REGULATING THE REGULATORS?
AN ASSESSMENT OF INSTITUTIONAL STRUCTURES AND PROCEDURAL RULES OF NATIONAL REGULATORY AUTHORITIES

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ABSTRACT

Regulation has been considered to be the tool for governments to control utilities industries like the telecommunications one. Based on the social principle of *public interest* and economic objectives, countries have developed divergent regulatory schemes, which were under the operation of governments for quite a long period. Chapter 1 sheds light on the rationale of regulation and presents the way that over the time, policy, regulation and operational practices have been identified as separate, though interrelated, mechanisms, which have to be undertaken by different bodies. On this basis, national regulatory authorities (NRAs) emerged.

However, no uniformity can be identified in the institutional structures of regulators introduced on worldwide basis. The underlying reason is that different political imperatives, institutional endowments and administrative practices have led to the development of abundant types (i.e. multi-sector and single-sector regulators) and forms (e.g. independent and autonomous regulatory Commissions) of regulatory bodies. Taking this on board, chapter 2 analyses the current models of institutional regulation of telecommunications and gives an insight of the interaction of NRAs with the executive, legislative and judicial branch, other governmental agencies and with the main stakeholders.

The main issue though regarding the aforementioned types and forms is the behaviour and the role of these regulators within the industry. Independence and isolation of any political capture are important qualities for building up a credible and efficient regulatory role. However, they are not enough. The legality of a regulator has not been in question; what has always been debatable is his legitimacy, which has to be proved in practice. Therefore, structural accountability must be gained. Chapter 3 shows that the most efficient way to achieve this goal is to invest on transparent, open and participatory regulatory working-methods, strong implementation and enforcement mechanisms and employ the appropriate legal safeguards, such as appealing processes, in order to keep the right balance between the regulators and the regulated. Nonetheless, this is not a static procedure; it is a dynamic one, which demands daily checks and balances of the regulatory mechanisms for establishing the sustainable legitimacy of a national regulator.

The mutation of the telecommunications industry from a monopoly to a fully liberalised and competitive market has caused rigid changes in the institutional structures and regulatory techniques around the world. The current trend, ratified officially by the European Community, is deregulation of the industry due to the convergence of technologies and the phenomenon of economic globalisation. Therefore, based on the fact that policies and facts of the market have a crucial impact on regulation, scepticism concerning the role of national regulatory authorities within the new legal framework has arisen. Policy-makers around the world struggle to find the optimal institutional form for national regulatory authorities within the new e-communications era. The last chapter subsequently assesses future developments with respect to regulatory governance in the electronic communications market and contemplates the best way forward. Ideas such as abolition of authorities and further reliance on mechanisms of competition law and thereby on competition authorities, establishment of a European Regulatory Authority with conferred regulatory powers within the internal market or convergence of current independent regulators in order to create one, multi-sector one with extended powers and a wide range of activities within the market have been suggested.

However, the above - mentioned suggestions should be faced with caution and their possible efficiency should be checked against the pursued policy objectives. No matter which type and form of national regulatory authority a country adopts, the prime regulatory objective should be the establishment of trustworthy, sustainable and legitimate structure and functions for the authority in order to serve specific policy goals, including the *public interest* one, efficiently.

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INTRODUCTION

The last two decades of the 20th century witnessed radical changes in the global telecommunications industry. The successful transition from the monopolistic telecommunications markets into competitive ones, the liberalisation of the telecommunications sector, and the introduction of pro-competitive and deregulatory telecommunications policies, constitute the inevitable consequence of technological revolution and restructure of the global economy.

The emergence of the Internet and the growth of the mobile and other wireless services, led to the introduction of new service providers to telecommunications markets. In addition, the proliferation of international trade in telecommunications services and the need for more private sector investments in order to expand and upgrade telecommunications networks have prompted many countries to revisit their policies and regulatory structures.

The transformation of existing regulatory regimes has never been an easy task. It comprises the restructuring of the two basic components of regulation, "regulatory governance"[1] and "regulatory incentives"[2]. The former includes putting restrictions on the discretionary scope of regulators, via societal and legal mechanisms and striking the right balance between such restrictions and the missions that the regulatory institutions serve. The latter incorporates rules, which directly affects the behaviour of the industry (i.e. rules related to pricing, market entry, interconnection). Thus, regulatory governance restrains the behaviour of regulators and the regulatory incentives are meant to influence the industry's behaviour. In the era of Information & Communications Technologies (ICT) convergence, both of these elements are essential, not only for the transition from a monopolised telecommunications market to a competitive, fully liberalised and deregulated electronic communications (e-communications) one, but also for the stable and sustainable function of such a market. Although during the 1990s the number of national telecommunications regulatory authorities (NRAs) increased from 12 to 90

[1] Levy & Spiller, Regulations, Institutions and Commitment: Comparative studies of telecommunications, Cambridge, Cambridge University Press, 1996, p. 4.
[2] Ibid.

around the world[3], most policymakers concentrated mainly on setting the regulatory incentives for the industry overlooking the importance of the regulatory governance rules.

However, the impact of the regulatory incentives on the market is evident only when the regulatory governance rules have been put into the right framework with all the necessary institutional safeguards (independence, autonomy, transparency, accountability, credibility, proportionality). Not surprisingly, this one-way approach made clear the need for a complementary focus on the institutional structure and the decision-making mechanisms of the NRAs around the world.

The Reference Paper[4], a unique feature of the 1998 World Trade Organisation (WTO) Agreement on Basic Telecommunications Services[5], is a binding statement of pro-competitive regulatory principles, which underscores for the first time at an international level the importance of the desirable governance structure of regulation:

"The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants." (Article 5)

This paper will try to shed light on the divergent institutional structures of NRAs and assess the current decision making procedures employed by most regulators in a mutating e-communications market. Chapter one will present the government's relations with the telecommunications industry by analysing the objectives and policies of telecommunications regulation. Chapter two contemplates the current models of institutional regulation of telecommunications and gives an insight of the interaction of NRAs with the executive, legislative and judicial branch. In addition, the relationship of the NRAs with other governmental agencies and with the industry will be considered. Furthermore, chapter three will examine the working methods and the implementation and enforcement mechanisms followed by the regulators. The last chapter is subsequently dedicated to an overall assessment and a discussion of future developments regarding the regulatory governance of the e-communications market.

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[3] H. Intven, McCarthy Tetrault, Telecommunications Regulation Handbook, infoDev, World Bank Group, Washington, 2000, p. 1-1.
[4] (WTO) Reference Paper (1998): www.wto.org/english/news_e/pres97_e/refpap-e.htm
[5] It is the "Fourth Protocol" which consists an integral part of the General Agreement on Trade in Services Fourth Protocol (GATS, 1996), available online at: www.wto.org/english/docs_e/legal_e/legal_e.htm#services

However, the starting point and the principal question is why regulate the telecommunications industry in the first place.

CHAPTER 1: RATIONALE OF REGULATION

The right of governmental regulation in particular of vital industries such as the telecommunications one has been ratified for well over a century and governmental interference has been seen as a way to achieve a number of different social and economic objectives.

St. Thomas Aquinas in the Middle Ages proclaimed the doctrine of *"justum pretium"* ("just price"), which reflects the ideal of social justice applied to economic life. The English common law identified *"common callings"* charged with special responsibilities, if suppliers or traders were serving the public. During the 1670s, Lord Matthew Hale considered the law of business to be *"affected with a public interest"* in *"De Portibus Maris"* and *"De Jure Maris"*. He made clear that once facilities such as common carriers, inns, wharves, ferryboats and cranes were serving the public, they were affected with a public interest and they were not regarded as *"juris privati"* only.[6] Even Adam Smith, the initiator of freedom of trade, recognised that his *"laissez-faire, laissez- passer"* theory could not be applied to all classes of business, as it could not effectively protect the public interest. In this way, he classified the *"common callings"* as a whole separate group of business, which falls within the government's special attention.

In the U.S.A., the right of government to regulate was certified in the Supreme Court in the *Munn v. Illinois*[7] case in 1877. Munn was one of the nine owners of fourteen grain elevators in Chicago and he was running his business without needing any franchising or charter from the State. Midwestern farmers had to use the elevators in Chicago in order to ship their grain to more distant markets. By agreement, the elevator owners set quite high prices. The Illinois government intervened and established lower maximum prices by statute. Munn challenged the state's right to regulate.

[6] William. H. Melody, Chapter 2: Policy Objectives and Models of Regulation in "Telecom Reform: Principles, Policies and Regulatory Practices", Den Private Ingeniørfond, Technical University of Denmark, Lyngby, 1997, p. 12.
[7] Munn v. Illinois, 1877. 94 U.S.

The Court pointed out that Munn was controlling a gateway of commerce and was taking a toll from all who wanted to pass. It quoted Lord Hale's theory and actually established the widely known *"public utility principle":*

"When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."[8]

The Court took a step further and recognised that the right to regulate *"may not be made so by the Constitution of Illinois or this statute, but it is by the facts"*[9].

The public utility principle constituted the milestone for the regulation of what Lord Hale recognised as *"business affected with public interest"*. Traditionally one of the industries identified as public utility has been the telecommunications one. However, the government's intervention in the telecommunications industry, yet quite strong, has developed and expressed in different ways around the world and was initiated by divergent regulatory objectives.

1.1 REGULATION OF TELECOMMUNICATIONS INDUSTRY

The public utility classification of telecommunications is founded on economic, social and technological developments. If a demand for a specific telecom service is regarded as common necessity for the public and the market conditions are such that the public cannot obtain the reasonable services at reasonable prices, then the government can acquire a regulatory role in order to ensure that they can. The most common example of a public utility is a monopoly supplier of a public necessity. Even though the supply conditions do not have to formulate a monopoly, it has been the abuses of monopoly power that have driven the governments to regulate (like in Munn's case).

The economic and social perspective of the public utility principle created two different governmental regulatory approaches towards telecommunications. Most countries, considered the telecommunications services as government social

[8] Ibid, 113, 126
[9] Ibid, 132

services, which have to be made available to everyone on reasonable terms, whether there is a profit or not, and thus they are not to be supplied by private entities. In this model, the justification for government regulation can be found in the social goal of *"universal service"*. Some others, including the U.S.A., followed the business model. Based on that model, the provided services must satisfy the consumer demand and be offered under conditions of optimal economic efficiency. Under this perspective, the telecommunications network is extended to the limit of economic efficiency and not to the limit of social need. Therefore, this view of economic policy emphasises the importance of reliance on market forces in order to promote efficiency and innovation and demands for another kind of justification of governmental regulatory intervention. In this case, the government intervenes in order to avoid market failures. Such failures can be seen in situations where the market mechanism is unlikely to bring the desirable results without regulatory support.[10]

No matter which philosophical standpoint is applied by governments to justify their intervention in the telecommunications industry, experience shows that most countries came to broadly similar results. In addition, it was obvious that economic efficiency can be achieved through the liberalisation of the telecommunications industry and the enhancement of competitive market forces. On the other hand, the telecommunications infrastructure has been constantly upgraded in order to extend the network and the provided services to more people and minimise the digital divide in the information society. Ultimately, the ongoing telecommunications reform throughout the 20th century inevitably led to the convergence of the economic and social models in the agenda of governmental objectives.

The regulatory objectives are similar throughout the world, although priority can be given to different goals depending on economic, political and social needs. For instance, in developing countries, where access to the telecommunications services is often limited especially in rural areas, the policy objective of *"universal service"* and the development of the telecommunications network's capacity are vital.

[10] Examples of market failures are the divergence between the market result and the governmental distributional goals (insufficient expansion of telecommunications services in rural areas), any anti-competitive abuse of a monopoly in a part of the telecommunications industry in order to obstruct competition in another one and the uncertainty/loss of necessary financial investments for the upgrade and proliferation of the telecommunications industry. For more information, see "The Changing Role Of Government in an Era of Deregulation", Briefing Report: Options for Regulatory Processes and Procedures in Telecommunications, ITU Regulatory Colloquium No.1, Geneva, Switzerland-February 17-19, 1993, May 1993, p. 8-10.

However, this goal is similarly important to industrialised countries. In the U.S.A., the *"universal service"* provision in the Telecommunications Act 1996 (The Telecommunications Act 1996)[11] is recognised as one of the primary policy objectives within the telecommunications market. However, the predominantly economic objectives of the American public policy are clearly set within this statute; in particular, the main goals are the removal of government-imposed barriers to market entry[12], the facilitation of access the incumbent local telephone networks[13] and the encouragement of the deployment of advanced telecommunications services[14].

On a regional level, the Framework Directive 2002/21/EC[15] sets clearly the pursued policy objectives in Article 8:

"[…] shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services […], […] shall contribute to the development of the internal market […], […] shall promote the interests of the citizens of the European Union […]".

