Designing Economic Regulatory Institutions for European Network industries

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1. Introduction

Liberalisation of European network industries and the creation of a single market have witnessed European Union (EU) institutions taking on increased economic regulatory competencies. At the same time national regulatory authorities (NRAs) have been established in many industries, and competition legislation in Member States has evolved to shadow more closely the rules on competition in the European Treaty. All these changes have inevitably generated a more complex setting in which there are multiple tiers of regulation. Under the principle of subsidiarity Member States are granted wide discretion in implementing European liberalisation, and arguably this has served to amplify complexity across the European Union.

The economic regulatory regime governing European network industries is further complicated by overlapping jurisdictions, notably the European Commission, the European Court of Justice (ECJ), the European Parliament, and Member State governments and their respective agencies. Many commentators are now questioning the efficacy of the current regulatory institutional framework and asking whether reforms could promote greater efficiency by encouraging more uniformity, simplicity and co-ordination.

In this paper we examine the design of the regulatory framework governing European network industries, taking account of structures that are more and less centralised than the status quo. We develop a framework within which the key criteria shaping regulatory structures are discussed. Given these criteria we are interested in addressing who is managing and who should be managing ‘multi-level’ regulation in Europe. Having outlined the criteria that ought to be satisfied by a ‘good’ regulatory regime, we argue qualitatively that the institutional framework of regulation falls into one of four categories. We then assess how each of these categories performs in terms of the criteria we establish. Throughout our discussion the principle actors in the regulatory game are examined.

To facilitate this typology we draw on examples from some specific industries within the network industries sector, such as telecommunications, electricity and postal services. The size and importance of these industries is widely recognized and it is not surprising that politicians see them as playing a significant role in influencing key European objectives: sustaining economic growth, improving competitiveness and forging greater cohesiveness. These objectives have resulted in a multitude of policies reforming many aspects of European network industries.

The factors precipitating the change in policy towards the network industries have, to a large extent, been technologically and market driven. In many cases newer technology is enabling several firms to supply outputs efficiently. Natural monopoly, where a single firm is in a position to supply market demand at lowest production cost (i.e. efficiently), no longer pervades in many parts of the network industries. It is no longer inefficient in most power markets to have several firms generating electricity. Increasing demand for some services, notably in telecommunications, has also helped facilitate multi-firm supply and competition.

Inefficiency in some of Europe's network industries coupled with market structure changes has accommodated political acceptance of pro-competition measures. In some countries it would appear that politicians have largely paid lip service to liberalization. For the European economy as a whole to benefit from liberalisation it has been necessary to have a strong central body committed to initiating and co-ordinating pro-market reforms. Since the Single European Act of 1987 the European Commission (the 'Commission') has been committed to implementing liberalisation in Europe's network industries. Indeed, without the European Commission's efforts it is extremely doubtful whether Europe's economy would have benefited as much from changes affecting the network industries.

The Commission has been at the heart of the reform programme introducing competition. It has been able to strengthen its position as the initiator of reforms because it operates an increasingly sympathetic political climate. Political legitimacy resulted in the 1987 Single Act facilitating the first major initiatives. The Single Act
mandated the Commission to devise policies bringing about a single market in communications, transport and energy. This required a legislative programme focused on liberalisation and harmonisation. The programme of reforms was strengthened following the Treaty of European Union in 1992. The Commission accelerated its programme of liberalisation and harmonisation in the network industries in the middle 1990s. By 1998 almost all the necessary liberalization measures had been adopted and attention has shifted more towards implementation.

Although the changing political landscape has unquestionably favoured reforms, another crucial factor helping to foster a competitive regime has been the changing corporate climate. Whereas at one time managers in most European network firms operated exclusively within their national territories, today many companies are keen to expand operations outside their traditional service areas. Managers in newly privatised companies in particular are keen to move into new markets. Even managers in publicly owned companies in network industries are also engaging in ambitious expansion programmes. For example, Electricité de France has acquired private electricity companies in the United Kingdom.

In this article we are interested in who should and how can EU regulation of network industries be managed. In part in part 2 we discuss how the liberalisation in the single market has altered the nature of regulation and how equity and efficiency factors impact on regulation of Electricity, Gas, Postal Services and Telecommunications. Having recognised the need for regulation, part 3 proposes four alternative regulatory regimes - Current Regulatory Model, Federal Regulatory Commission, Regulatory Agency, and Regulatory Forums - and assesses how each interacts with the European and member state institutions. Finally, part 4 proposes a set of principles that should govern credible and effective regulation and constructs a simple qualitative cost benefit of the four competing regulatory regimes. We conclude by assessing the political and practical constraints of implementing a credible EU regulatory regime.

