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Article — Published Version

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Intereconomics

Suggested Citation: Koenig, Christian; Loetz, Sascha; Fechtner, Sonja (2008) : Do we really need a European agency for market regulation?, Intereconomics, ISSN 0020-5346, Springer, Heidelberg, Vol. 43, Iss. 4, pp. 226-235,
<https://doi.org/10.1007/s10272-008-0255-x>

This Version is available at:

<https://hdl.handle.net/10419/42004>

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Do We Really Need a European Agency for Market Regulation?

In November 2007, the European Commission suggested that an EC regulatory agency should be set up for the telecommunications markets. The following paper examines the key tasks and structure of the proposed agency and identifies the limits to the delegation of powers involved by reflecting on the relevant case law and the existing doctrine. It compares the concept with a recently published rapporteur report to the European Parliament and an alternative model of a joint body of national regulatory authorities.

As part of the current review of the regulatory framework for the telecommunications sector under Community law, the institutional aspects of regulation have become the focus of discussion. In its amendment proposals on the regulatory framework of November 2007, the European Commission suggested that an EC regulatory agency (European Electronic Communications Market Authority, EECMA) should be set up for the telecommunications markets. Concerning the objectives of and grounds for the proposal the Commission identified – after an extensive and comprehensive review process – considerable differences in the way the regulatory framework is implemented at national level and a fragmentation of the internal market into different regulatory systems. To assist in overcoming this lack of true harmonisation, the new authority shall work in close cooperation with the national regulatory authorities and the Commission and thus further the internal market by improving consistency in the application of EU rules.

The institutional setting and governance principles of the proposed Authority are based on rules and practices for Community regulatory agencies. In recent years, using these agencies to implement key tasks has become an established part of the way the European Union administers supranational governance.

However, there is no general consensus concerning the conditions for the creation, operation and control of European agencies. This contribution reflects on the legal conditions for the establishment of European agencies and the connected delegation issue. After briefly presenting the key tasks and the structure

of the proposed agency it will be examined in greater detail if, and on what legal basis, the establishment of the EECMA is feasible. The paper identifies the limits to the delegation of powers to this new Authority by reflecting on the relevant case law and outlining the existing doctrine; it thus seeks to highlight those features that have an impact on all regulatory agencies rather than focus on the single proposal for an EECMA that – considering the widespread resistance it has already met – might easily be dropped in the future. At the end of this paper a recently published rapporteur proposal within the European Parliament and an alternative model for a joint body of national regulatory authorities that might avoid all the uncertainties under EC Law arising from the Meroni ruling of the European Court of Justice and subsequent jurisprudence will be outlined and evaluated.

The Commission's Proposal

The Commission's proposal to establish an EECMA has been presented as a draft regulation.¹ The Commission has indicated within the framework of the current review that it has detected a number of weak points in an essentially positive development. It has identified two major problem areas relating to current EC communications legislation in the relevant area of market regulation.² From the Commission's perspective, the present decentralised regulatory system has two major flaws that are attributed to the fact that EU legislation is applied in 27 different national regulatory systems. In the Commission's view, this is causing:

- segmentation of the Market into individual, national markets
- a general lack of consistency in the application of the regulatory framework.³

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The authors wish to thank Martin Busch, Student of Law and Politics at the University of Bonn, for his valuable assistance.

¹ In the following, the features of the EECMA will be outlined only where it is necessary for comprehension of the text.

² Commission's reasoning in Document COM (2007) 699 final, p. 5.

³ Commission's reasoning on amendment proposals, COM (2007) 696 final, p. 9 ff.

These developments which the Commission deems to have observed are to be countered by making amendments in the area of the market regulation process and to the institutional organisation of regulation at Community level. To substantiate its assumption that there is a problem in relation to consistency, the Commission refers to its consultation with market players and the results of a study⁴ it commissioned for the review of the framework.