It is clear that the European Commission has set a harmonised combination of public policies in relation to the e-communications industry. The same applies to the latest international initiative undertaken in this sector. The WTO Reference Paper[16] highlights the most crucial objectives, as being the facilitation of interconnection, enhancement of competition and prevention of anti-competitive practices, as well as universal service obligations for a successful telecommunications industry.[17] The following table summarises the most important and widely employed regulatory objectives around the world:

[11] Telecommunications Act 1996, Public Law No. 104-104, p. 110 Stat. 56,(codified in scattered sections of 47 U.S.C.), Section 254 of 47 U.S.C.:uscode.house.gov/usc.htm
[12] Ibid, Section 253 of 47 U.S.C
[13] Ibid, Section 251, 252 of 47 U.S.C
[14] Ibid, Section 706 of 47 U.S.C
[15] Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L108/33, 2002
[16] See note 4
[17] P.Cowhey and M. M. Klimenko, "The WTO Agreement and Telecommunications Policy Reforms", p.5 et seq: www.sice.oas.org/geograph/services/cowhey.pdf

Promotion of universal access to basic telecommunications services
Fostering of competitive markets in order to promote: efficient supply of telecommunications services, good quality of services, advanced services and efficient prices
Active prevention of abuses of market power, where competitive markets do not exist or fail
Creation of favourable climate for the promotion of investment in order to expand telecommunications networks and stimulate technological innovation
Promotion of public confidence in telecommunications markets through transparent regulatory processes
Protection of consumers rights, including privacy rights
Promotion of telecommunications connectivity for all users through efficient interconnection arrangements
Optimal management and use of scarce resources, such as the radio spectrum, numbers and rights of way
Assurance of non-discriminatory policies within the telecommunications industry ("level playing field for all participants")

Source: infoDev and ITU Colloquium No.1, See notes 3 and 10.

However, the formulation of policy and regulatory objectives is not considered to be the most difficult task; their effective implementation has always been challenging. It is beyond any doubt that the relationship between the government and industry is regarded as being one of the key points of future success, which highly depends on the institutional structure of regulation. In other words, who is eligible and responsible to regulate?

1.2 MODES OF REGULATION

It is apparent that there are three sets of activities that are essential for the function of any industry, in particular the telecommunications one; policymaking, regulation and operation management. No matter how distinct they appear to be, history proves that they have been widely exercised by the same institution, the government. It was generally believed that the policy maker could at the same time materialise the policy objectives and supply telecommunications services to the public. The supply of services could either take the form of government ownership of a public telecommunications operator, like in the U.K. or of a private monopoly protected by the government like in the case of the U.S.A. No need was perceived for allocating these activities to different bodies. The same governmental officials were involved in setting and implementing the policies as well as operating telecommunications services. A closer view of the telecommunications regime in the United Kingdom testifies this inherent model of regulation.

1.2.1 THE U.K. EXPERIENCE

Until 1660, when King Charles II was restored to his thrones in England and Scotland, anyone could operate a postal system within U.K. However, King Charles II nationalised the postal services and created a monopoly under the auspices of the General Post Office (GPO)[18], a government department headed by a government minister (the Postmaster General). The monopoly over the delivery of letters throughout the UK lasted for more than 300 years. It was not until the passage of the Postal Services Act (2000)[19] that a licensing system was established as the foundation for operating postal services. In the nineteenth century, the emergence of

[18] "The GPO was not based on legislation or Charter. It was established under the Royal Prerogative and the monopoly appeared to be taken by the King and was not conferred by Parliament or legislation". For more information see John Angel, "The telecommunications Regime in the United Kingdom", p. 53 et seq., in "Telecommunications Law", edited by I. Walden & J. Angel, Blackstone Press, 2001.
[19] Postal Services Act, 2000, Ch. 26, HMSO, available online at: www.hmso.gov.uk

the telegraph system led to a series of Telegraph Acts[20], which set the legal framework for the operation of the telegraph system. Consequently, telegrams were treated as letters and they inevitably fell within Postmaster General's monopoly and any commercial development was allowed under his sole control.

In 1876, the invention of the telephone and the development of the telephone system created a whole debate as whether telecommunications services should be regulated under the Telegraph Acts and thus fall within Postmaster General's exclusive privilege. In *Attorney General v. The Edison Telephone Company of London (Limited)*,[21] the company failed to show the technical differences between the telegraph and the telephone and the conclusion was drawn that telecommunications services should be regulated under the telegraph regime and thus any telecommunications operations should be controlled by the Postmaster General through a licensing system.

Although up to the end of the 19th century, the GPO was in charge of any developments in the communications sector, a move towards privatisation of services supply under his control can be witnessed. Nevertheless, at the beginning of the 20th century, the threatening expansion of several private telephone networks led the GPO to nationalise the telecommunications sector by not renewing any granted licences. For more than 50 years, the GPO and thus the government had a monopoly in the UK telecommunications services.[22]

Until the second half of the 20th century, there is no trace of any effort to clearly delegate a specific and independent body with regulatory powers. The GPO was at the same time the policy maker and the regulator of the existing communications market. The Post Office Act (1969)[23] signified the first steps towards the independence of the GPO from the government. The GPO was established as a statutory corporation called the *"Post Office"* with two divisions dealing with postal and telecommunications services respectively and the position of the Postmaster General was abolished. The head of the Post Office was the Minister of Posts and Telecommunications, who was appointed by the government. In essence, that Act

[20] Telegraph Act, 1863, Ch.112, Telegraph Act 1868, Ch.110, Telegraph Act 1869, Ch.73, repealed by the Post Office Act, 1969, ss 137 (1), 141, Sch. 8, Pt. I, Sch. II, Pt. II, HMSO
[21] AG v. Edison Telephone Company of London, 1880, 6 QBD 244
[22] The only exception was the Kingston upon Hull City Council, whose licence was renewed in the year of main nationalisations (1912) and could run a telecommunications network in the Hull area.
[23] Post Office Act, 1969, Ch. 48, HMSO

provided the foundation for the independence of the organisation from the government's daily control and it can be seen as the start of the liberalisation process, which continued until the end of the 20th century.

The Post Office was allocated with licensing powers, which even though was not considered to be a regulatory issue, it actually played an important role in the evolution of perceptions regarding the regulatory structure. The British Telecommunications Act (1981)[24], a statute that aimed at the introduction of competition in the telecommunications market, allowed the restructure of the Post Office and formalised the split of this organization into two different corporations responsible for two different markets within the same industry. However, the landmark piece of legislation in the British telecommunications history was the Telecommunications Act (1984)[25]. Not only did it pave the way for the rapid establishment of competition in the telecommunications industry and privatisation of British Telecommunications but also officially recognised the need for an independent regulator to implement policies and monitor changes:

"[…] provide for the appointment and function of a Director General of Telecommunications […]"[26].

Therefore, in U.K. the split among the policymaking, regulation and services supply was clearly established in 1984. In July 1984, Professor Bryan Carsberg was appointed as Director General of Telecommunications and the Office of Telecommunications (Oftel) was officially established on 1 August 1984.[27]

1.2.2 THE U.S.A. EXPERIENCE

On the other side of the Atlantic, the market and technological changes since Bell's invention led to a different evolution not only of the industry but also of the regulatory institutions. In the U.S.A., the telephone was developed within the private sector just like the telegraph network. However, it was early perceived that a specific body should regulate the telecommunications industry. The distinction among the set

[24] British Telecommunications Act, 1981, Ch. 38, HMSO, available online at: www.hmso.gov.uk
[25] Telecommunications Act, 1984, Ch. 12, HMSO, available online at: www.hmso.gov.uk
[26] Ibid," Long Title"
[27] A brief history of recent UK telecoms and Oftel: www.oftel.gov.uk/about/history.htm

of activities was clear on both federal and state level. In 1887, the Interstate Commerce Commission was established as the first federal regulatory body. It was succeeded by the Federal Communications Commission (FCC), which was established by the Communications Act in 1934[28] and it currently remains the federal regulator of the telecommunications industry.

1.2.3 THE E.U. EXPERIENCE

On a regional level, the delegation of regulatory powers to independent bodies, which are separated from either the government or the incumbent telecommunications operator, was considered to be one of the key points for the future of liberalisation of the telecommunications industry within the internal market. The starting point was the Green Paper in 1987[29], which drew the conclusion that a regulator with distinct powers is necessary in a competitive market. Therefore, the notion of the national regulatory authorities (NRAs) emerged at a supranational level, although some of the Member States had already established NRAs (i.e. U.K in 1984).

In particular, the Equipment Directive 88/301/EEC[30] required that all the included obligations to be *"entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector"* (Article 6). In fact, that Directive ratified what was held earlier that year in the European Court of Justice in *Régie des Télégraphes et des Téléphones v. GB-Inno-BM SA* case[31]. The Court ruled that the Article 30 (now 28) of the EC Treaty excluded an entity from having the power to approve telephone equipment for connection to the public network without being susceptible to legal challenge. Thus, the Court identified the importance of the separation of the regulation from the

[28] Communications Act, 1934, Public Law No. 416, 48 Stat. 1064 (codified in Section 47 of U.S.C): uscode.house.gov/usc.htm
[29] Towards a Dynamic European Economy, Green Paper on the development of the common market for telecommunications services and equipment, COM (87) 290, June 1987
[30] Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ L 131/73
[31] Régie des Télégraphes et des Téléphones v. GB-Inno-BM SA (Case C-18/88), 1991, ECR I-5941

operation management. The Services Directive 90/388/EEC[32] as well as the Open Network Provision (ONP) Framework Directive 90/387/EEC[33] and the subsequent ones regarding the application of the ONP to leased lines 92/44/EEC[34] and to voice telephony 95/62/EC[35] repeated the principle of separation of regulatory functions from operational ones. In fact, Directive 90/387/EEC[36] required Member States to notify their designated NRAs to the European Commission by 13 December 1996.

In addition, Directive 97/51/EC[37] took a step further and provided also for the autonomy and accountability of regulators:

"…whereas the national regulatory authorities should be in possession of all the resources necessary, in terms of staffing, expertise, and financial means, for the performance of their functions…" (Recital 9) and a decision of a NRA must be capable of being repealed by any affected party to *"a body independent of the parties involved"* (Article 5a (3)).

Nonetheless, the required independence does not necessarily mean structural separation of the regulatory body from the policymaker, the government. At least this is not one of the prerequisites according to the EU law. Due to the divergent institutional models of regulation within the European Union, the European Commission embraced all the developed structures under two basic conditions: a) all NRAs must be distinct and independent from the telecommunications industry and b) specific institutional safeguards (constitutional or statutory) must be applied in order to avoid any kind of regulatory capture. The EU's perspective of regulatory structure is reiterated in chapter II of the Framework Directive 2002/21/EC[38].

The introduction of limited competition in 1992 till the full liberalisation of the telecommunications sector in 1998 within the internal market has inevitably led to a re-organisation of governmental institutions involved in this sector. Policymaking,

[32] Article 7 of the Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192/10
[33] 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 L 192/1
[34] Recital 14 of the Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, OJ L 165/27
[35] Article 2(2) of the Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony, OJ L 321/6
[36] See note 33.
[37] Article 5a inserted into Directive 90/387/EEC by the 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 L 295/23
[38] See note 15

regulation and supply of services were identified as separate functions, which have to be allocated to distinct and independent bodies.

1.2.4 OVERVIEW

Ultimately, NRAs in the telecommunications sector flourished during the last 10 years, as they were regarded as an essential mechanism in the effort towards the proliferation of full competition within this industry. However, the three-level separation of the function of the telecommunications industry, which constitutes the standard mode of regulation (Table I), has been employed in diverse ways around the world due to different political, technological, legal and institutional standards.

FUNCTION	RESPONSIBLE ENTITY
Policy development	**Executive Branch or Government Ministry**
Regulation	**National Regulatory Authorities**
Operation of networks, Provision of services	**Public Telecommunications Operators (PTOs) - privately/commercially operated**

Table I: Standard mode of regulation Source: ITU

Currently, the trend is towards deregulation. Notions such as *"light-touch regulation"* and *"reliance on general competition law"* are adopted in order to face the challenge of ICT convergence. This deregulatory movement raises substantial issues in relation to the necessity of NRAs in the new era, their role and responsibilities. Nonetheless, this paper will consider the fact that this generic reform of the industry influences primarily the recently established institutional structures of regulation. Policymakers around the world are trying to renovate NRAs and are seeking for the optimal structural model of e-communications regulation in the 21st century.

Taking this on board, the following chapter based on the principles of independence, autonomy and structural accountability will discuss the most common

types of NRAs and explore the relationships between NRAs and other bodies involved in the telecommunications industry. This examination can offer a better understanding on what the governments should bear in mind when designing and structuring a regulatory body.