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4 Liberalisation establishes the conditions, or market rules, necessary for the operation of an internal or single market, and harmonisation is aimed at bringing consistency across what had hitherto been industries predominantly shaped by national markets.
2. Efficiency, Equity and the Evolution of Regulation

Economic regulation is usually required (demanded) because 'free' markets fail to deliver desirable outcomes. Monopoly abuse in retail and wholesale markets may call for the level of prices to be regulated and discrimination across customers may lead to calls for regulation to affect the structure of prices. In the former case regulation is undertaken to achieve efficiency and in the latter case regulation is motivated by fairness or equity considerations. In Table 1 we highlight how efficiency and equity factors impact on regulation in four network industries.

<table>
<thead>
<tr>
<th>Industry Characteristics</th>
<th>Equity Arguments</th>
<th>Efficiency Arguments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Electricity</strong></td>
<td>Security of supply</td>
<td>Natural monopoly in transmission and distribution. Third party access to customers. Incumbency dominance.</td>
</tr>
<tr>
<td><strong>Gas</strong></td>
<td>Security of supply</td>
<td>Natural monopoly in transportation. Third party access to customers. Incumbency dominance.</td>
</tr>
<tr>
<td>Storable. Demand rising as an input to electric generation. Innovations minimal.</td>
<td>Universal service</td>
<td>Natural monopoly local delivery network. Incumbency dominance.</td>
</tr>
<tr>
<td><strong>Postal Services</strong></td>
<td>Universal service</td>
<td>Natural monopoly in some elements of the local loop (depends on demand and population density) and scarce resources (eg. radio spectrum). Incumbency dominance.</td>
</tr>
<tr>
<td>Demand rising, innovations affecting sorting and tracking processes.</td>
<td>Geographic uniformity</td>
<td>Geographic uniformity</td>
</tr>
<tr>
<td><strong>Telecommunications</strong></td>
<td>Universal service</td>
<td>Natural monopoly in some elements of the local loop (depends on demand and population density) and scarce resources (eg. radio spectrum). Incumbency dominance.</td>
</tr>
<tr>
<td>Demand growing significantly, due especially to internet. Innovations significantly affecting industry. Convergence across fixed and mobile, and horizontally with IT and media sectors.</td>
<td>Geographic uniformity</td>
<td>Geographic uniformity</td>
</tr>
<tr>
<td></td>
<td>Access to information society</td>
<td>Access to information society</td>
</tr>
</tbody>
</table>
As has been described elsewhere (see MED1 1998), liberalisation in Europe is resulting in network industries evolving along a path from monopoly (phase 1), to monopoly and competition (phase 2), and possibly to competition (phase 3). These three phases of market structure are described in Box 1, along with the industries and sectors associated with each phase. It can be seen that there is considerable diversity across the industries. Air transport and telecommunications are highly liberalised, but most sectors within these industries have yet to progress into phase 3. Gas has not yet been liberalized, but in the near future it will enter phase 2. Most industries or sectors within industries currently lie in either phase 1 or phase 2 and this is likely to continue for some years to come.

Box 1: The evolution of competition

| Phase 1 – Monopoly: One firm supplies services. |
|------|------------------------------------------------|
|      | **Airports, ports, most rail services and rail infrastructure, gas, reserved postal services and water.** |

| Phase 2 – Monopoly & Competition: Competition is gradually introduced into some or all markets. |
|------|------------------------------------------------------------------------------------------------|
|      | **Airport ground handling facilities, electricity, port-handling facilities, some rail freight markets, most air services, and residential telecommunications.** |

| Phase 3 – Competition: Here competition is extensive and increasingly effective and sustainable in some or all markets. |
|------|---------------------------------------------------------------------------------------------------------------------------------|
|      | **Some air and shipping services, business telecommunications services, and non-reserved postal services.** |

The introduction of competition in network industries necessitates a corresponding increase in regulatory activity in the short term because of the presence of powerful incumbent firms. Over time it is expected that competition will become more effective and the scale and scope of regulatory activity correspondingly decline. In Box 2 we describe the evolution of regulatory activity over the three phases of market structure.

