fifth Implementation Report notes in general a difficulty for NRAs 'of recruiting and retaining staff in a market where liberalisation and the rapid take-off of the market… has led to severe skills shortages'.[106] With regard to staff at executive level, the

100. See, among others, Article 5 (a) (2) of the ONP Framework Directive.
101. See Article 18 (1) of the ONP Interconnection Directive and recital 9 of Directive 97/51/EC, *op cit.*, Ref 7.
102. Especially pp 9–12, 32.
103. 1999 Review Communication, p 58. See also Fifth Implementation Report, pp 9–11, 32.
104. See Alain Vallée, 'Le régulateur face à l'asymétrie d'information', *Communications & Stratégies*, No 14, 1994, pp 15–27. See also Fifth Implementation Report, p 11 stating that 'for some new entrants, over-reliance (by NRAs) on information provided by the incumbent is seen as an issue'.
105. Fifth Implementation Report, p 10.
106. Fifth Implementation Report, pp 11–12.

nominations should be based on experience and know how and for fixed but renewable terms. The directors should function as a college, with a casting vote for the president if need be.

It should finally be noted that the Fifth Implementation Report raises the question of the opportunity for introducing benchmarking exercises concerning NRA's independence and aspects of its performance like 'supervision of the incumbent's cost accounting, approval of the reference interconnection offer, consultation procedures, response times or reporting on service quality or consumer complaints'.[107] With regard to the good results that such 'best current practice' exercises may provide in general,[108] this appears, in principle, to be a good idea. Its usefulness could nevertheless be discussed with regard to the fact that the Commission's periodical Implementation Reports acts already, to some extent, as a national regulation and a national regulatory authority benchmark. Furthermore, benchmarks are probably easier to put in place, and national comparisons are more reliable, with regard to quantifiable data (like the number of individual licences granted), than with regard to subjective, 'untouchable' characteristics, like know how, openness, or the determination of an NRA.

107. Fifth Implementation Report, p 32.
108. See, for example, Commission Recommendation 98/195/EC of 8 January 1998 on interconnection in a liberalised telecommunications market (Part 1 – Interconnection pricing), OJ No L 73/42, 12.03.1998.
109. See Article 6 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ No L 131/73, 27.05.1988, modified by Commission Directive 94/46/EC, *op cit*, Ref 22; and Article 7 Services Directive as well as Article 2 (1) (b) of the Licensing Directive.
110. See for example ECJ Judgement of 19 March 1991, Case C-202/88, *French Republic v Commission of the European Communities* [1991] ECR I-1223, pts 51–52, ECJ Judgement of 13 December 1991, Case C-18/88, *RTT* [1991] ECR I-5941, pts 25–26.
111. See Bruno Lasserre, 'L'autorité de régulation des télécommunications (ART)', *L'Actualité Juridique – Droit Administratif*, No 3, 20 March 1997, pp 225-226, William H. Melody, 'Policy objectives and models of regulation', in William H. Melody (ed), *Telecom Reform: Principles, Policies and Regulatory Practices*, Den Private Ingeniørfond, Technical Universiy of Denmark, Lyngby, 1997, esp. pp 22–25; William H. Melody, 'On the meaning and importance of "independence" in telecom reform', *Telecommunications Policy*, Vol 21, No 3, pp 195–199; Melody, *op cit*, Ref 3, pp 12–13, 16–21; Nihoul, *op cit*, Ref 8, pp 239–240, 246–248.
112. Report of 7 June 1996 from the Committee of Permanent Representatives to the Council (Telecommunications) concerning the Proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, 8125/96, ECO 170, CODEC 382, 16.06.1996, Annex 1. See also Projet de procès-verbal de la 1941e session du Conseil (Télécommunications) tenue à Luxembourg, le Jeudi 27 Juin 1996, excerpts published in Documents parlementaires (B), Sénat, Session 1997/1998, 1-808/3, pp 68–69.

Independence

An NRA should be independent. This requirement aims at ensuring improvement in quality of services; by maximizing its own profit, the operator also maximizes the profit for society. A regulator's independence also enables fostering the development of effective competition by ensuring impartiality and objectivity of the regulator's decision, as in this case 'the referee is not at the same time a player'.