CHAPTER 2: INSTITUTIONAL STRUCTURES AND ISSUES OF NATIONAL REGULATORY AUTHORITIES

Once the policy objectives are set and the split among the telecommunications policy, regulation and operations is guaranteed, the establishment of a regulator is the next step. The main point in setting up a NRA appears to be the assurance of its isolation from any kind of external or internal pressure. Specific safeguards have been employed in order to establish the independence of regulators. These can be found in a country's constitution and administrative law, in the legal mandate that founds the NRA, or even in the case law. However, signs of regulatory capture are present even in the cases of the most proclaimed and well-safeguarded independent regulators. On the other hand, structural accountability of a regulator is the principal prerequisite in democratic societies; transparency in the institutional organisation of a regulator is considered to empower the agency's legitimacy and thus enhance its credibility in the public eye. Experience shows that even though regulators around the world share the same objective of striking the right balance between their organisational independence and accountability, different trends have been emerged regarding their scope and organisational structure. This pluralism of regulatory structures is derived from different constitutional, legal, political and economic characteristics of each country.

2.1 TYPES OF NATIONAL REGULATORY AUTHORITIES

Regarding the scope of regulatory agencies there are three main bases on which they can be organised; **Industry-specific**, in which there is a separate agency for each industry-such as telecommunications in most E.U. Member States (i.e. Oftel in U.K. and the National Post and Telecommunication Agency (NPTA) in Sweden), **sector-specific**, in which there is a regulator for each more broadly defined sector-such as the FCC in the U.S.A. and **multisector**, in which there is one regulator for all or most utility industries-such as the State Public Utility Commissions (PUCs) in the

U.S.A. and the Office of Communications (OFCOM)[39] in U.K. There is a debate on whether multi-utility regulators are the optimal type of regulation in competitive, deregulated and converged markets.

Multi-sector regulators (MSRs) offer several potential advantages in comparison to single-sector ones. First of all, MSRs can reduce political capture, since the establishment of an agency with responsibilities for more than one sector will loosen its dependence from the relevant line ministries. Moreover, the broader range of bodies, which are regulated by a MSR, are more likely to resist any political intervention in a decision in one sector, since that decision can set a precedent for other sectors. Such precedents create more certainty and predictability and ultimately attract more potential investors. In addition, industry capture can be also minimised since a MSR can avoid the lobbies' influence in its rule-making process.

Economies of scale in the use of experts (i.e. one set of lawyers, economists and analysts for multiple industries) and in administrative and support services appears to be important, especially when there is lack of regulatory expertise and the regulatory costs can affect the affordability of basic services. Furthermore, a MSR is regarded as an effective means of dealing with converging sectors, such as the telecommunications and the broadcasting ones, and with the bundled provision of services, the so called *"one stop shop"*, where the same company provides for instance both electricity and telecommunications services. There are even more points in favour of establishing a MSR such as coordination of requirements among sectors, harmonisation and uniformity of rules and procedures, an essential element for avoiding market distortion, which is caused by the application of different rules in competing markets, flexibility in dealing with peak load periods and gain of profound and extensive regulatory knowledge management (know-how).[40]

By contrast, the supporters of single-sector regulators underline potential dangers arising from the adoption of such a model. A MSR can be easily manipulated by a dominant multi-industry player and the dominant ministry of the entire MSR can increase the possibilities of political capture. Moreover, precedents in

[39]The organisational establishment of OFCOM was introduced through the Office of Communications Act, 2002, available at: www.legislation.hmso.gov.uk/acts/acts2002/20020011.htm but it will take its regulatory action on 29 December 2003.

[40] T. Schwartz & D. Satola: "Telecommunications Legislation in Transitional and Developing Economies", p.31-32, October 2000: www.worldbank.org. For a further discussion see W. Smith, "Utility Regulators-Roles and Responsibilities", Viewpoint No. 128, October 1997: www.worldbank.org/html/fpd/notes/128/128smith.pdf

one sector do not automatically qualify for application in other sectors. They might be inappropriate for a specific market and thus lead to negative financial results. However, this can be easily mitigated by establishing sector-specific units underneath a MSR, or by keeping them in case the MSR is created by the merger of pre-existing independent single-sector regulators[41]. Yet, it seems that this way of overcoming the obstacle of applying precedents in a whole range of markets opposes to the internal uniformity, which is the institutional essence of MSRs.

In addition, line ministries can be reluctant to accept the idea of a MSR and thus there can be subsequent difficulties in reaching agreement on the institutional structure of a MSR, its level of independence, and the allocation of responsibilities between the ministries and the regulator. Such issues can lead to severe delays and problems in the establishment and the function of a regulator and consequently reducing its credibility and legitimacy. Nonetheless, the key disadvantage can be found in the way a government chooses to establish a MSR. There are at least three possible ways of introducing a multi-sector approach. A MSR can be established from the outset and gradually different sectors can be brought under its jurisdiction, once liberalisation is introduced in these sectors, or an existing sector-specific regulator can be the core for the MSR and progressively expand the legal mandate of the single-sector regulator in order to cover new sectors. The feasibility of the latter option is somewhat questionable.

Currently there are regulators for each industry/sector in most countries around the world. Consequently, in order for this scenario to work, some regulators will have to be abolished gradually. Not surprisingly, this can provoke reactions from the political scene and the industry and create uncertainty and discomfort to consumers. However, according to the standards around the world, the most feasible way of introducing a MSR is via merging the existing single-sector regulators (i.e. Oftel, the Radio Authority, etc. in U.K.). This strategy appears to be a double-edged sword, since existing regulators with vested powers and incentives can be negative towards this kind of merger and the efficiency and credibility of a MSR. In particular, during the early stages, such effects can be minimised by the reluctance of co-operation and the mistrust among the merged regulators.

[41] Ibid and D. Sommer, “Multi-Utilities: Policy”, Viewpoint No. 228, March 2001: www.worldbank.org/html/fpd/notes/228/228Somme-327.pdf

Irrespective of which of the three aforementioned bases are chosen by countries to establish such an authority, the task can be quite dangerous, since political imperatives and market powers usually control such initiatives and determine their success. However, the core of the issue under discussion is actually found in the level of independence and autonomy attached to the regulator primarily from the government and subsequently from the industry.

2.2 FORMS OF NATIONAL REGULATORY AUTHORITIES

The most common institutional forms of NRAs in most liberalised jurisdictions fall within these categories:

a) Independent, autonomous, semi-judicial commissions such as the FCC in the U.S.A,

b) Semi-autonomous, independent regulators or NRAs outside a Ministry, such as Oftel in U.K., usually headed by an independent official such as the Director General (DG) of Telecommunications,

c) Separate NRA within a Ministry such as L' Autorité de Régulation des Télécommunications, (ART) in France,

d) A government ministry, which is the policymaker at the same time such as the Ministry of Posts and Telecommunications (MPT) in Japan, or

e) No NRA for telecommunications at all such as in New Zealand, where the Commerce Commission and the Courts have surrogated the role of a telecommunications regulator.

The first structure of a NRA is set up either by the executive branch or the legislature and it is delegated with a high degree of independence regarding its decision making process. For instance, the FCC has such broad powers that it operates much like a court of law. This type of commission is not headed by one single official; it actually constitutes a collegial body of five Commissioners (no more than three from the same political party), who are nominated by the President and then approved by the Senate. The FCC's annual budget has to be approved by the Congress and the Commission is self-financed for the most part. In fact, most of the

FCC's budget is derived from licence fees than governmental appropriation[42]. The FCC's independence from political issues is so clearly defined that its general public acceptance is quite strong. The FCC stands as an unbiased regulator and its institutional structure is solidly founded on the U.S. Constitution and the Communications Act (1934)[43]. Its autonomy is strengthened by the fact that the FCC can recruit its employees and make any necessary personnel changes. On the other hand, its structural accountability is ensured by the clear procedural rules led down in the U.S. Constitution and administrative law[44], the U.S Criminal Code[45] and Codes of Conduct[46]. In addition, the FCC reports solely to the Congress and only the Courts can overturn its decisions. In fact, the FCC is such an independent and self-contained agency that it has both policy and regulatory responsibilities. It is obvious that such a NRA presents all the merits of a desirable institutional structure around the world. However, the history of the FCC reveals that the regulator has experienced constant capture and undue intervention from the government.

On the other hand, the semi-autonomous model, although quite similar to the FCC one, has its own particularity. First of all, it is a creation of the British constitutional tradition. This tradition precludes in a way the definite separation of powers among different governmental branches. For instance, in Oftel's case the ultimate decision for granting licences (and for other regulatory issues) relies upon the powers of the Department of Trade and Industry on the advice of the DG of Telecommunications, who is the head of the body with wide discretionary powers and is appointed by the government. Nonetheless, in practice Oftel takes most or all decisions. Therefore, Oftel's powers are delegated by the ministry and are included in the Telecommunications Act 1984[47].

Oftel is not a collegial body and most of the decision-making rests with the DG. However, it is a highly independent body from political powers and it is accountable to the legislative branch. The DG provides the Secretary of State with an

[42] In 2001, only 13% of its annual budget was appropriated by the government. ITU TREG On-line country profile, Regulators Profile- United States: www.itu.int
[43] See note 28
[44] Administrative Procedure Act (APA) 1994, 5 U.S.C, 551 and Government in the Sunshine Act 1976, 5 U.S.C., 552b: uscode.house.gov/usc.htm
[45] For example, Conflict of interest statutes contained in the U.S Criminal Code: uscode.house.gov/usc.htm
[46] For example, the Standards of Ethical Conduct set by the Office of Government Ethics (OGE). For more details, see: www.usoge.gov
[47] See note 25

annual report of his activities to lay before the Parliament and he can be called to give evidence to Select Committees of both Houses of Parliament. In addition, DG's decisions can be overturned by the Courts but also by the Appeal Tribunals of the Competition Commission[48] in respect of infringements of the provisions of the Competition Act 1998[49] regarding anti-competitive agreements and abuse of dominant position. Its annual budget is approved by Her Majesty's Treasury and it is self-financed for the most part[50] like the FCC. The staffing autonomy of Oftel and its low administrative costs in comparison to the FCC's ones empowers its character as an effective and independent regulator of the telecommunications industry.

The third model of regulation, which can be found in France, is a compromise between the Oftel model and a governmental ministry. An independent official (Le Directeur de Réglementation Générale, DRG) is given statutory responsibilities for all regulatory aspects apart from the initial issue of licences, which is held by the ministry. The degree of independence of the head of a regulator within such a structure varies widely. Although third parties are involved in the decision-making process, such a regulator can be captured by political demands and ultimately the minister can put constraints to the DRG's freedom. Therefore, the regulator's independence is much more vulnerable than in the other two models and the structural credibility of the body can be questioned in the public eye.

However, the success of such a structure highly depends on the constitutional safeguards and the administrative processes employed by a country. Such a model has been working exceptionally well both in France and in Sweden, where the regulatory bodies are little different from governmental departments. For example, structural accountability is ensured by reporting to the legislative branch and by the possibility of appealing a regulator's decision to the Courts[51]. An underlying shortcoming of such a NRA is the fact that the regulator cannot recruit its own employees, who are usually bureaucrats working within the ministry. Additionally, considering that the administrative costs are mostly covered through the allocation of

[48] "A guide to Regulatory Authorities and Agencies for Operators and Service Providers": www.oftel.gov.uk
[49] Competition Act, 1998, No 3166, Ch.77, HMSO: www.hmso.gov.uk
[50] In 2001 only 16% of Oftel's budget was appropriated by the government. ITU TREG On-line country profile, Regulators Profile-United Kingdom: www.itu.int
[51] In France, any decision can be appealed to an administrative court up to the Council of State (Conseil d' Etat): M. Stafilidou, "Cross-Country Survey of Telecommunications Regulatory Structure", February 1996, Private Sector Development Department, World Bank, available online at: www.worldbank.org

the ministry's resources, the autonomy of such a regulator can be easily challenged.[52]

In the case where a governmental ministry is at the same time the regulator, as is the case in Japan, independence, autonomy and accountability become quite relative and subjective concepts. In this model, a department within a ministry has delegated regulatory powers on behalf of a minister, who has all the statutory responsibilities and powers. Although, this allows for stricter checks of the quasi-regulator by the executive and the legislative branch, political intervention and lobbying are easily traceable. Appealing procedures in Courts are provided; yet, this institutional structure does not present the virtues of a desirable independent regulator within liberalised telecommunications markets and it is not supposed to be the optimal recommended NRA especially for countries, which have poor administrative governance and regulatory experience.

The model, which has been developed in New Zealand, is definitely a simple one in organisational terms and has low costs. It could even be the far-reaching objective of deregulatory mechanisms within the market. However, experience in New Zealand shows that the absence of a NRA does not imply the absence of issues requiring regulatory action. That is why this country has been lately seeking to establish a regulator. In particular, the regulatory regime in New Zealand is based on competition law in order to prevent any anti-competitive behaviour. The Minister of Commerce advises the government on setting regulation and the Commerce Commission, the competition authority, has monitoring powers over the telecommunications market based on the Commerce Act (1986)[53].