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5 Box 1 characterises the formal position at a European level. In some Member States competition is much more extensive than that suggested by Box 1.
Box 2: The evolution of regulatory activity

**Phase 1 – Monopoly:** Regulation is concerned with the prevention of monopoly abuse in retail markets and the attainment of public service objectives (e.g. universal service).

**Phase 2 – Monopoly & Competition:** Regulation focuses on: monopolies abuse in both retail and interconnect markets by dominant incumbents; emerging competition issues; and public service obligations.

**Phase 3 – Competition:** Some light-handed regulation is needed, as in other competitive markets, to ensure fair trading practices and the maintenance of public service objectives.

A number of articles in the EC Treaty (last updated in May 1999 following the implementation of the Amsterdam Treaty) are applicable to network industries. Over time some articles have become more relevant following liberalization, in particular the articles outlining the rules on competition, especially Articles 81 and 82. These are summarised in Box 3 below.

Box 3: EC Treaty Articles relevant to network industries

*General Economic Interest:* Article 16 (fulfil their missions).
*Rules on Competition:* Articles 81 (restrictive practices), 82 (dominance) and 86 (exclusive rights).
*Aids granted by States:* Articles 87-89.
*Approximation of Laws:* Article 95 (internal market).
*Trans European Networks:* Articles 154 (interconnection and interoperability), 155 (guidelines and standards) and 156 (consultation procedures).
*Industry:* Article 157 (competitiveness and adjustment).
In Table 2 we outline the main European legislative measures that have been taken in some of the key network industries.

**Table 2: European Legislation in the Network Industries**

<table>
<thead>
<tr>
<th>Industry</th>
<th>Liberalization and Competition Measures</th>
<th>Current Status of Competition in Europe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Natural Gas</td>
<td>Directive 98/30/EC along the same lines as electricity.</td>
<td>Gradual approach to liberalization. Industry will enter phase 2 from 10 August 2000. Some Member States like the UK already in phase 2 and approaching phase 3.</td>
</tr>
</tbody>
</table>

The detailed legislation that has been passed at the European level has been accompanied by considerable national legislation. These measures and the complexity of network industries justify sector specific regulation. The main issue facing policy makers is the nature such regulation should take.
3. Credible regulatory institutions in the multi-level EU

If the newly liberalised network industries are to operate efficiently and equitably it is important that EU and member states have effective institutional structures and procedures in place.

Led by the Council of Ministers, the European Commission and increasingly the European Parliament, it has become very apparent that similar economic frameworks, legal principles and political goals are relevant across the single market. What is less apparent are the forms such regulatory institutions should take and what structures are feasible. Should regulatory institutions be increasingly integrated and operated at a central level through some formal European body? Alternatively, should regulation be largely devolved to national regulatory bodies? If a European body were acceptable, should it operate as a stand-alone institution or a pan-European organisation - that is the sum of national regulatory bodies?

The choices available regarding regulatory development in the EU naturally generate ambiguity. Sir Iain Vallance, Chairman of BT, captures this in a recent quotation:

"… the Commission, and specifically DGIV, must have the power to ensure the single market is completed while rooting out state aids. It has been suggested that the creation of a European Cartel office might offer a partial solution. I personally do not believe the case for this has yet been proven. Nothing in BT's dealings with the Commission has offered unequivocal proof that it cannot handle big competition cases without undue political interference. That said, a pan European agency for telecommunications sector could perhaps be desirable in the longer term as the Single Market strengthens. The alternative of 15 regulators taking 15 different approaches to the promotion of consumer interests and competition does not sit altogether comfortably with the single market ideal. Consistency is essential for a genuine Single Market, but a good and politically realistic halfway house might be a committee of

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6 See Pelkmans 1997 and Hancher 1996.

Accepting that there is variance across countries, size of firms, and nature of markets, we construct a qualitative cost-benefit analysis for a variety of potential EU regulatory regimes. Recognising that regulation must take into consideration trade-offs between equity and efficiency, deter unfair competition, and minimise undue political intervention, we propose a number of regulatory characteristics that facilitate credible and effective regulation and assess their practical implementation for four potential EU regulatory regimes:

- Current Regulatory Regime - European principles, national implementation and shared responsibilities for enforcement.
- Federal Regulatory Commission - European principles, European implementation and European enforcement.
- Regulatory Agency - European principles, European led implementation and enforcement.
- Regulatory Forum - European principles, National led implementation and enforcement.