However, there is no actual proof that the examples of consistency problems provided by the Commission can be attributed to the diverging application practices of the national regulatory authorities or to diverging market conditions. The Commission, for instance, blames different cost models that have been used by the national regulatory authorities for diverging mobile termination rates without going into the issue of different national circumstances in sufficient detail.⁵

Moreover, the premise of a consistency problem is doubtful for the following reason. In accordance with the Framework Directive, it is up to the national regulatory authorities to define relevant markets within their territory. It is thus assumed that market conditions in the Member States are not sufficiently homogenous to allow a community-wide definition. Given the differences in network architecture the market conditions in the Member States vary substantially. In this context, the Commission seems to put the objective of community-wide relevant markets on a level with the internal market concept according to Art. 14 (2) EC, which states: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." An internal market-consistency problem does not occur if the application of the competition rules leads to the definition of different relevant markets; the internal market approach is more about the elimination of access barriers to the different markets and the exercise of the four freedoms. Thus, the presumption of a consistency problem in the internal communications market does not appear convincing.

In the Commission's view, the EECMA is to be responsible for the following:⁶

- creating the framework for national regulatory authorities to cooperate
- regulatory oversight of market definition, market analysis and the implementation of remedies
- definition of transnational markets
- advice on radio frequency harmonisation
- decision-making on numbering administration and advice on number portability
- network and information security (subsuming the current tasks of the European Agency for Network and Information Security, ENISA)
- general information and advisory tasks.

Apart from decision-making regarding numbering administration, the Commission envisages the EECMA's playing an advisory role only. This top-down approach implies that while the regulatory agency advises the Commission, the national authorities are obliged to transpose decisions taken by the Commission.

The organisational structure of EECMA is to include the following bodies:

- an Administrative Board, responsible for the appointment of the Director and the Chief Network Security Officer, the adoption of the annual work programme and budget, the approval of the report on the EECMA's activities, and the adoption of the financial rules applicable⁷
- a Board of Regulators, comprising one member per Member State, in charge of technical decision-making in areas such as the identification of potential rights holders⁸
- the Director, being the Authority's legal representative and responsible for the implementation of the budget, the preparation of the draft work programme and for personnel matters⁹
- the Chief Network Security Officer, responsible for the coordination of tasks and the annual work programme in the area of network and information security¹⁰
- a Board of Appeal, ensuring that parties affected by decisions of EECMA in the field of numbering enjoy the necessary remedies¹¹

⁴ Study "Preparing the next steps in regulation of electronic communications. A contribution to the review of the electronic communications regulatory framework", Hogan & Hartson and Analysys, 2006, which can be downloaded at: http://ec.europa.eu/information_society/policy/ecomms/library/ext_studies/index_en.htm#2006.

⁵ Cf. the Working Document of the Commission on the amendment proposals in the telecommunications sector, SEC(2007) 1472, pp. 67 ff.

⁶ The following account is based closely on the Commission's reasoning in Document COM(2007) 699 final, pp. 5 ff.

⁷ COM(2007) 699 final, Art. 24.

⁸ COM(2007) 699 final, Art. 27, 28.

⁹ COM(2007) 699 final, Art. 29, 30.

¹⁰ COM(2007) 699 final, Art. 31.

¹¹ COM(2007) 699 final, Art. 33, 34.

- a Permanent Stakeholders' Group, composed of experts representing the relevant stakeholders, to advise the Chief Network Security Officer.¹²

Concept of European Agencies

Before proceeding further, some clarification of the term and the concept of "European Agencies" is necessary. These agencies (also often denominated "authorities") can be identified as bodies with a legal personality of their own which have been established without a specific legal foundation in the EC Treaty providing for their creation. Over recent years, there has been a considerable expansion of these agencies in the European Community. The number has increased from four in 1993 to 29 in 2008.¹³ Notwithstanding the many differences existing among these bodies (in terms of internal structure, their relations with other institutions, responsibilities and powers, for example) and the variety of fields in which they are active, it is possible to identify a few common features. First, the agencies generally have a limited mandate, which is laid down by the establishing regulations and consists of tasks of a technical, scientific and managerial manner.¹⁴ Moreover, all have legal personality and enjoy a certain degree of organisational autonomy.