With this regime, Courts play an important role in the supervision of the telecommunications regulation. Any action introduced based on the Commerce Act can be brought before the High Court. Decisions of the High Court can be appealed before the Court of Appeal and finally before the Privy Council in U.K[54]. Any determination made by the Commerce Commission can be appealed before the High Court and then before the Court of Appeal. This mechanism is time-consuming, can

[52] p.728 of D. Gillick, "Telecommunications Policies and Regulatory Structures: New issues and trends", Telecommunications Policy, December 1992, p.726-731
[53] Commerce Act, 1986, No. 5 (N.Z)
[54] An illustrative case, which shows how the whole mechanism works and how inadvisable such a structure is, is the Clear Communications Ltd v. Telecom Corporation of New Zealand Ltd, 1992, T.C.L.R (N.Z)

create a lot of uncertainty within the market, discourage investments and cause consumers' dissatisfaction. In addition, the over-reliance on the industry's self-regulation mechanisms has led the Telecom New Zealand (TCNZ), the dominant PTO, to be the *de facto* regulator, who was imposing the rules and other players had to play by them.[55]

The above analysis is indicative of the different institutional structures endorsed in most countries around the world. Within the EU the independence of the regulator from the regulated industry is a prerequisite; yet, its independence from the government is not. Thus, different structures of NRAs have been introduced in all Member States, which present divergent levels of separateness from the government. Indeed, regulatory independence is seen to create greater investor confidence in the objectivity and stability of the regulatory process and support increased investment and economic activity within a country. Thus, several methods have been developed in order to strengthen independence of NRAs, where this has been necessary. For instance, lots of countries, which have introduced types of regulators with strong attachments to the government, have structurally separated them from the ministries in order to enhance their independence.

In terms of autonomy, most NRAs have access to their own funding resources and they can recruit their own personnel. Regarding a regulator's structural accountability the head of the agency is usually appointed by the head of the government (i.e. the President or the Prime Minister) with the approval of the legislative branch. In addition, there is currently the tendency to abandon single-headed regulators and introduce collegial bodies (i.e. a commission), which has an odd number of Commissioners with guaranteed fixed terms. This is actually the case of the OFCOM in the U.K. Moreover, most regulators report to bodies, which do not hold any policy-making task and only courts can overturn their decisions[56].

In most cases, the excellence of a regulator's decision is safeguarded in such a way that only traditional judicial review is permitted, while the merits of a case cannot be checked by the courts. Such mechanisms have always been considered to be the key points for the establishment of a structurally powerful and autonomous

[55] See note 10. p.36
[56] For more information see "Telecommunications Regulations: Institutional Structures and Responsibilities, DSTI/ICCP/TISP(99)15/FINAL, May 2000, available online at: www.olis.oecd.org/olis/1999doc.nsf/LinkTo/DSTI-ICCP-TISP(99)15-FINAL

regulator. However, the practical efficiency of the aforementioned forms of regulatory authorities has been widely questioned since history indicates that political isolation of NRAs has not proved to be as high as most countries were declaring. In fact, the more independent and autonomous the regulator is, the stronger the governmental interventions are.

2.2.1 REGULATORY CAPTURE

The regulatory behaviour of an agency can be influenced in several ways. There is a wide variety of regulatory behaviour theories, which have been proposed in order to classify the sources of influence, but the *"interest group theory"* organises these theoretical approaches into three groups: a) political b) industry- derived and c) organisational.[57] The political group of regulatory behaviour theory underlines that institutions such as the Congress or the Parliament and the President and the Prime Minister are the basic factors, which determine a NRA's behaviour. For instance, in the U.S.A. the congressional power of appropriation and investigation authority, the Senate's power to approve or not the presidential appointments of the FCC's Commissioners and the constant threat of direct legislative measures are some of the potential ways of strong intervention within the institutional structure of the regulator. In addition, the presidential power of appointment of the FCC's Commissioners can be manipulated in order to staff the regulator with sympathetic towards the President personnel. What is more, the President's power to designate the chairman of the FCC, which is not subjected to congressional approval, is capable of affecting the policy and the decision-making processes of the FCC.

On the other hand, the second category asserts that the regulated industries can affect the regulator's behaviour the most. According to this theory, regulators with prior industry experience are more considerate to industry's interests than the ones, who do not have any, while the prospective of being post-regulatory absorbed in the regulated market also triggers a kind of partisan approach towards the industry. In the U.S.A., this kind of regulatory capture has been attributed to the

[57] p.410, P. M. Napoli: "Government assessment of FCC performance: Recurring patterns and implications for recent reform efforts", Telecommunications Policy, Vol. 22, No. 4/5, p.409-418, 1998

inevitable *"revolving door"*, which exists between the government and the industry.[58] However, there is another explanation of this type of capture. Regulators are established at the request of the industry and their primary objective is to serve its interests.[59] Even if this approach sounds quite extreme, there have been periods of such capture by powerful corporate interests. For example, in the 1980s Oftel was highly influenced by the British Telecommunications; yet, the *Duopoly Review White Paper*[60] in 1991 found the British regulator far more experienced and more independent.

The last theory suggests that inefficiencies in bureaucratic structure and organisation are important factors of a regulator's behaviour. It is further implied that bureaucrats within a NRA make decisions, which rather serve their interest in maintaining their positions than the public one. In essence, elements such as underqualified and underpaid personnel of a regulator and difficulties relating to upward mobility of positions discourage motivated and well-qualified personnel and hence the NRA will most likely be inefficient and ineffective.

The magnitude of regulatory capture, no matter its origin, can be concluded, if someone takes a look at the most proclaimed independent regulator, the FCC. FCC's former chairman, W. E. Kennard, declared the regulatory comme-il-faut of a NRA worldwide:

"An effective regulator should be independent from those it regulates, protected from political pressure, and given the full ability to regulate the market by making policy and enforcement decisions. The regulator should have the authority and jurisdiction to carry out its regulatory and enforcement functions effectively and unambiguously. And the regulator must be adequately funded from reliable and predictable revenue sources".[61]

However, reality proves the opposite. The paradox in U.S.A. is not really the strong influences on FCC (this is easily anticipated in the case of such a powerful regulator), but rather, despite the recognised diversity of regulatory behaviour theories,

[58] T. W. Gormley: "A test of the revolving door hypothesis at the FCC", American Journal of Political Science, Vol. 23, No. 4, p. 665-683, 1979
[59] p. 31-34, B. R. Horwitz: "The Irony of Regulatory Reform: The Deregulation of American Telecommunications", Oxford University Press, New York, 1989
[60] Duopoly Review White Paper Competition and Choice: Telecommunications Policy for the 1990s (Cm 1461), DTI, 1991: www.dti.gov.uk
[61] W. E. Kennard: "Connecting the Globe: A Regulator's Guide to Building a Global Information Community, Washington, DC, 1999: www.fcc.gov/connectglobe. William Kennard has been immediately replaced by US President George W. Bush upon taking office in January 2001!

government sponsored analyses of the FCC present the same results regarding the sources of influences. In particular, it is suggested that FCC's independence and autonomy is challenged only due to organisational capture; political and industry-based influence do not appear as reasons of FCC's regulatory deficiency.

The *Hoover Commission Report*[62], which was actually initiated by the Congress, criticised the FCC for lack of coordination among bureaus, interest in long-term planning and regulatory philosophy, for failure to regularly revisit policies and a high turnover rate. The *Report* did not find any evidence that the President or the industry were trying to influence the FCC's behaviour. A *Study*[63] commissioned by the Senate in 1976 regarding the appointment procedures for the Federal Trading Commission (FTC) and the FCC Commissioners found failures in analysing policies and personnel inadequacies; in relation to any political capture the study took a step further and declared that the Senate had traditionally abstained from using its power to approve presidential appointees! The *Landis Report*[64] underlined the FCC's underqualified personnel and inability of policy planning, issues related to organisational influences on the regulator's function. However, the paradox in these analyses can be found in their recommendations for the FCC's improvement.

Typically, the aforementioned findings would call for structural changes. Nonetheless, these analyses actually smoothed the way for strong political intervention. The *Landis Report*[65] recommended empowerment of the FCC chairman's authority; an alteration that could strengthen the President's influence. Similarly, the *Hoover Commission Report*[66], even though it did not make any suggestion on the relationship between the Congress and the FCC, recommended an amendment of the Communications Act (1934)[67] in such a way that the President had to clearly justify the removal of a FCC Commissioner. It is obvious that this recommendation was targeting the reduction of the President's power on the FCC,

[62] U.S. Commission on Organization of the Executive Branch of Government: "The Hoover Commission Report on Organization of the executive Branch of Government", McGraw-Hill,, New York, 1949
[63] p.402, M. J. Graham & H. V. Kramer: "Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal trade Commission (1949-1974): Report to the Committee on Commerce, U.S. Senate, U.S. Government, Printing Office, Washington, 1976
[64] M. J. Landis: "Report on Regulatory Agencies to the President-Elect: Report to the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, U.S. Government, Printing Office, Washington, 1960
[65] Ibid, p.85
[66] See note 62
[67] See note 28

thereby underlining the constant rivalry between the Congress and the White House. The 1976 Senate *Study*[68] recommended that the number of Senate staff dealing with nominees for the FCC should be increased and that the Senate should have its own inquiring procedures regarding the appropriateness of the nominees and full access to the checks conducted by the White House for the same issue.

Moreover, as if these direct interventions on behalf of the political representatives were not enough, even the Courts were recruited in order to strip FCC from its regulatory status. The rationale was the same; organisational deficiencies turned FCC incompetent to serve the public interest and thus measures had to be taken. In 1974, the FCC appeared unable to control and impose anti-competitive principles on AT&T's behaviour; AT&T has managed to monopolise the manufacture and distribution of telecommunications equipment and the provision of long-distance services within U.S.A. That is why the Department of Justice (DOJ), under the pressure of the market, took the initiative, put aside the regulator and started an anti-trust suit against AT&T.

This litigation went on for 8 years, until AT&T and the DOJ announced in 1982 that they had entered into a consent decree, which would put an end to that judicial battle. That consent decree, the *"Modified Final Judgement" (MFJ)*, was approved by Judge Harold Greene of the U.S. Court for the District of Columbia.[69] From 1982 until 1996, Judge Greene, who was managing the MFJ, was carrying out major regulatory duties. In fact, that consent decree, took away most of FCC's regulatory authorities under the 1934 Act. The breadth of MFJ, the reliance on a single judge to regulate the telecommunications market and the substantial discretion given to judges to interpret competition laws made J. Greene the sole most powerful regulator and decision-maker in the U.S. communications policy.[70]

Subsequently, the passage of the Telecommunications Act (1996)[71] was regarded as the way of giving back to the FCC its regulatory character. However, in reality it gave once again the right opportunity for recommendations on restructuring

[68] See note 63
[69] United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982)That decree is known as the Modified Final Judgement because it modified a previous one, known as the Final Judgement, which settled another anti-trust suit brought by the DOJ against AT&T in 1949. P. 12 of M. Kerf & D. Geradin: "Controlling Market Power in Telecommunications: Antitrust vs. Sector-Specific Regulation, An assessment of the United States, New Zealand and Australian Experiences", available at: www.law.berkeley.edu/journals/btlj/articles/14_3/Kerf/html/text.html
[70] For more information, see p. 23 et seq. of Kerf's & Geradin's article cited in note 70.
[71] See note 11

the FCC. Even though suggestions[72], such as that the FCC's chairman should be statutorily allowed to be maximum 50 miles away from Washington while on official business in order to be better monitored by the Congress, did not pass, they mirrored the precedents set by the aforementioned analyses. Constant competition between the executive and the legislative body for acquiring more institutional control over the regulator makes the FCC's work harder and its credibility look like a roller coaster.

The U.S. example gives another perspective to the issue of independence. First of all, while governments around the world struggle to create an independent and autonomous regulator, insulated from any kind of capture, based on the theoretical advantages of such a model, they tend to neglect constitutional, legal and political characteristics of their own countries. In these cases the regulatory failure can be easily foreseen. It is preferable to design regulatory mechanisms that correspond to a country's institutional endowments than to copy practices of other countries. However, the U.S.A. did actually devise the FCC according to the solid principles of the U.S. Constitution; safeguards have been designed and the maximum level of independence has been ensured for the federal NRA. What went wrong then? Why is the FCC's status so vulnerable in front of political and industry-based powers? On the other hand, why Scandinavian countries present exceptional results of regulatory performance, whilst at the same time most of the NRAs are based within a ministry? These questions highlight that regulatory independence, no matter how strong it appears to be, is neither the ultimate institutional objective nor the only means towards good regulatory governance.