3.1 Current Regulatory Regime
At present the EU regulatory regime consists of a number of national regulatory bodies that interact with business, consumers, national governments and European institutions. Under these conditions it is possible to see a hierarchical pattern appearing as illustrated in Figure 1. In this multilevel model, firms make representation to the national regulatory authorities - which deal with pricing and consumer issues; national government - which determines the normative goals of regulation; and EU institutions - which focus on regulating the member states via judgements on competition policy and levels of state aid.
Significantly, while the Commission has encouraged liberalisation and exerted pressure on macroeconomic convergence criteria, they have not sought to harmonise formal regulatory institutions. Instead, significant variance still occurs in national regulatory bodies across sector and country - as illustrated in Table 3. Differences have important implications for the speed of liberalisation in each member state and the degree of competition.
### Table 3 National Regulatory Regimes

<table>
<thead>
<tr>
<th></th>
<th>Energy</th>
<th>Telecom</th>
<th>PTT</th>
<th>Rail</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>Direction générale de l'électricité</td>
<td>Autorité de Regulation des Télécommunication (ART) &amp; Ministry</td>
<td>Department Postal</td>
<td>Department Equipment, Transport and Tourism</td>
</tr>
<tr>
<td>Germany</td>
<td>Federal Cartel Office, Ministry and Lander</td>
<td>RegTP</td>
<td>Federal Cartel Office, Ministry and Lander</td>
<td>Transport &amp; Ministry</td>
</tr>
<tr>
<td>UK</td>
<td>OFGEM, Office of gas and electricity markets</td>
<td>OFTEL &amp; DTI</td>
<td>Department of Trade and Industry</td>
<td>OFRAFF &amp; ORR. Legislation passed to create a single Strategic Regulatory Authority</td>
</tr>
</tbody>
</table>

While Germany has thus far preferred to regulate the majority of its sectors via its cartel and commerce ministries, the UK has chosen to establish independent regulatory agencies and France, interestingly, has taken a more mix and match approach to regulation as demonstrated by the developments in the energy sector. While, European economic convergence pressures can be observed, in the spirit of subsidiarity the Commission recognises that NRA's have numerous responsibilities and an expertise of national markets. For example mutual recognition exists in the drafting and granting authorisation to enter a national market; dealing and offering procedures to deal with disputes between operators or between an operator and its customers. Consequently, the existing EU regulatory system provides a large degree of discretion while attempting to ensure that services are affordable and equitable.

Where there has been convergence, as in Telecoms, it would appear that it was more a function of the economic structural aspects of directives than an explicit request for
institutional uniformity. For example, while Article 7 states that: "Member states shall ensure that from the 1 July 1991 the granting of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and surveillance of usage conditions are carried out by a body independent of the telecommunications organisations." Agencies' actual powers and independence from national government vary dramatically.

Clearly, the Commission has chosen to focus on the business issues of market access and structure and has attempted to work with, rather than harmonise, the member states regulatory regimes. In a recent speech Jean Francois Pons the deputy director of Competition at the European Commission observed: "The Commission's notice on the application of competition rules to access agreements in the telecommunications sector" (The Access Notices) deals with the relationship between the application of competition rules and sector-specific regulation as well as procedural issues regarding access agreements in the telecommunications sector. It notably set out (para 28) that the priority should be given to sector-specific regulation applied by NRAs where applicable and subject to the rights of companies to complain under the competition rules".

Significantly, the Commission will not initiate any investigation into infringements of EU competition rules, but rather monitors cases and allows the NRAs to remedy issues. This is consistent with the Commission's belief that EU Competition law incorporates strong elements of subsidiarity. As Sir Leon Brittan observed "subsidarity has always been the central pillar upon which the Jurisdictional divide between the Community and the member states in the field of competition policy is based." However, the Commission will intervene if the NRAs take an unreasonable amount of time (approximately 6 months), or if the case has a substantial Community interest - i.e. affects competition in a number of member states. The Commission therefore monitors NRAs' judgements to check they are consistent with pricing practices in articles 81 and article 82. As a result of the above, the existing

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7 ONP Directive 90/388/EC
8 Laudati 1996 p247 quotes from the Antitrust &Trade Regulation Rep. (BNA), N0.63 at 150 of 30th.
multinational/institutional regulatory procedures score badly in terms of speed and procedural clarity and place undue pressures on new entrants.