The Commission defined its views on the classification of these agencies in an "Operating Framework for the European Regulatory Agencies" in 2002.¹⁵ Here, the profiles of two types of agencies are identified:

- "Executive agencies" are responsible for purely managerial tasks (e.g. assisting the Commission in implementing the Community's financial support programmes) and are subject to strict supervision by it.
- By contrast, "regulatory agencies" are required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector. The majority of them are intended to make such regulation more consistent and effective by combining and networking at Community level activities which are initially a matter for the Member States.¹⁶

Obviously, some of the existing agencies in the Union do not fall into either of the above categories.

Legal Basis for the Establishment

Since the agency is an instrument of implementation of a specific Community policy, it follows that the legal instrument creating it must be based on the provision of the Treaty which constitutes the specific legal basis for that policy.¹⁷

The following provisions have been used in the past:

- In the absence of a separate and specific legal basis for the establishment of European agencies some of the existing ones have been based on the provisions of the Treaty which constitute the specific legal basis for the policy field in question. An example is the European Aviation Safety agency.¹⁸
- Some European agencies have their legal basis in Art. 308 EC.¹⁹ The provision reads: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures." It has often been discussed in the past whether Art. 308 EC may serve as a legal basis for the establishment of European agencies.²⁰ The provision allows the Community's competences to be adjusted to the objectives laid down by the Treaty when the latter has not provided the powers of action necessary to attain them. Art. 308 EC thus cannot be used as a legal basis unless the following conditions are met. First, the action envisaged is "necessary to attain, in the operation of the common market, one of the objectives of the Community"; and second, no provision in the Treaty provides for action to attain the objective. Art. 308 EC reflects awareness that the powers specifically conferred (functional competence) might not be adequate for the purpose of attaining the objectives expressly set by the Treaty itself (*competence*

¹² COM(2007) 699 final, Art. 32.

¹³ See Press release: European agencies – The way forward, MEMO/08/159 (11 March 2008).

¹⁴ D. Geradin, N. Petit: The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform, in: Jean Monnet Working Paper 01/04, NYU School of Law, 2.2.1. The authors mention as an example the OHIM, which is entrusted with the duty of "implementing in relation to every trade mark the trade mark law created by the Regulation 40/94".

¹⁵ Communication from the Commission: The operating framework for the European Regulatory Agencies, COM(2002) 718 final.

¹⁶ COM(2002) 718 final, p. 4.

¹⁷ Art. 234 EC and Art. 248 EC indicate that the establishment of new bodies is not *per se* precluded. However, according to the wording and the systematic position the provisions cannot serve as a legal basis.

¹⁸ Established by the Regulation 1592/2002/EC, having regard to Art. 80 (2) EC.

¹⁹ One of the various examples that can be found is the European Agency for Reconstruction, established by Regulation 2666/2000/EC, having regard to Art. 308 EC.

²⁰ R. Priebe: Entscheidungsbefugnisse vertragsfremder Einrichtungen im Europäischen Gemeinschaftsrecht, Baden-Baden 1979.

ratione materiae). It cannot in any circumstances be used as a basis for extending the areas of competence of the Community. Consequently, it has to be questioned in every single case whether action is necessary and the EC Treaty has not provided any other specific powers. This way, it mainly serves as a residual competence.

- The internal market clause of Art. 95 EC provides for the adoption of Community-wide rules which improve the internal market by qualified majority in the Council, in co-decision with the European Parliament.²¹ Whereas the Commission sees Art. 95 EC as suitable legal basis for the establishment of agencies in a number of cases,²² it has been argued in the ENISA case that the power conferred on the Community legislature by Art. 95 EC is the power to harmonise national laws and not one which is aimed at setting up Community bodies and conferring tasks upon them.²³
- In her opinion issued on 22 September 2005,²⁴ Advocate General Kokott stated that Regulation 460/2004 setting up the European Network and Information Security Agency (ENISA) on the basis of Art. 95 EC should be annulled. While acknowledging that ENISA will potentially make some contribution to the approximation of laws, Advocate General Kokott did not consider this sufficient as it is not possible to predict whether this harmonisation will happen and what form it could take. Art. 95 EC could not be understood as permitting all measures for the elimination of obstacles to the internal market: there must be a substantial element of approximation of laws.
- However, the European Court of Justice held that ENISA was correctly established on the basis of the

internal market clause in Art. 95 EC.²⁵ The judgement confirms that Community agencies which contribute to the proper functioning of the internal market can be established on the basis of the internal market clause – even where their powers are essentially non-regulatory in nature. The European Court of Justice also held that internal market rules do not necessarily need to have Member States as their addressees.