2.2.2 UNDERSTANDING INDEPENDENCE

The desirable end is an effective and functional regulatory framework, which promotes competition within the market, stimulates technological developments and

[72] FCC Modernization Act of 1996, H. R. 3957, 14th Congress, 2nd Session, 1996

initiates efficiency, while protecting consumers' interests. In this context, regulatory independence can be viewed as an experiment of good governance. Yet, the success of this experiment cannot be guaranteed because an independent NRA *per se* cannot protect the integrity of structural regulation unless profound improvements in governance are made. In addition, the "independent approach" is not static; it is a dynamic means, which demands daily work on gaining legitimacy in the public and the stakeholders' eye. Without that legitimacy, a NRA can loose any trace of independence and ultimately its regulatory efficacy, credibility and unbiased character. An analogy can be found in the case of the last U.S. presidential elections. The way in which George W. Bush became president and the processes, which eventually led to that direction, doubted the foundations of solid governance. In other words, the legitimacy and not the legality of his presidency was severely questioned.[73]

Several methods of winning institutional legitimacy have been developed. Some of them focus on safeguarding the institutional governance of a NRA. In this context, the concept of structural accountability has to be ensured. Involving both the executive and the legislative body in the appointment process of the head of the NRA or, in case of a collegiate regulator, of the Commissioners, setting specific standards regarding their appointment (i.e fixed and staggered terms, so political isolation can be secured), providing the agency with a distinct legal base free of constant ministerial control but open to judicial review and appealing processes, using mechanisms of administrative law in order to make NRAs politically responsive[74], permitting external auditors and other public regulators to scrutiny its efficacy, providing the NRA with reliable sources of funding and accrediting it with strong statutory recruiting autonomy (i.e. exemption from civil service salary rules, prohibition of conflicts of interest), which can lead to regulatory expertise and technique, are some of the ways that guarantee accountability and thus structural legitimacy.

[73] p.5 of R. Samarajiva: " Regulating in an imperfect world: building independence through legitimacy", TelecomReform, Vol. 1, No. 2, July 2001: www.telecomreform.net/PDF_files/1-2/policy.pdf

[74] In the U.S., "sunset" clauses have been introduced to ensure NRAs' structural accountability. These clauses require that the existence of an administrative agency is scrutinised after a set period. J. Hills: " Regulation, politics and telecommunications" in "Deregulating Regulators? : Communications Policies for the 90's" by J-P Chamoux, IOS Press, 1991

However, such ways can minimise the degree and the quality of independence that a regulator can enjoy. Since structural accountability initiates close co-operation between regulators and the government, a fragmentation of the individuality of the agency can be witnessed. On the other hand, regulatory expertise can be won mostly through the industry's profound experience. Regulators, who work closely with the industry and keep in pace with the evolutions in the market, tend to be more successful in their regulatory functions and thus more credible in the public eye. Nonetheless, this kind of co-operation may be considered to be another path for regulatory capture.[75] At that point the legitimacy paradox arises. Independence and structural accountability of NRAs appear to be inherently contradictory yet necessary to ensure an agency's efficacy in its role. However, they are not enough. There is a legitimacy gap, which can be easily enlarged by the nature and materialisation of the principles analysed above.

Having said that, there must be a way to reconcile these two concepts in order to guarantee their co-existence and thus the legitimate sustainability of a regulator. This way represents the second façade of legitimacy and is mirrored in the decision-making processes followed by a regulator. Principles such as transparency, non-discrimination, consistency and fairness in the working methods of an agency enhance its credibility, create a predictable environment ideal for investment and show how governmental policies should be incorporated in the regulatory process for effective implementation with one sole objective: maintenance of the NRAs' legitimacy[76].

CHAPTER 3: WORKING METHODS OF NATIONAL REGULATORY AUTHORITIES

[75] p.144 of T. Nambu: "Regulatory issues" in “Deregulating Regulators? : Communications Policies for the 90’s” by J-P Chamoux, IOS Press, 1991

[76] Good analysis of this issue can be found in S. V. Berg, A. Nawaz & R. Skelton: "Designing an Independent Regulator", available at: www.bear.cba.ufl.edu

The working methods of a regulator cover a wide range of practices from identifying the issues that need to be dealt with and notifying the public about these issues to mechanisms of consideration and decision-making processes. Articles 5 and 6 of the Directive 2002/21/EC[77] underline how these methods should be developed and employed both by Member States and NRAs especially under the new e-communications regime. It is vital to ensure that regulators can meet the requirements of free participation of the interested parties, procedural consistency, transparency, publicity and accountability and sufficient protection of human rights.

Thus, the starting point is the formulation of the regulatory agenda, which can be initiated by different sources. For instance, the statute can outline the policy objectives, which a regulator must pursue, and allow the NRA to achieve these goals in the most flexible and appropriate way, and in accordance with market conditions and technological changes. On the other hand, initiatives from the executive and the legislative or any kind of advisory body can influence a regulator's agenda. In the U.K. the Consumer's Advisory Committee, a unit within Oftel though independent in organisational terms, raises issues related to consumers' interests, which are dealt with and considered by the regulator. Even Courts can bring to a regulator's attention issues that have to be taken into account and can have an influence on a NRA's agenda. Any duty imposed on a telecommunications company by the Courts can alter the whole structure of the market in such a way that the regulator would have to adjust policies and practices to the new reality. In 1984, the divestiture of the Regional Bell Operating Companies (RBOCs) by AT&T in the U.S.A. (as a result of the 1982 *MFJ*[78]) changed the scene in the U.S. telecommunications industry, putting a whole new set of issues on the FCC's agenda.[79]

In addition, petitions or any kind of initiatives from interested parties are ways in which issues are addressed to regulators. For example, the Consumer Representation Section (CRS) within Oftel is the unit, which receives all the complaints made by any party (i.e. consumer or company) about practices of an operator or a service provider. If the CRS decides that there is actually more than a

[77] See note 15
[78] See note 70
[79] Issues such as equal access, which is the policy letting users served by a dominant PTO's local network to access any long-distance carrier by dialling the same number of digits, through the same technical arrangements and with the same quality of services, and requirements associated with access charges. For more details see note 10

compliance issue, then the whole practice can be reviewed and scrutinised by the Oftel; a regulatory procedure initially ignited by a complaint. Internally generated initiatives and mandate periodic reviews (i.e. period mobile market reviews or price control reviews) are also methods employed by regulators in order to build their agenda and materialise their policy objectives. It is obvious that the more flexible and public-friendly ways are followed in specifying regulatory issues, the more credible a regulator is. An agenda ready to adjust to changes and impartially address issues minimises any legitimacy gap, which can arise because of institutional structures. This is the actual point of this analysis. Efficient results based on democratic principles and procedures are the essence of regulation; absolute structural independence and autonomy does not appear any more to be a priority for the sustainable governance of a NRA.

In this context, the principle of *public interest* must be satisfied. Open participatory procedures and publicity mirror the social and legal impetus of serving the *public interest* imposed on NRAs. The aforementioned mechanisms cannot be proved effective unless interested parties and the public is aware of the issues placed in the regulatory agenda. Public hearings, public notices, consultative documents followed by consultation periods, meetings with industry and consumer groups, sharing of information among other authorities are the basic tools for informing the public of matters that have to be taken care of and at the same time fulfil the requirement of transparency, and empower the integrity and ultimately the legitimacy of the regulator.

However, NRAs around the world do not follow the same pattern of procedures. Based on administrative practices and the regulatory history of each country, NRAs attribute divergent levels of importance and priority to mechanisms of openness and participation, which formulates the nature of consideration and decision-making processes in due course.

3.1 DECISION-MAKING PROCESSES

The administrative working models that have been extensively used by NRAs are the *"discretionary process"* and the *"due process"*. The former is a working method in which the regulator mainly works informally in order to gather information and representations, analyse, consider issues, and make decisions. In fact, the deployment of the whole process relies predominantly upon its own discretion. On the other hand, the due process is primarily formal and is based on a set of specific procedures and practices usually incorporated in law and publicly known in advance. Yet, informal practices, such as informal meetings and consultations may well be included in this process. Emphasis is given to procedural safeguards in order to ensure that processes are transparent and essential rights (i.e. the right of participation, the right of hearing) are appropriately guaranteed. In the discretionary approach, the regulator is the one who determines, for instance, whether a decision and its rationale should be published, whilst in the due process approach legal rules (i.e. in U.K. the Telecommunications Act 1984) define the measure of disclosure required even for each procedure.

Notwithstanding this, most NRAs follow a mixed approach in order to be more flexible and at the same time credible towards the public. The pure discretionary approach, though quite fast and cost-effective, does not serve well the principles of transparency and does not safeguard sufficiently the whole process. Thus, the public and in particular the parties, which will be ultimately affected by a NRA's decision, can easily question the validity and the authenticity of a regulator's practices. In this case, the degree of independence that a regulator enjoys cannot help when the procedural legitimacy is in doubt.

On the other hand, the due process approach, though more time-consuming and costly, fulfils the regulatory requirements of openness, transparency and accountability. Not only does a regulator have to act but also he has to be seen to act in the public interest. As long as specific criteria are met, a NRA can strike the suitable to the national environment balance between the discretionary and the due process. For example, clarification of the regulatory issues and the policy objectives that should be achieved, assessment of all the policy objectives based on information sharing and communication with the interested parties, clear and open working

processes and adequate justification of the final decision are basic criteria that have to be applied in order to build up a regulator's efficacy and credibility.[80]

An illustrative example of how the combination of the two processes work effectively within a regulatory regime can be found in Oftel where the working methods undoubtedly served the public interest, established a solid and trustworthy regulatory environment and backed up the institutional structure of the regulator. [81] However, such effects must be present in further steps of the decision-making process. Once a decision is made, adequately justified and published, the regulator must have legal powers to implement it and, if needs be, impose sanctions on non-compliant with the law companies.

3.2 IMPLEMENTATION AND ENFORCEMENT MECHANISMS

Most NRAs around the world have legal powers both to make legally binding decisions and issue legal binding instruments such as licences. Although, as always,

[80] R. Samarajiva: "Establishing the legitimacy of new regulatory agencies", The International Journal on Knowledge Infrastructure Development, Management and Regulation, Vol. 24, No. 3, April 2000, Telecommunications Policy Online, available at: www.tpeditor.com/contents/2000/samarajiva.htm

82 For example, before 25 July 2003, in case of modification of conditions appearing in PTOs licences (section12 of the Telecommunications Act 1984) the regulator was publishing a notice of the modification including the proposed changes and the rationale of its decision in the Gazettes. At the same time the Secretary of State, who was statutorily responsible for the grant of licences, and the interested parties were notified about the modification and copies of the documents that were published in the Gazettes were sent to them as well. A minimum 28 days consultation period started from the day of the publication of the formal notice in the Gazettes in order to give the opportunity to the parties to comment on the issue. In some cases, a second statutory consultation period of 14 days, starting from the day that the first one ended, could be given. In case the licencees gave their consent for such a modification, the regulator, based on due consideration of the received comments, was eligible to proceed with its decision and modify a specific condition. Otherwise, a reference to the Competition Commission would be made by the regulator in order to decide whether the proposed modification served the public interest and therefore it was necessary to be done (Section 15 of the Telecommunications Act 1984). Even after this process, Oftel followed again the practice of the public notices and was notifying the Secretary of State and the interested parties about the conclusion of the modification procedure. This practice attached the maximum degree of legitimacy to a NRA.
Yet, the DG, in an effort to further improve the mechanisms of transparency and accountability employed informal working methods too. For example, he published and invited feedback on his annual management plan, held open meetings, workshops and seminars for consumer and industry groups both prior to and during consultation on policy proposals, employed the Internet in order to further publicise consultative documents on all key policy issues prior to any decision and gave an opportunity to the interested parties to comment on each others' observations (two stage consultation), provided sufficient feedback to participants, took on and publishes market research in order to measure the consumers' satisfaction with provided services, established independent advisory panels (e.g. Consumer Panel, Advisory Body on Fair Trading in Telecommunications, the Technical Experts Panel) and published consumer guides on policy issues.

an exception to this rule exists. According to constitutional structures and administrative precedents, a regulator might have to address the issue to other governmental agencies, which hold the legal authority to implement a regulatory decision. For example in Switzerland, the regulator (BAKOM)[82] can only make recommendations regarding licences to the Communications Commission, which is the authority responsible for granting licences. In other countries, the legal powers for issuing licences are withheld by the relevant ministries (i.e. Greece).