It is these new entrants who created the greatest pressure for institutional regulatory reform in Europe. Initially, new entrants promoted the primacy of European competition law as a means of accessing markets - but in the process they created the 'first supranational policy' regime of the EU. Secondly, as Levi-Faur noted the telecommunication industry has promoted "A draft of a directive which aims at creating a self-certification regime, as well as a single "one-stop" conformity assessment procedure, has already been prepared by the Commission. If approved, this new regime will transform the relations between the European manufactures and the Community." This directive would place the issues of safety, health and interoperability of telecommunication equipment under EU consumer protection legislation and would give business a great deal of lobbying flexibility in playing the regulatory game.

By setting only broad duties and objectives, European objectives will give a large degree of flexibility to member states and business interests (who move at different regulatory speeds) and allow for regulatory diversity within Europe. However, while it avoids the problems of the role of national competition law and different ministries/agencies, it creates a level playing field through consistent monitoring and the European courts. The existing EU model has the advantage of allowing national cultural variance to continue and has a medium to high level of political legitimacy, but it suffers from the increasing risk of multiple-level business lobbying, problems of transparency and accountability, and the risk of 'regulatory competition' between national regulatory bodies. Moreover, its over reliance on courts reduces flexibility and the possibility of self-regulation and co-operation.

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9 McGowan and Wilks 1996.
10 Levi-Faur 1999p113
3.2 Federal Regulatory Commission
A possible reform of the existing European regulatory regime would be the introduction of a federal regulatory system. This would give clear powers to the FRC to co-ordinate and legislate on matters of EU economic regulation. As figure 2 suggests, it would operate as an umbrella organisation over similar NRAs and NCAs. This has the benefit of greater clarity of procedure and accountability within the regulatory regime, but it does make the regulatory process more rigid. Moreover, there is a risk that a federal system, that is merely the sum of the NRAs, would suffer in terms of speed and flexibility as a result of 'lowest common denominator' compromises between NRAs and member states. Yet, conversely such a regulatory regime has a high level of legitimacy and credibility if the sole criteria are economic efficiency and represents a fully integrated policy process.

Figure 2: Federal Regulatory Commission

Federal Regulatory Commission

FRC

European Union Political and Executive Bodies

NRAs NCA

Member State Political Bodies

Firms Consumers

Some member states, such as Germany and Italy, have suggested that DG IV could gradually evolve into a European Competition Authority independent of national and European bodies. This would avoid the potential political games that have occurred at the Commission and create a clear regulatory hierarchy. The model most often cited
is the German cartel office with its constitutional political independence and procedural transparency. However, for this new institution to be created and work effectively, we would require significant changes to European treaties. Yet, once created, a federal cartel office would still suffer from limited political legitimacy in member states and enforcement of its judgements would vary - depending upon traditions of competition law.\textsuperscript{13}

In terms of practical application, it is significant that each of the utility sectors would require individual regulatory organisations and that much of the costs of EU regulation in terms of implementation and compliance could still be passed on to NRAs. However, it is reasonable to assume that member states with no tradition of agency would be reluctant to concede power to such an autonomous body. The Commission may also show reluctance to delegate regulatory competencies to another independent regulatory body without some oversight or judicial review.

\textit{3.3 Regulatory Agency}

A possible solution to the risk of national compromises in the regulatory market is to establish a European Regulatory Agency with independence from European Institutions and member states. Such a body could incorporate existing national regulatory bodies to allow for some national variance. Assuming that the European regulatory agency was given judicial powers and autonomy, it would benefit from not waiting for NRAs to enforce common directives. In this uniformed environment it is possible to envisage higher levels of trust between member states.\textsuperscript{14} But within the context of the democratic deficit in Europe a number of important questions must be raised about responsibility and accountability.\textsuperscript{15}