The requirement of independence is explicitly envisaged in European telecommunications regulation.[109] It is underlined by the Court of Justice[110] and by the literature.[111] Article 5 (a) (2) of the ONP Framework Directive (1997) states: 'In order to guarantee the independence of national regulatory authorities:

- national regulatory authorities shall be legally distinct from and functionally independent of all organizations providing telecommu-nications networks, equipment or services,
- member states that retain ownership or a significant degree of control of organizations providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control'.

This independence must therefore exist on two levels – the level of the relationship between NRAs and market players and the level of the relationship between the NRA and the 'political', supervisory bodies. The requested effective structural separation between regulatory function and activities concerning ownership or control of one (or more) network operator or service provider, has been further worked out in a declaration made by the representative of the Commission to the Committee of Permanent Representatives,[112] which draws on a 1995 Commission Communication considering the implementation of the

Services Directive.[113] According to the declaration, 'the phrase "a significant degree of control" implies that the government is in a position to influence the commercial behaviour of the state-owned or state-controlled network operator'. The declaration furthermore shows that 'the emphasis is on the effectiveness of the separation, not its form' so that 'effective structural separation could be achieved in a number of ways depending on the legal and administrative traditions in a Member State'. Structural separation must impeach anti-competitive information transfer and ensure 'that the two activities of regulation and supervision/ownership have separate financial accounting, personal management, and reporting structures, and that no member of staff in either department faces a conflict of interest between the role of government as shareholder/owner, and the role of government as regulator'. According to the declaration, both functions could be realized by departments of the same ministry, only if the safeguards mentioned are guaranteed. Nevertheless, in practice, the combination of both functions within one ministry is not the best solution, since it presents a serious risk of conflict of interests. This problem is not solved by the mere fact that all the different interests at stake may be perfectly legitimate as such (eg one could imagine the maintainance of employment in a public telecommunications operator *v* the overall promotion of sector interests in ensuring the emergence of competition). The same risks might also, owing to the solidarity of a government's members, be present when placing the regulatory and operational activities in separate ministries (eg the ministry of finance aiming to raise a maximum of funds on the occasion of an operator's partial or total privatization, and the minister responsible for telecommunications in charge of giving all the operators present the chance to raise their value in the general interest of the sector).[114] Even if, in reality, no undue interference takes place, the mere possibility, existing under the latter two models, of seeing ownership considerations interfering in regulatory decisions, could already be considered to some extent as harmful to investments and legal certainty. The third possible solution presented by the Commission's declaration, was to place regulatory activities with a regulatory authority that is independent from the relevant ministry or any other minister. It should be added that, according to the 1995 Commission Communication, independence from a ministry does not *per se* exclude the control by a ministry of the accounts and of the legality of the decisions of the regulatory authority. I believe the latter proposal to be the best way, if the requested structural separation is to be achieved. This proposal does not imply that the regulatory authority becomes a 'free floating agency' with no accountability to the political level. It simply implies that the legality of the regulator's decisions are supervised, instead of a control of decision opportunity and a hierarchical power vested with the minister. In this system, a Minister may annul an act of the regulatory authority for being illegal. He may not replace the decision. Neither may he annul a decision just for being 'not appropriate'.

While the independence of the NRA with regard to operational activities is uncontested, independence with regard to political institutions, especially government and the minister responsible for telecommunications, raises more questions. This concerns especially the need to maintain this independence, in particular the third form of structural separation described above, once a member state

113. European Commission, Communication to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services, OJ No C 275/2, 20.10.1995, especially section III (e).
114. For organizational models see Fifth Implementation Report, p 10.

no longer retains ownership, nor a significant degree of control of a telecommunications operator, in the context of privatization. The 1999 Review Communication underlines the importance of an NRA being able to free from political interference (keep footnote 115),[115] while it should be noted, that the practice of structural separation still raises concerns in a number of Member States,[116] according to the Commission's assessment.

A number of arguments plead in favour of maintaining regulatory authorities independent from political interference, even after full privatization of public operator(s), in particular the need to avoid day to day government influence[117] and to go beyond short term goals. It is 'indeed absolutely essential that the "competition" among the major industry players be moved from the arena of politics and bureaucracy to the market-place, and to achieving the industry performance objectives of government policy. This will only happen if regulatory decisions are made on their substantive merits, not on the basis of political favouritism or the backdoor influence of the most powerful industry players'.[118] This is especially true, by reason of the fact that even if an incumbent operator is no longer state-owned, government may continue to regard it as the 'national champion'.[119] It must be ensured that the NRA can focus on the interest of the regulated sector as such and not be captured by other, more external interests, legitimate though they may be (eg short-term employment in a state's major enterprise). In this sense, independence becomes a basic element of the NRA's credibility and a basic requirement for the continuity of its work.