However, a two-tier approach has emerged during the years. There are cases where a NRA does actually hold statutory powers to decide directly on certain matters; yet, reliance on making recommendations to other governmental bodies is explicitly necessary for other issues.[83] Notwithstanding the aforementioned, it is important for the regulators to have powers to make decisions at least on minimum matters. The practice of referring each time to another governmental authority or applying for a court order is not only cumbersome but also hampers the regulator's ability to build on his regulatory character effectively. Based on this rationale, more legal powers regarding the implementation and enforcement of decisions was given to the DG of Telecommunications through the Competition Act (1998)[84] and in fact more are given to OFCOM under the Communications Act 2003.[85]

Nonetheless, such mechanisms are related to cases where regulators exercise their regulatory powers and actually make a *positive decision.* There are though cases where NRAs find that a *negative decision* would be more appropriate. This approach, the so-called doctrine of *"forbearance"*, highlights one of the rights (in some cases, even obligation) some regulators have around the world. It incorporates the right of a NRA not to exercise its statutory or delegated regulatory powers or to abstain from regulating on *ad hoc* basis. In other words, a regulator can freely and flexibly decide whether a specific case requires to be regulated or not. This administrative policy and thus regulatory practice is derived either from legal

[82] Bundensamp für Kommunikation (BAKOM), Office of Communications in english: www.bakom.ch
[83] For instance, in the U.K., the Secretary of State had the legal power to grant licences to applicants; the DG of Telecommunications could only provide recommendations. Thus, the licensing power did not lie strictly with him, even though the DG's recommendations had generally been taken into serious account. On the other hand, the DG exclusively held powers to enforce licences and there was a wide range of matters, on which the NRA could act directly. The DG could issue binding determinations on terms of interconnection between the networks of different operators and orders on licensed entities in order to secure compliance with their licence conditions.
[84] Competition Act, 1998, Ch. 41, HMSO, available online at: www.hmso.gov.uk
[85] Communications Act 2003, available at: www.hmso.gov.uk

mandates or from the new regulatory tactics, enhanced by the application of competition law and the avoidance of relying on strict sectoral rules or even from their combination. For example, in the U.S.A., forbearance from applying regulations is required, when such regulations are obviated by competition and when such practice is consistent with the public interest.[86] In this way, the law gives the FCC the flexibility to deal with fast-evolving technologies within the industry and the regulator has the statutory discretion to allow the market to make its own determinations and set the rules under its supervision.

This practice is part of deregulatory mechanisms, first actually employed by the U.S.A. and currently strongly promoted within the E.U. Since light-touch regulation is the imperative in the new legal framework and the answer to the phenomenon of market and technology convergence, NRAs rely more and more on initiatives of self and co-regulation and on the application of general competition law than on sector-specific mandates. However, NRAs should thoroughly consider whether, and under which conditions, the application of this doctrine is appropriate, as it can be quite tricky, lead to appealing procedures and even bring undesirable results within the market.

No matter whether regulators make a positive or a negative decision, their decision-implementing processes must be accompanied by monitoring practices in order to ensure uniformity in the market and strengthen the regulators' credibility as a competent authority. Such practices can be based both on sectoral regimes and general competition rules[87] and their success can be testified, for example, by the work produced by the compliance directorate within Oftel. A formal and dynamic structure fosters transparency. Nonetheless, more informal methods of monitoring cannot be neglected. The information gathered through the CRS or self-certification

[86] Section 401 of the Telecommunications Act, 1996 (codified at 47 U.S.C par. 160), see note 11. In the *MCI WorldCom Inc et al v. Federal Communications Commission and United States of America,* (No. 96-1459, 2000*)*, the Court denied the review of a FCC order, which prohibited the petitioners from filing tariffs with the regulator based on the principle of forbearance, ratifying the legality of the practices followed by the federal regulator.

[87] For instance, in the U.K. under the Competition Act, the DG of Telecommunications, apart from his enforcement powers under the Telecommunications Act, had concurrent powers with the DG of Fair Trading. However, his jurisdictional competency was focused on anti-competitive agreements and abuses of dominant positions in the telecommunications market. In this context, the regulator had increased powers of investigation in comparison to the ones under the sectoral Act, including the power to carry out unannounced visits and the power to request information from anyone rather than just from operators. In addition, the sanctions for non-compliance under the Competition Act were more severe than the ones provided under the Telecommunications Act

procedures[88] give precise insights of the behaviour of the market and constitute useful regulatory tools, which allow a NRA to supervise the telecommunications companies. Such informal mechanisms do not lessen the degree of credibility that a regulator enjoys. They merely accelerate and facilitate the process of monitoring, let alone the fact that they minimise the administrative and regulatory costs of a NRA. Considering the current changes regarding regulatory techniques, where self and co-regulation are being promoted as ideal models of regulation within fully liberalised markets, the incorporation of such methods of implementation and monitoring within a body of rigid formal methods can modernise regulatory practices and keep the NRAs more alert and closer to the regulated.

Conversely, since such informal ways of regulation and voluntarily compliance on behalf of the industry cannot always provide the desirable results, most regulators have statutory powers to impose sanctions and penalties on the industry. The kind of sanctions that can be imposed on a company is closely associated with the way that the law views a breach of the rules. Simply put, uniform practices do not exist. A regulator can impose civil or criminal sanctions on a company depending on how legislators perceive breaches of law in this area. The "civil v. criminal" issue has always been a debatable one, yet in most countries extremely draconian enforcement mechanisms are not employed. If a regulator holds the powers to initiate the enforcement (on its own or via another appropriate authority) of excessive penalties, then possible abuses of this power can be witnessed. The objective in "punishing" a company's behaviour is not to destroy it and provoke the inevitable recession of the industry but to give a clear message that compliance with the rules is vital. On the other hand, such measures can slow down enforcement procedures, since the Courts might appear reluctant to act vigorously and convict offenders. In addition, this strict mechanism can be severely undermined due to political

[88] According to Condition 16 of PTO licences, the licencees had the obligation to satisfy the DG that arrangements had been put in hand to ensure that sufficient funds were available to Highway Authorities after the occurrence of a Relevant Event (revocation of a licence, expiry of a licence without granting a similar one or the licencee stops to trade) to meet liabilities decscribed in the Condition 16.2. Based on this, Oftel proposed that in respect of each year operators would have the obligation to submit to the DG a certificate approved by the operator's Board of Directors and signed by either a Director or the company secretary of the operator which would assure the regulator that sufficient funds were available in order to meet the requirements of Condition 16. See "Funds for Liabilities: the way forward", Consultation document issued by the DG of Telecommunications, 24 June 2002, available at: www.oftel.gov.uk

circumstances and interventions.[89] Therefore, due diligence should be exercised and the right balance should be reached before enforcing measures that can be destructive and even create hostility between NRAs and the industry.

The U.K. serves as an illustrative example of the above. According to the Telecommunications Act[90], the operation of telecommunications systems or services without a licence was a criminal offence. However, breaches of licences' conditions did not constitute criminal offences as such. This was particularly important for companies operating under class licences, such as the Telecommunications System Licence (TSL).[91] Therefore, if an operator was in breach of a term of the TSL, the DG might order compliance. If compliance was not achieved through this order, then a Court injunction might be requested. In case of persistent violation then the operator was in breach of the court order, which constitutes "contempt of court" and severe penalties could be imposed. Even revocation of licence could be employed in case the operator continued to be in breach of law.

Then again, there is a strong legislative inclination towards civil law sanctions in U.K. In particular, the DG can fine companies in breach of the Competition Act[92] up to 10% of their annual turnover. Following the spirit of the new e-communications regime, the Communications Act 2003[93] introduces stronger civil law powers of enforcement, while removing any criminal offence of running telecommunications systems without a licence, since the licensing regime has already been abolished. Thus, OFCOM[94], under the new sectoral legislation, will be able to impose on companies a fine up to 10% of their annual turnover for breach of either general or specific conditions of entitlement. In addition, if a company is in breach of a general or specific condition of entitlement, any person possibly affected by such a breach will be entitled to take legal action for compensation, no matter if OFCOM has already taken enforcement action or not. Apart from these powers, OFCOM (like Oftel) will have concurrent powers under the current Competition Act, which will be

[89] It is not a surprise why during the Clinton's presidency, the telecommunications and mass media industry in the U.S.A. has been in a way "pampered" by the regulator and not severe sanctions were imposed on it.
[90] See note 25
[91] The TSL provided for interconnection of customer premises equipment (CPE) and private networks to the public switched telephone network (PSTN). In this type of licence, self-certification applied.
[92] See note 49
[93] See note 85
[94] See note 39

extended in order to cover the whole communications sector including broadcasting.[95]

Although Oftel's example testifies that strong implementation and enforcement mechanisms provide stability and predictability within the market and support a credible and dynamic regulator, the issue of regulatory accountability would not be complete, unless appealing mechanisms were in place. Such mechanisms serve as fundamental safeguards against any abuse of power and fortify the sustainable legitimacy of NRAs.

3.3 APPEALING A REGULATORY DECISION

No matter how independent the regulators are, specific limits apply in order to constrain their powers and ensure that the public interest is well heard and served. Therefore, the right to appeal is acknowledged as one of the most fundamental rights of law worldwide.[96] The Directive 2002/21/EC provides that under the new regime Member States have the obligation to provide mechanisms against decisions of NRAs to an appropriate appeal body.[97] It even takes a step further and clarifies that even the merits of the cases must be subject to appeals and not only the processes

[95] The Communications Act 2003 Explanatory Notes, available at: www.hmso.gov.uk
[96] Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocols Nos. 1, 4, 6 and 7, 1950, available at: www.echr.coe.int/Convention/webConvenENG.pdf
[97] Article 4 of the Directive 2002/21/EC, see note 15

of decisions. Currently, the common practice regarding appealing mechanisms is mainly restricted to traditional judicial reviews. However, there are cases where the substance of a decision is subject to scrutiny.

For instance, in the U.K.[98] under the telecommunications licensing regime, undertakings, which felt that they had been treated unfairly due to a proposed modification of a licence's condition, could appeal the regulator's decision to the Competition Tribunal, which is part of the Competition Commission. In this case, the Competition Commission would determine whether the condition in question could be expected to *"operate against the public interest"* and, if so, whether a licence modification could prevent this.[99] This appealing mechanism resulted in such determinations/recommendations, which were bound to be based on a thorough examination of the substance of the case.[100] In addition, the binding power of the Commission's decisions was clearly defined in the Northern Ireland Electricity case[101]. The electricity regulator for Northern Ireland proposed that it would follow the Monopolies and Mergers Commission's (MMC-now Competition Commission) recommendations for the company's revenues.[102]

Although the company lost the case in court, the Court of Appeal ruled that the regulator must follow the substantive proposals in the Commission's report. Setting a vital legal precedent, this highlighted the legal binding power of the Commission's recommendations, as well as limiting the discretion of NRAs in such cases. [103] However, the Commission's decisions are not final; they can be appealed, on a point of law, to the Court of Appeal and from there to the House of Lords. Moreover, the Swedish National Post and Telecom Agency's (PTS)[104] decisions are subject to appealing mechanisms to the Regional Courts.

The Courts can either confirm or eliminate the decisions and they may change their substance partially or even completely. However, according to the Swedish experience, this is a burdensome procedure and the regulator pinpoints the fact that

[98] Apart from the appealing possibilities set above, under Section 46B of the Telecommunications Act even third parties could appeal a DG's decision.
[99] See note 85
[100] In fact, the Competition Commission has normally six months for its inquiry, which can be extended, asks all interested parties and it even seeks for views more broadly.
[101] Northern Ireland Electricity v. Director General (1998) NI Court of Appeal, 300
[102] The regulator had to reduce Northern Ireland Electricity's revenues from £575 to £538 million over five years.
[103] See note 85
[104] Post-och Telestyrelsen (PTS): www.pts.se

such practices have created insecurity within the market, slowed down the development of competition and ultimately have undermined its efficacy to regulate. The right balance between the right to appeal and the need to secure and stable regulatory practices have to be reached. That is why the Swedish government was trying to introduce alternative methods to court proceedings (e.g. like the Competition tribunal in U.K. or even an Ombudsman scheme), where an exhaustive list of specific disputes would be solved faster and more efficiently.[105] Therefore, it is not surprising that, since extensive scrutiny of substance in disputes, where a NRA is involved, can hamper the regulatory process and lessen the credibility of the regulator, most countries have developed solid mechanisms of judicial review. In fact, during the past decade these mechanisms have been fortified in order to allow wider and more profound review.

In the U.S.A., where the rights of appeal are quite far-reaching, the Courts[106] tend to focus more on the scrutiny of procedural issues than on the merits of the cases. In addition, they make extensive reference to the doctrine of the *Chevron deference*[107], which obliges them, when dealing with cases where federal agencies, like the FCC, are involved, to follow the regulators' statutory interpretations of the issues in question. In other words, by deferring to the expertise of FCC on specific matters, the Courts minimise any possibility of changing and substituting the regulator's views and interpretations made within his conferred decision-making powers. Based on the *Chevron deference*, the Courts can review a decision on usual U.S. administrative legal grounds and rule on whether the FCC's decision is reasonable or not. The *principle of reasonableness*, widely used in common law countries, instructs that an appeal may be successful, if a "reasonable man" could not possibly have reached the decision, which the regulator has made. Nonetheless, recent U.S. Supreme Court case law substantially limited the application of *Chevron deference*, and consequently opened the way for appeals against the substance of NRAs' decisions.