\textbf{Figure 3: European Regulatory Agency}

\textsuperscript{11} Majone 1997.
\textsuperscript{12} See Everson 1996 p210-215. As Majone notes while the German Federal Cartel Office itself is not immune from political influence, the procedures that a government must follow are so transparent that to change a judgement incurs high political costs.
\textsuperscript{13} Ehlermann 1995.
\textsuperscript{14} See Everson 1995, 1997 and Majone 1996.
In recent years, we have seen the introduction of ten such bodies, for example the European Environment Agency, the European Agency for the evaluation of medicinal products and the European vocational training foundation. The agency solution can be justified in efficiency terms if we accept the hypothesis that agents have substantive knowledge and informational advantages. In a policy area like economic regulation where we have a high degree of technical expertise and knowledge, the creation of a specialised body can have large economies of information. Moreover, the creation of an independent agency will allow governments, who are under increasing EU macro convergence pressure, to pass on the responsibility for difficult political decisions regarding subsidies and markets access. Therefore, European agencies by coordinating the European regulatory environment can help to minimises the potential regulatory "races to the bottom" and subsequent market failures between member states.

However, there are a number of problems in creating an agency. In addition to the diversity in government business relations in member states and lack of a European

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16 Kreher 1996.
17 Mitnick 1993.
tradition in the use of statutory competition law, we are faced with no precedence in the European Treaties for new institutional bodies.¹⁸ What is more, as previously noted, the EU has traditionally taken a decentralised and legislative approach to integration and has relied on implementation by member states.¹⁹ It is therefore unlikely that national governments would quietly accept the introduction of independent rule-making agencies at the present time.

With the creation of current regulatory agencies, the Commission has circumvented some of these problems by delegating executive functions to the agencies, while still maintaining oversight and final judicial control. In terms of legitimacy, agencies can be viewed as yet another unelected European institution or as an independent institution of appropriate size and positioning to regulate the single market - only time and court cases will tell. Unquestionably an agency improves the accountability, transparency and clarity of EU regulation as they remove the different levels of enforcement.

3.4 Regulatory Forums: Informal networks of regulation
With the reluctance of many national governments to hand over full regulatory control, co-operation between national regulatory bodies offers a temporary solution and may illustrate the long run benefits of formal co-ordination at the European level. While, at the present time, the Commission recognises that many of the regulatory problems must be tackled at both the national and European level. It also recognises that it is possible to encourage the emergence of transitional regulatory networks. Majone argues, that while individual NRAs are weak and susceptible to domestic political pressure, if they are integrated into a European network of regulators, they gain collective strength. “This is because the regulators have an incentive to maintain their reputation in the eyes of fellow regulators in other countries; a politically motivated decision would compromise their credibility and render co-operation more difficult to achieve in the future.”²⁰ These networks could be informally co-ordinated by voluntary regulatory forums that gradually encourage the standardisation of NRAs and facilitate the establishment of European regulatory norms by defining operating frameworks.

In other cases the Commission has created a number of committees of standing experts. In the case of Telecomm, DGIV and DGXIII have been active in establishing groups like the ONP Committee. Meeting once every 2 months, and made up of member state governments ministries, permanent representatives, NRAs and Commission officials, the ONP Committee is primarily involved in monitoring issues of licensing and implementation but is gradually taking on more substantial regulatory roles. The success of such committees led to the formation of two new structures in October 1999 - The EC Communication Committee (ECCC) which is the sum of member states (i.e. DTI) and the European Union Communication Regulatory Group (EUCRG), which is made up of the Commission and NRAs. The clear division of power and agenda setting roles for these new forums is as yet unclear, however, the EUCRG is expected to have advisory powers and issue comment on draft proposals and is seen by some as a means of establishing best practice on questions of implementation. It is hoped that when the EUCRG draft decisions it will be hard for individual NRAs to distance themselves from the group. The ECCC will deal more with principles than details and provide guidance on interpretations of rules and directives. Again if guidance and advice on the terms of recommendation is formally accepted at the ECCC, it will be hard for NRAs to oppose it. The Commission's role, having established the forums, is to participate but not steer and chairs of each forum will change with the EU presidency. However, while these forums provide the opportunity for co-ordinated EU regulation many of the issues are no longer confined to the single market. As David Edmonds the Director General of OFTEL notes: “We need strong co-operation between NRAs to deal with international issues....I think (International Regulatory Group) IRG has got off to a good start. But we need to find ways of convincing interested parties that the NRAs can and will co-operate so that similar problems get dealt with similarly in all parts of the Community. Otherwise there is bound to be pressure for a Euro-regulator- even though this would be a second-best solution.”
It is hoped that these committees and co-ordination networks will gradually encourage procedural convergence and harmonisation of the regulatory experts' goals. The networks will improve information and personnel flows between countries and create a more stable regulatory environment. Such regulatory developments have the advantage of being incrementally accepted by member states, EU institutions and the public. By avoiding hard political choices and conflicts the networks allow for the development of trust and understanding. While representing the status quo, the incremental forum networks may gradually evolve into more formalised independent European regulatory bodies.