Nevertheless the scale of competencies devolved to the NRA requires, as counterbalance, some form of democratic accountability.[120] Independence does not mean freedom to behave in an illegal way. Therefore a supervision of legality could be appropriate. Even if, by reason of the large discretion given to NRAs (eg in the application of flexibility clauses, which for example require a definition as to whether a market is competitive), the boundary between supervision of legality and opportunity might not be easy to draw, the risk of undue interferences by the supervising minister might be considered as not too serious. Indeed, the minister would not be allowed to replace an annulled NRA decision by their own ruling and the minister's decision itself would, in principle, be subject to administrative appeal procedures in order to verify its legality. This supervision of legality could be exercised on behalf of the minister by a specialized government commissioner. Through its ongoing character, and the possibility of swift intervention of this supervising authority, such supervision would usefully complement individual appeals introduced by concerned operators against NRA decisions, with a kind of 'general advocate' for legality.[121]

Another possibility would be, in the event of the NRA not living up to the expectations of the rule makers, that they may change the rules underlying an NRA's action, eg to define more strictly the objectives of this action. Such a reaction would be based upon an activity report, to be drafted annually by the NRA which could also usefully expose market developments and the conclusions to be drawn with regard to these developments. A further possibility for ensuring a certain accountability of NRAs, would be to act in the context of nominations and, for

115. 1999 Review Communication, pp 14, 58. The fact that the Communication adds 'without prejudice to the government's responsibility for national policy' to the requirement is in our opinion not to be considered as questioning the principle, but rather as a confirmation that the NRA's role is limited to 'rule-application'. See also European Commission, *op cit*, Ref 21, p 13: 'regulatory authorities should be independent of government and operators'.
116. Fifth Implementation Report, p 10.
117. Melody, *op cit*, Ref 3, p 12.
118. *Ibid*, p 17.
119. Fifth Implementation Report, p 10.
120. See in this context recital 9 of Directive 97/51/EC, *op cit*, Ref 7: 'the requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States'.
121. In this context see also: 'The proposed new regulatory framework would set out clear and explicit objectives for NRAs, and any NRA decisions that go against these objectives would constitute an infringement of Community legislation' that would be recriminated by the Commission (1999 Review Communication, p 10).

example, not reappoint an NRA's managers once their term of duty comes to an end.

The question of the NRA's accountability may be seen in a broader context than accountability to governments and courts. Accountability could also, to some extent, be considered with regard to the industry and the public.[122] This could be realized through the NRA's activity report, but also through public consultations, where it could be important to ensure equal opportunity to participate to all concerned, not only to industry.

One might finally consider that, if one of the reasons behind an NRA's independence is distance from day to day political interference and short term goals, placing the NRA in some way or another in the bosom of the parliament, instead of that of the government, might also not be a good idea.

The impact of self-regulation

The regulatory function should in principle be carried out by a public body.[123] Nevertheless there is, and will be, a place for both public NRA and private self-regulation. Despite the fact that the sector representatives are rather sceptical about the idea,[124] there might indeed be an interesting complementary role to be played by industry 'self-regulation', even with regard to electronic communication infrastructures and associated services.[125] This would go beyond content regulation, where self-regulation seems to be highly appropriate, as is shown by Council conclusions on the role of self-regulation in the light of the development of new media services.[126] Self-regulation could be especially useful in the context of highly technical issues, such as standard setting or interconnection, which require specific know how. Furthermore, in principle 'such measures can be more easily and quickly agreed or adapted than legislation'.[127] The procedure nonetheless raises some comments.

In the case of self-regulation, the borderline between rule making and rule application is particularly thin. Indeed this is the case as self-regulating bodies both adopt the rules and apply them within their circle. Enforcement could be typically ensured by traditional courts in cases brought before them by concerned parties. An instrument established by self-regulation may have binding internal force, if all the members of an association have worked out and accepted it, or if the instrument has been established, eg by the board of such an association. This is so if this board was duly mandated and even more so if there is ratification by a general assembly.