[105] Annex 3 of the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions" COM(2001) 706, Seventh Report of the Implementation of the Telecommunications Regulatory Package, available at: europa.eu.int/information_society/topics/telecoms/implementation/index_en.htm

[106] FCC's actions can be appealed to the Federal Courts. Regulation adopting rulemaking proceedings and final decisions in adjudicatory proceedings can both be appealed to the US Circuit Court of Appeals. Decisions of the Court of Appeals can be subject to judicial review by the Supreme Court of the U.S. See note 51

[107] Chevron U.S.A. v Natural Resources Defense Council, 467 U.S. 837 (1984), U.S. Supreme Court

According to the *United States v. Mead Corp.* case[108], there are cases where courts may decide statutory questions *de novo* and give only the *"Skidmore weight"*[109] to a regulator's interpretation. In this case, the Supreme Court held that the *Chevron deference* would only be applied when an interpretation has been made during the exercise of statutory authority in order to prescribe norms carrying the force of law (i.e. formal adjudications, notice-and –comment rulemaking or a comparable law-making method). In the case under review, the ruling letter could not have any claim to *Chevron deference.* Thus, if the *Chevron* does not apply, then a court is eligible to interpret the statute *de novo* but take into consideration the regulator's interpretation under *Skidmore*. In this case, whoever appeals a FCC's interpretation should not just argue that the interpretation is unreasonable but wrong. The ruling of the Supreme Court changed a well-established U.S. legal precedent. Most Courts were quite reluctant to be involved in such litigations and quite happy to predominately rely their rulings on the *Chevron deference*. However, this change can make the FCC more responsible regarding its decision-making procedures, offer a good balance to the extensive powers, which the regulator has, and create an openly legitimate environment within the market.

On the other side of the Atlantic, actions of the DG of Telecommunications were only subject to judicial review[110] when it could be proved that the decision was

[108] United States v. Mead Corp., 121 S. Ct. 2164 (2001), No. 99-1434. The Headquarters office of the U.S. Customs Service issued a "ruling letter", according to which certain imported articles fell under a classification subject to a tariff. Mead filed a suit in the Court of International Trade, which issued the government summary judgement. In reversing, the Federal Circuit found that ruling letters cannot be treated like Customs Regulations, which receive the highest degree of Chevron deference, as they do not emerge from any law-making process, do not carry any force of law and are not intended to be used beyond this specific case in order to clarify the rights and obligations of importers. The Federal Circuit neither attached any deference to the letter nor gave any weight to it. The Supreme Court agreed with the Federal Circuit's ruling on the Chevron Deference; however, it ruled that that court should assess the ruling letter under the Skidmore weight.
See "U.S. Supreme Court substantially limits deference to agency statutory interpretations: A summary of United States v. Mead Corp., decided June 18, 2001", available at: www.mwe.com/news/ots0701a.htm and "Supreme Court substantially limits Chevron Deference", available at: www.emlf.org/lastowka.htm

[109] The Skidmore v. Swift &Co, 323 US 134 (1944), case ruled that only weight can be given to a NRA's statutory interpretation and the amount of this weight depends upon *"the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control".*

[110] A court procedure that does not scrutiny the merits of a case. Administrative legal grounds for judicial review are in general terms: a legal error in the way the decision-maker has reached the decision, which has affected the outcome,
procedural failings in the way the decision-maker has gone about making the decision and
totally unreasonable decision-making, where the result is so obviously wrong that it can be described as perverse.

unreasonable, taking into account the followed procedures and the presented evidence. The meaning of reasonableness in the U.K. is the same as the one applied in the U.S.A. However, since the principle was derived from the case law, it is classified as the *Wednesbury principle*[111]. In other words, the DG's decision could be challenged only if a "reasonable man" in the same position would not have arrived at the same decision. In addition, although there is no doctrine such as the *Chevron deference*, the Courts avoided substituting the views and interpretations of the regulators by deferring to their thorough expertise. In the *R v. Hillingdon LBC Ex parte Pulhofer*[112], Lord Brightman defined the limits of any judicial competence in assessing and interpreting matters, which fall primarily within the regulator's jurisdiction under a specific condition. He stated: *"Where the existence or non-existence of a fact is left to the judgement and discretion of a public body […], it is the duty of the court to leave the decision of the fact to the public body to whom Parliament has entrusted the decision- making power* ***save in a case where it is obvious that the pubic body, consciously or unconsciously, is acting perversely.*** (emphasis added)*"*[113]

The Cellcom case[114] exemplified the limits of this condition. Thus, the Court may interfere with a DG's decision, if the DG has taken into account an irrelevant consideration or has not taken into account a relevant one or he has made a relevant mistake of fact or law. As long as his decision is not perverse (i.e. the reasoning is illogically unsound[115]) and based on the fact that a mistake is not proved by showing that on the material before the DG the Court would reach a different conclusion, the Court will not interfere.

The method employed in the U.K. makes it quite difficult to challenge the merits of a DG's decision in Courts. However, experience shows that Oftel has not manipulated the system in order to achieve ulterior goals. The regulator realised quite early that transparency, credibility and fair practices are important within the market. Therefore, based on due process, solid decision-making mechanisms and following methodologies introduced by the Competition Commission, and its predecessor (MMC), it managed to create a trustworthy environment and keep a

[111] Associated Provincial Picture Houses v. Wednesbury, 1948, 1 KB 223
[112] R v. Hillingdon LBC Ex parte Pulhofer, 1986 AC 484
[113] 518B-F of R v. Hillingdon LBC Ex parte Pulhofer, 1986 AC 484
[114] R v Director General of Telecommunications ex parte Cellcom, 1999, ECC 314
[115] R v. Director General of Electricity Supply ex parte Scottish Power Plc, 1997, AC

reasonably satisfactory balance between the public interest and the industry's needs. Under the new regime introduced within EU, U.K. found itself mature and experienced enough to take the next step, setting out under the Communications Act[116] that the merits of decisions will be subject to appeals. What was quite difficult to achieve before 25 July 2003, thus becomes the norm under the new legal framework.

Nevertheless, in another Commonwealth country, the difficulty of appealing the substance of a regulator's decision, witnessed in the U.K., is enlarged by recent case law.[117] Australia, which follows the same principles regarding appealing mechanisms against regulators' decisions, has recently found itself constraining the already limited application field of the *Wednesbury principle* to extreme circumstances only. Such circumstances will arise only when the presented evidence is capable of supporting only one possible conclusion. Thus, if the regulator does not reach this conclusion, his decision will be characterised as unreasonable and scrutiny of the merits of the case will be ruled. It seems that the Courts tried to reserve for themselves the determination of what is or is not the only possible interpretation of the evidence and at the same time, they switched the principle of reasonableness with the one of correctness. In other words, the main question is not whether a regulator's decision is reasonable or not but whether based on the evidence before him he made the correct decision or not.[118]

On the other hand, most civil law countries employ the *principle of proportionality* in cases of judicial review. The concept of the principle well established within the EC Treaty[119], and proclaimed in Article 8 of the Directive 2002/21/EC[120], focuses rather on the determination of the necessity of a measure than on the reasonableness of that measure. Thus, the doctrine of proportionality

[116] See note 100

[117] See Minister for Immigration and Multicultural Affairs v. Eshetu (1999) 162 ALR and Minister for Immigration and Multicultural Affairs v. Betkhoshabeh (1999) FCA 980

[118] For a more detailed discussion on the principle of reasonableness in Australia see N. Sidebotham: "Judicial review: Is there still a role for unreasonableness?", E-Law, Murdoch University Electronic Journal of Law, Vol 8, No. 1, March 2001, available at: www.murdoch.au/elaw/issues/v8n1/sidebotham81nf.html

[119] Article 5 (ex Article) 3b of the Treaty establishing the European Community (Treaty of Rome), 1957, as amended by the Maastricht Treaty*: "[…] any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty».,* Official Journal C 340, 10.11.1997, pp. 173-308, available at: http:// europa.eu.int/eur-lex/en/treaties/

[120] Article 8 § 1: *"[…] Such measures shall be proportionate to those objectives".* See note 15

calls for a judicial assessment of policy objectives pursued by the relevant authority. Applying this principle to judicial reviews of regulators' decisions, what is important to establish first is the lawfulness of the decision; and a decision is lawful as long as it is appropriate and necessary to achieve the objectives set out by the law and legitimately pursued by a NRA. In conjunction to this, it is further examined whether a regulator chooses the least onerous measures from the ones available and whether the disadvantages caused are not disproportionate to the aims pursued.[121] The need to act is not under review; the means employed are scrutinised and if the court decides that a regulator's decision is disproportionate to the aim, then a re-evaluation of the substance will be ruled.[122]

Based on the above analysis, different constitutional and institutional structures around the world are the key answer to the emergence of divergent methods of assessment in determining the basis on which a decision should be appealed or not on its merits. Irrespective of these differences, international consensus on what should be done in order to further enhance the legitimacy of NRAs was achieved long ago. Thus, the main issue is that concrete and transparent appealing mechanisms against NRAs' decisions are put in place and are used in order to serve the public interest efficiently. Since the European Commission has realised the vital importance of the aforementioned, it set forth a whole new scheme for the renovation not only of these mechanisms but of the whole regulatory structure of the telecommunications industry. Following the market and the technological trends of the last decade, the institutions of the EC as well as other policy-makers around the world realised that new rules should be made or better still, no explicit rules should apply to the sector anymore. The new legal framework, which came into

[121] Definition of the principle of proportionality and further clarification of its applicability can be found in Case C-66/82 Fromançais (1983) ECR 395 and Case C-331/88 R. v. Minister for Agriculture, Fisheries and Food, ex parte FEDESA and others (1990) ECR I-4203. For a further discussion, see J. A. Usher: "General Principles of EC Law", p. 37-51, European Law Series, Longman, 1998

[122] Although this paper does not intend to go into a comparative discussion regarding the *principles of reasonableness and proportionality*, certain points need to be highlighted. In simple mathematical terms, reasonableness is a static concept; either it is there or not, and no test of justification can be employed. Yet, when someone tries to identify the relationship between two matters (in our case a regulator's decision and the ultimate aim), they must put these matters in a qualitative and quantitative equation. In other words, he tries to strike a balance, and this balance can be classified as proportionality. However, the test of reasonableness will be employed as part of the whole assessment. The underlying idea is what is reasonable is not always proportionate but what is proportionate is always reasonable. Therefore, in judicial reviews, when a Court applies the principle of proportionality a more complete assessment is available, as other factors apart from the reasonableness of the decision of a NRA are taken into account.

force on 25 July 2003, can have an interesting and quite unpredictable impact on the future status of NRAs of the e-communications market.

Chapter 4: PROJECTING NATIONAL REGULATORY AUTHORITIES INTO THE FUTURE

Telecommunications regulation is currently under an evolutionary process in which explicit and prescriptive rules are being replaced by more generalised rules and procedures. The trend of deregulation is the political and legal answer to the convergence of telecommunications, media and information technology sectors both at technological and market level. Moreover it further provokes divergent reactions to legislators, regulators and stakeholders. It is sometimes characterised as an unprecedented and unique regulatory means, whilst it is no more than a change in regulatory techniques. It just puts in legal terms what the sociologists call *proceduralisation of law*.[123] Under this regulatory approach, the objective of law is to organise the way that regulatory powers are exercised through procedural and general rules rather than to provide detailed and technological-specific direction. This policy alteration, initiated by the technological revolutions and the structural changes within the liberalised relevant markets through vertical and horizontal integrations, has already caused a lot of scepticism regarding the necessity and the institutional structures of NRAs within the industry.

The above analysis underlines the fact that no optimal form of regulator exists. There is no specific formula, which can guarantee efficiency and success of the regulatory work. Principles such as independence and autonomy of a NRA can be so easily manipulated and they can weaken the credibility of the regulator. This does not mean that these principles are not vital for the construction of an effective agency; yet, they have to be supplemented and strongly supported by transparent, solid and sustainable regulatory procedures and methods. Each country endorses the type and

[123] C. Scott: "The proceduralization of telecommunications law", Telecommunications Policy, Vol. 22, No. 3, p. 243-254, 1998

form of regulation according to its institutional endowments and methods of governance. So long as NRAs can constantly pass the test of structural and regulatory accountability, then these NRAs are considered to be the optimal ones. How this test works is quite simple. If a regulator is regarded as trustworthy, competent to create a stable and predictable environment within the market, dedicated to serving the *public interest* and initiator of clear, open and transparent procedures, then his efficiency is warranted.