The opaque and at times arbitrary membership of some of the existing EU committees raises a number of questions marks about their accountability and transparency and over time may undermine their legitimacy and ability to enforce judgements. Consequently, while we can expect quicker decision-making and implementation the low jurisdictional transparency will result in calls - from industry and member states - for more formal regulatory arrangements like the ECCC.
4. A qualitative cost-benefit analysis of the regulatory regimes

The criteria we propose for a credible regulatory regime are as follows:

- **Independence.** This refers to the regulator's protection from undue direct political interference in its operations. In the case of an EU regulatory regime it is important to assess the degree to which national regulatory bodies are free from direct political interference in each member state and the degree to which a European regulatory body would be insulated from national pressures pushing-up and European institutional pressures from the Commission and Parliament.

- **Enforcement Powers.** At present the European Commission requires through Article 226 of the Treaty that member states implement directives and has the power under section 228 of the Treaty to fine those states that fail. However, the complexity and lack of speed of legal processes at a European level undermines the credible sanctioning of states and firms. The discussion of the balance of enforcement between the Commission and Member states therefore requires greater clarity, whatever the regulatory regime in place, to ensure that companies face credible deterrents and member states do not attempt to gain regulatory advantage.

- **Legitimacy.** A regulatory regime must avoid ambiguity. It must therefore have clear appeal mechanisms, clear review processes, and consistent judgements. Legitimacy is best achieved through long run commitment to impartial regulation. Any EU regulatory body must recognise that its democratic mandate is limited in comparison with that of an elected member state parliament - or even the European parliament.

- **Accountability.** To maintain independence and credibility it is important that the regulatory bodies are subject to judicial review. However, the advantages of the
various national and European courts, national governments and European institutions must be assessed. Accountability of any new EU regulatory body would face the additional problem of democratic deficit.

- Transparency. Credibility is greatly enhanced in a clear and open system where the process is understood and respected. Transparency facilitates the development of trust and the flow of information. Moreover, it may alleviate some of the accountability problems and reduce the risk of regulatory capture by business.

- Clear and well-defined objectives. This will enable the public and regulated companies to understand the regulatory regime. In avoiding ambiguity, firms will understand better the rules of engagement and policy making should operate more speedily. Clear and well-defined objectives should establish trust for all parties in the system. EU regulation has thus far suffered due to the number of levels and institutions involved in the regulatory process. Moreover, the bureaucratic and often opaque nature of the Commission limits the appeal as a single supranational regulatory body.22

The above criteria constitute a set of principles that should govern a credible regulatory regime. Using these principles we examine the four regulatory regimes according to whether they exhibit high (3 points), medium (2 points) or low (1 point) tendencies towards the characteristics identified. We attribute a simple credibility rating for each of the options and calculate a credibility rating.

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Current Regulatory Regime</th>
<th>Federal Regulatory Commission</th>
<th>Regulatory Agency</th>
<th>Regulatory Forum</th>
</tr>
</thead>
</table>

21 Synder 1993, Weiler 1992
22 For example the Sutherland Report in 1992 expressed a need for the Commission to become more open and transparent and introduce procedures for developing regulatory awareness.
<table>
<thead>
<tr>
<th>Independence</th>
<th>Low-Medium</th>
<th>High</th>
<th>Low-Medium</th>
<th>Low-medium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforcement</td>
<td>Medium</td>
<td>Medium</td>
<td>Low-Medium</td>
<td>Medium-high</td>
</tr>
<tr>
<td>Legitimacy</td>
<td>Medium-High</td>
<td>High</td>
<td>Medium-High</td>
<td>Medium</td>
</tr>
<tr>
<td>Accountability</td>
<td>Low-Medium</td>
<td>Medium?</td>
<td>Medium-High</td>
<td>Low</td>
</tr>
<tr>
<td>Transparency</td>
<td>Medium</td>
<td>Low?</td>
<td>Medium?</td>
<td>Low</td>
</tr>
<tr>
<td>Clarity</td>
<td>Medium</td>
<td>Medium?</td>
<td>Medium</td>
<td>Low-medium</td>
</tr>
<tr>
<td>Credible Rating</td>
<td>11</td>
<td>13</td>
<td>12</td>
<td>9.5</td>
</tr>
</tbody>
</table>

The above show that in terms of our credibility rating a federal regulatory commission is the most effective regulatory structure.