In principle, self-regulation can only have legal binding effect[128] beyond the group that has adopted that specific instrument if it is flanked by legal measures providing for this binding force[129] by giving legitimacy to the results of self-regulation concerned. In these cases it is therefore more appropriate to use the concepts of 'cooperative self-regulation'[130] or of 'state regulated self-regulation'.[131] The procedure envisaged with regard to standards and/or specifications by Article 5 of the ONP Framework Directive is an example.[132] One could nevertheless imagine that a judge might give certain consequences to these instruments as such, considering them as an expression of common practice of a sector.[133]

122. Melody, *op cit*, Ref 3, pp 17, 20.
123. We do not address in this section the case where the body entrusted by the State with the function of regulatory authority adopts a private law form (eventually as company fully owned by the State).
124. Eurostrategies, Cullen International, *op cit*, Ref 5, pp 35, 81.
125. 1999 Review Communication, eg pp 14, 15, 17, 19, 33, 34, 57.
126. 27 September 1999, OJ No C 283/2, 6.10.1999. See also European Commission, *op cit*, Ref 21, p 13.
127. 1999 Review Communication, p 19.
128. With regard to the conditions which self-regulation must fulfil in order to have effect in State law, see Yves Poullet, 'Les diverses techniques de réglementation d'Internet: l'autorégulation et le rôle du droit étatique', *Ubiquité*, No 4, April 2000, points 10–13.
129. See 1999 Review Communication, p 19 and Ref 22.
130. See for example Klaus W. Grewlich, 'Good governance in the age of cyberspace', info, Vol 1, No 3, June 1999, pp 269–70.
131. Wolfgang Hoffmann-Riem, 'Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen – Systematisierung und Entwicklungsperspektiven', in Wolfgang Hoffman-Riem, E. Schmidt-Aßmann (eds), 'Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen', Nomos Verlagsgesellschaft, Baden-Baden, 1996, pp 301–3.
132. See also 1999 Review Communication, pp 33–34.
133. Poullet, *op cit*, Ref 128, pp 62–63.

One could discuss whether, in the context of industry self-regulation aiming at binding effects, the principle of separation between operational and regulatory functions is still respected. To ensure the main goal of this separation, emergence and maintainance of fair competition, procedures should guarantee both the possible participation of all those eventually concerned and a fair balance of bargaining power, especially when the instrument worked out aims at having external effects, but also when it is limited to internal binding force. One might, in this case, nevertheless wonder whether this way of proceeding might not lead to complex structures and to a certain 're-invention' of democracy.

It should be added that instruments worked out by associations of sector representatives may be useful, even if the group which drafts them does not envisage them having binding force. In this case simple non-binding guidelines may provide useful orientation to concerned parties. In this context, a useful example may be guidelines established by the European Telecommunications Platform with regard to interconnection agreements.[134]

Conclusion

What will be the future of telecommunications national regulatory authorities taking into account the way in which the European telecommunications regulatory framework in general, and the European Commission's 1999 Review Communication in particular, addresses NRAs, their scope, their tasks and their characteristics?

An NRA is, in principle, entrusted with 'rule application' rather than with 'rule making tasks'. The scope of today's telecommunications NRA should be widened to include all electronic communications infrastructure and associated services, though it should, in principle, not address content related issues.

There will be a need for sector specific regulatory authorities, in particular for managing the transition towards effective competition, but also in general for all those issues needing a proactive and structuring approach. On the other hand, NRAs should in future no longer be entrusted with the task of dispute settlement by decisional power.

Among the characteristics a regulator should present, the following are highlighted: that it should be independent, provided with the necessary means and should be coordinated as much within its national territory with regard to other regulatory authorities, especially the competition authority, as outside its state's boundaries. This latter coordination could usefully be organized under the auspices of a High Level Communications Group. Nevertheless, even the best coordination might, in the future and in some specific cases, still not negate the need to consider the creation of a European regulatory authority. The regulator's work could, in some cases, be usefully completed by activities of self-regulation bodies.

134. ETP, Framework interconnection agreement guidelines, Brussels, June 1998, p 31, http://bscw2.ispo.cec.be/infosoc/telecompolicy/en/interconref.doc. For other ETP documents, see http://www.etp-online.org/position_papers.html