The debate between independence and accountability is an illusionary one; it is obvious that the former cannot exist without the latter. A regulator has to prove that it is independent; a legal mandate establishing its independence is not enough. In addition, it has to be seen that it is not captured, in other words that its accountability is not manipulated, and that it respects the limits of its regulatory power. Someone could wonder how is this linked to the future of NRAs within the new deregulatory legal framework. Since, the super-NRA does not exist but it is the result of a wide set of factors, then the next logical step is to, at least, create the appropriate to the circumstances legal environment for the development of the best possible regulator. The current circumstances are convergence of technologies and markets, full competition and liberalisation of sectors and deregulation of procedures and institutions. Thus, the dominant question is which institutional formula would serve better the objectives set within the new framework.

Some suggest that NRAs should and will be absorbed in due course by competition agencies. Based on the fact that the economic objectives of the new regime are founded on competition law, it appears logical to hand regulatory powers on the e-communications sector to the general competition authorities. This proposition does sound quite appealing. Under this scenario, there is going to be tremendous economy of both human and financial resources. In addition, this would mean the perfect alignment of national regulatory practices with the international policy impetus. However, general competition authorities do not hold the profound expertise to handle matters within such a complex industry.[124] Moreover, their role is mainly focused on *ex post* controls and they take action on *ad hoc* basis. On the other hand, NRAs promote and apply *ex ante* competition rules, which are vital

[124] Dialogue Highlights, World Dialogue on Regulation for Network Economies, 2002: www.regulateonline.org/dialogue/dialogue.htm

particularly with respect to the use of scarce resources (i.e. radio spectrum, rights of way, numbers) and to obligations towards the public (i.e. universal service obligation). In that way, companies are fully informed of the rules of the game. Since the growth of competition is heading towards its peak in converging multi-sector markets, NRAs will be more necessary than they were ever expected to be.

Based on their proactive regulatory techniques they will have to monitor the practices, structures and performance elements of a fast-evolving market. No matter how simple this appears to be, it demands a substantial and extensive market knowledge and thoroughness on behalf of NRAs regarding the use of analytical tools employed by competition authorities. This is due to the complicated and unique character of the e-communications market. New Zealand's example proves that the efficiency of a competition authority within this industry can be quite limited. NRAs and general competition authorities apply different aspects of competition law and this practice is what strikes the right balance between economic and social objectives within the communications market. Therefore, shared jurisdiction between these authorities regarding the application of competition law is the most effective regulatory model of the industry for the future.

Moreover, in the realm of changes introduced in particular within EU, it is suggested that the next generation regulatory model will be a supranational regulator.[125] The idea of a European Regulatory Authority (ERA) is considered to be the possible means to confront the challenges of augmented overseas competition within the industry. In addition, it can simplify and speed up procedures within the internal market and thus give the right stimulus to the European market to proliferate. Regardless of how challenging this solution can be, there are important issues that have to be taken into account before making any decision. Primarily, the major issue relates to the role of this ERA. Since there is an abundance of advisory commissions and working groups, the creation of such a super-authority aims at allowing it to have a determined regulatory role within EU. However, such a step demands for an empowered institutional structure of the authority.

There are two kinds of possible EU regulatory models; the ones, whose creation does not call for any amendment of the establishing Treaties[126] (i.e. the

[125] J. Worthy & R. Kariyawasam: "A pan-European telecommunications regulator?", Telecommunications Policy, Vol 22, No 1, p. 1-7, 1998
[126] Ibid

Office of Harmonisation-the Trade Mark and Designs Office[127]) and these, which can be established only after the necessary amendments (i.e. the European Investment Bank[128] and the European Central Bank[129]). The procedure of establishing an ERA is vital for its future role. For example, the Office of Harmonisation, which was created under Article 235 of the Treaty,[130] functions independently of the European Commission, yet it is accountable to it on regular basis. It does have an important role in the administration of the trademark policy within the EU and its working methods are set out in the Council Regulation 40/94/EC[131]. Nonetheless, the European Commission has the final word regarding policies and practices of the Office. Within this context, an ERA would be another authority functioning at arm's length of the European Commission.

If someone counts the number of bodies currently available at supranational level and analyses their roles within this industry, will come to the conclusion that there is no need for an additional authority with complementary character within the internal market. Currently, authorities, which hold a role within this sector, are the Information Society Directorate-General (responsible for harmonisation measures), the Competition Directorate-General (responsible for liberalisation measures) and the Communications Committee. In addition, the new framework provides for a High Level Communications Group to be established, which will offer the necessary platform of sharing experience, identifying problems and promoting changes, let alone the existing and the future working and other advisory groups.[132] Thus, there is no doubt that a sufficient number of authorities will be in place in order to deal with all the relevant issues.

On the other hand, establishing an independent and autonomous body, following the model of the European Central Bank or the Investment Bank, has to be seen through the right perspective. The kind of tasks that will be assigned to the ERA will determine its legal basis and most importantly the extent of its regulatory powers. Since an amendment will be the tool for the creation of such an Agency, the EU will

[127] Information about the Office of Harmonisation is available at: http://europa.eu.int/agencies/ohim/index_en.htm
[128] European Investment Bank: www.eib.org
[129] European Central Bank: www.ecb.int
[130] See note 127
[131] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark O. J L 011, 14/01/1994 P. 0001 - 0036
[132] See note 15

make sure that essential principles of accountability will be ensured. However, apart from all the practical issues involved (i.e. staff, funds, choice of language etc), the most crucial point is whether such an idea can satisfy the test of subsidiary and the trend of decentralisation of powers promoted within EU. Such an authority will remove a lot of regulatory activities currently conferred on NRAs of Member States and ultimately it will allow them to hold more of a consultative character than a regulatory one.

In addition, such an institution would be a step closer to principles of federalism, a concept and an institutional structure that is somewhat unwelcome from the Member States. Such a rebuff originates from the idea that the EU is based on convergence of powers and co-operation among countries with the same objectives and interests rather than on the creation of a federal state consisting of independent countries. It is obvious that at least for the time being no Member State would like to loose its heritage and history and become part of a federation. Nonetheless, even if someone can speculate that the EU will end up being a federal union, this is unlikely to happen in the foreseeable future. Therefore, what would actually be useful and helpful is a further enhancement and clarification of the currently available mechanisms and authorities at supranational level. Further support of co-operation techniques among the Member States' NRAs and more recognised powers conferred on the regulatory authorities would be an important improvement within the new legal framework. However, the EU can keep this issue under review and when the timing is right, which will most probably be after some reasonable years of experience in regulating converged markets, an ERA might appear as the next step to take within the internal market.[133]

Finally, there is a trend towards the creation of multi-sector regulators within the industry. Following the example of the market, countries have found that a convergence of regulation at an institutional level will facilitate harmonised

[133] A point clearly made in the two surveys undertaken regarding the creation of an ERA and its possible added value for the telecommunications with respect to the new legal framework. In addition, both of them offer an extensive analysis of an ERA's possible role, reactions and anticipations of Member States regarding EU's work on this area. "Issues associated with the creation of a European Regulatory Authority for Telecommunications", A Report by NERA and Denton Hall for the European Commission, March 1997, available at: europa.eu.int/ISPO/infosoc/telecompolicy/en/Nera.htm. And "The Possible Added Value of European Regulatory Authority for Telecommunications", Eurostrategies/Cullen International for the European Commission, October 1999, available at: europa.eu.int/ISPO/infosoc/telecompolicy/en/eraes12-99.pdf

deregulation within the industry and support efforts of self-regulation and co-regulation. This suggestion does not lead to an abolishment of NRAs; in contrary, it builds up on the current structures and shows the next generation regulatory models.[134] An extensive analysis of the advantages and disadvantages of multi-sector regulators was presented in chapter 2, however, it is necessary to point out that this structure is by nature less vulnerable to political capture, as there is no strong relationships with a line ministry.

In contrast, the same amount of effort and thoroughness regarding the establishment of legitimacy of current NRAs should be invested on regulatory procedures and roles of multi-sector ones as well.

Nonetheless, international past experience on the behaviour of such agencies is not really broad, but there is no obvious reason to apply different criteria and rules to their structures and procedures, since they are in essence regulatory authorities. Therefore, issues and problems identified and solutions proposed throughout this paper in relation to simpler types of NRAs apply to multi-sector ones as well. In other words, a more solid, clarified and flexible regulatory role is necessary for such big NRAs in order to enable them to maintain a legitimate and credible character within the market. Based on the Communications White Paper (2000)[135], the U.K. has already introduced the establishment of OFCOM[136], a multi-sector regulator, structured as a corporate body, which will combine the functions of the Broadcasting Standards Commission, Independent Television Commission, Oftel, the Radio Authority and the Radiocommunications Agency.

The growing number of multi-sector NRAs established around the world proves that special authorities and not only general ones (i.e. competition authorities) at national level and not necessarily at a supranational one are necessary for the successful function of the e-communications market. Under this scenario, the core of regulatory approach remains the same; the only thing that changes is the institutional organisation and thus the type of regulation, which gets a wider character. In fact, most countries welcome this kind of regulation. However, the extent to which such NRAs will be endorsed around the world strongly depends on institutional structures,

[134] P Smith: "What the Transformation of Telecom Markets Means for Regulation", Note No. 121, World Bank Group, July 1997: www.worldbank.org/html/fpd/notes/121/121smith.pdf
[135] United Kingdom Communications White Paper, 2000, available at: www.communicationswhitepaper.gov.uk
[136] See note 39

regulatory habitat, and technological expertise and market maturity within each country.

Therefore, under the new legal framework the future of NRAs can be promising. Leaving aside, at least for the foreseeable future, ideas that can have a confusing impact on the market, policy-makers should further support clarity and predictability of regulatory processes with the ulterior intention of sustain the independence, legitimacy and credibility of the structures of NRAs. However, this cannot be achieved, unless consideration is given to techniques of governance employed by each country, the policy objectives set at international level and the regulatory working-methods of NRAs.

CONCLUSION

In conclusion, the rationale of regulating utilities industries especially the telecommunications one is derived from the need of governments to control important financial sources as well as from the social objective of *public interest*. Even though, regulation was not regarded as a separate function from policy and operational services, experience and market impetus led to the delegation of regulatory powers to specific bodies, the national regulatory authorities.

Their emergence was combined with the development of divergent types and forms of agencies due to the abundance of institutional endowments available in each country. In addition, it brought a number of issues related to their optimal institutional structure and regulatory procedures. Since their international recognition through the WTO and the official declaration of their independence from telecommunications companies, most countries concentrated on safeguarding the autonomy of NRAs. However, much of the efforts were in vein. Even NRAs, which were - at least according to their establishing legal mandate - enjoying a high degree of independence not only from the industry but also from the policy-makers did not manage to escape from practices of political capture.

The problem is likely to be tracked into the working methods employed by NRAs. As long as these methods are not properly secured and do not offer a fertile

environment for open, transparent and participatory procedures, then the efficiency of NRAs can be severely sabotaged. The point is not just to create and maintain an independent agency at any cost, but to enhance its legitimate character. The most viable way to achieve this goal is to enhance NRAs' regulatory accountability and to strike the right balance between the powers they hold and the needs of the public, including the industry's interests. Although, there are reactions towards this kind of accountability, it is true that there cannot be efficient independence without it. The public needs to witness and experience a NRA's role and actions within the industry. The objective must be the sustainability of NRAs' legitimacy and not just their independence, a concept quite vague and relative on its own.

Since these regulatory principles, whenever employed within competitive and liberalised markets, proved to bring successful results, they do constitute the basis for the next generation regulatory structures as well. However, different approaches have been lately emerged with respect to the future of NRAs. The changes brought by the rapid technological innovation and the globalisation of markets affected the regulatory regimes of the telecommunications industry. The most illustrative example of this impact is seen within EU. On 25 July 2003, the internal market was officially set to the imperatives of deregulation. Due to the phenomenon of convergence of ICT any reference is made in relation to an electronic communications market.

However, deregulation does not signify the end of NRAs. Even though there are some interesting suggestions of relying more on competition authorities and gradually abolishing NRAs or establishing powerful supranational NRAs such as an ERA leaving a minor role to the national ones, it is still quite early to make such plans. This approach towards regulation simply introduces a more flexible way of doing things. Within this context, there might be a move towards regulatory agencies, which do not just cover one sector but a whole industry, such as the OFCOM in the U.K., but this does not mean that NRAs are not necessary especially under the new legal framework.

Nonetheless, even in the era of deregulation the main issue remains the same. Regardless of which type of regulatory structure a country chooses to establish and maintain its NRA, all the efforts should be prominently focused on the enhancement of the regulator's legitimacy and credibility. There is no optimal NRA by virtue. However, there is a way to achieve the best possible and least unreliable

regulatory model; and it could not be better emphasised than through the words of the United Nations Secretary General Kofi Annan:

"Without good governance – without the rule of law, predictable administration, legitimate power and responsive regulation – no amount of funding, no short-term economic miracle will set the developing world on the path to prosperity. Without good governance, the foundations of society – both national and international –are built on sand." (Original in French)[137]

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