We should recognise political and practical constraints. Which regimes are more acceptable to member states? How fast and effective are the mechanisms of regulation in each regime? Questions like this pose a further question: Credibility at what price? Accepting these practical limits we therefore score the credibility function of the competing regulatory systems in terms of:

- **Speed**: The ability to co-ordinate policy goals across Europe, mediate between the various member states goals and make quick competition judgements.

- **Flexibility**: While it is important for a level playing field in a single market, the new regulatory regime must be sensitive to cultural and institutional variance within the EU.
• Jurisdictional transparency: Provide a clear understanding of the policy process, the points of appeal, who makes decisions and why. At present the European Treaty requires Regulations, Directives and decisions adopted by the EU to have accompanying statements outlining the reasoning for legislation. However, there would appear to be discrepancy between the member states legal requirements - with direct consequences for business action and regulatory circumvention.

• One size fits all: How universal is the regulatory regime? Are the skills and institutional access points similar across: firms, sectors and countries?

• Political Implementation. What regulatory institutions are acceptable and more likely to be accommodated by member states?

In Table 4 we calculate the credibility cost of each regulatory regime. The scoring is as before and in addition assigns No (zero), Yes (1), Maybe (0.5), negative (-1), positive (1), Neutral (0), and Status Quo (0).
<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Current Regulatory Regime</th>
<th>Federal Regulatory Commission</th>
<th>Regulatory Agency</th>
<th>Regulatory Forum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Speed</td>
<td>Medium</td>
<td>Low</td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td>Flexibility</td>
<td>Medium</td>
<td>Low</td>
<td>High</td>
<td>Medium-high</td>
</tr>
<tr>
<td>Jurisdictional Transparency</td>
<td>Medium</td>
<td>High</td>
<td>Medium</td>
<td>Medium-Low</td>
</tr>
<tr>
<td>One size fits all Firms</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Maybe</td>
</tr>
<tr>
<td>Industries</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Countries</td>
<td>Maybe</td>
<td>No</td>
<td>Maybe</td>
<td>Maybe</td>
</tr>
<tr>
<td>Political Reality</td>
<td>Status Quo</td>
<td>EU -ve, States -ve</td>
<td>EU +ve, States -ve</td>
<td>EU: Neutral, States: Neutral</td>
</tr>
<tr>
<td>Credibility Costing Score</td>
<td>6.5</td>
<td>3</td>
<td>10.5</td>
<td>9</td>
</tr>
<tr>
<td>Aggregate Score</td>
<td>17.5</td>
<td>16</td>
<td>22.5</td>
<td>18.5</td>
</tr>
</tbody>
</table>

5. Concluding remarks

With ongoing liberalisation in the single market and growing competition and regulatory challenges, there are increasing demands for pan-European regulation. On the basis of our qualitative analysis we advocate that Europe will be best served by adopting an Agency regime. However, while agencies perform well in terms of our simple regulatory topology and practical application, some political and legal questions still surround them in the European context.
Viewed as part of a medium term solution we can expect EU institutions to continue to encourage some form of regulatory convergence/uniformity in member states and for NRAs to put in place the best regulatory regime for consumers in the respective countries within a broad European framework of principles. Much of this EU regulatory convergence will be initiated via the introduction of liberalization directives and Reviews (such as the 1999 Telecom Review). We can also expect the EU institutions to be more proactive in raising regulatory questions via the use of resolutions and recommendations. As David Edmonds notes: “As competition grows and deepens, (NRA) can rely increasingly on competition law. But (we are) likely to need sectoral rules to deal with certain competition issues for some time.”

In sum, we can expect multiple speed regulatory harmonisation across sectors and countries as it is doubtful if one model can fit all scenarios. However, whatever the speed of change there is a need for a clear regulatory process that governments, regulators and businesses can live with. Although, European agencies may ultimately provide this structure, flexibility and expertise, current political reality would make this difficult. Few NRAs or member states would feel comfortable with this distribution of power and the European Commission would appear to favour regulatory forums in line with the concept of subsidiarity.