Delegation of Powers

The legitimacy of the establishment of a European agency, specifically EECMA, cannot be assessed without regard to the powers transferred. The delegation of powers has been described as one of the most delicate issues in Community law.²⁶ As the issue of delegation is not explicitly mentioned in the original treaties, it was – also under reference to the principle of enumerated powers – put forward by some that a delegation of powers was completely prohibited.²⁷

However, since specialised agencies have mushroomed in recent years and relevance and nature of delegation of powers is increasingly explored, it is accepted that the silence of the treaties does not necessarily convey the meaning of a general prohibition of delegation of powers.²⁸ Nevertheless, the restrictions and limitations related to these powers remain to be heavily discussed.²⁹ The question as to how far authority may be conferred upon bodies not incorporated in the Treaty was addressed for the first time in the landmark *Meroni* judgements of the European Court of Justice in 1958.³⁰ After reflecting on the conditions set out in this case and the subsequent jurisprudence the continuing validity of this very early ruling will be assessed.

The Meroni Judgements

The judgements concerned a dispute between the Italian steel undertaking Meroni and the High Authority of the Coal and Steel Community. Meroni claimed that a decision by the High Authority according to which Meroni was required to pay a certain amount of

²¹ To the application of Art. 95 EC see the Tobacco Advertising Case: “While a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market.”, ECJ, C-491/01 (2002), *The Queen v British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*.

²² Examples are the establishment of the European Chemicals Agency and the European Medicines Agency.

²³ Argument brought forward by the United Kingdom in C-217/04 – *United Kingdom v. European Parliament and Council*, para. 11. The contested Regulation No. 460/2004, the ENISA Regulation, sets up a European Network and Information Security Agency the function of which is to provide guidance, advice and assistance to the Commission, the Member States and the business community on issues relating to network and information security within the scope of the ENISA Regulation.

²⁴ Opinion of Advocate General Kokott, C-217/04, 22 September 2005.

²⁵ ECJ, C-217/04, 2.5.2006, *United Kingdom v Parliament and Council*.

²⁶ C.-D. Ehlermann: Die Errichtung des Europäischen Fonds für währungspolitische Zusammenarbeit, in: *Europarecht*, 1973, pp. 193-208.

²⁷ Cf S. Griller, A. Orator: Meroni Revisited – Empowering European Agencies between Efficiency and Legitimacy, *NEWGOV D* 40 (2004), p. 3.

²⁸ Already underlined by S. Griller, A. Orator, op cit., p. 4.

²⁹ Cf. S. Griller, A. Orator, op cit., p. 2 ff.

³⁰ See ECJ, C-9/56 and 10/56, 1957/1958 E.C.R. 133, *Meroni v. High Authority*.

money to a “*sociétés coopératives*”, an agency called “Imported Ferrous Scrap Equalization Fund”, should be annulled. After the agency had failed to reach an agreement with Meroni on its obligation to pay its contributions, the agency demanded the intervention of the High Authority.³¹ One of the submissions by Meroni related to the alleged illegality of the delegation of powers resulting from the decision by the High Authority. The latter had entrusted certain tasks falling within its responsibility to two private agencies, one of them being the above-mentioned Fund. According to Meroni, this delegation was beyond the High Authority’s powers.

Pursuant to the judgement a delegation may be lawful under the following conditions³²:

- the delegating authority confers only powers that are not different from those possessed by itself;³³
- the delegating authority has to adopt an express decision transferring the powers;³⁴
- conferrable kinds of powers are identified by distinguishing the permissible delegation of *clearly defined executive powers* from the unlawfulness of conferring *discretionary power*;³⁵
- decisions by the agencies must not lack supporting reasons indispensable for the exercise of judicial review.³⁶

Subsequent Jurisprudence of Community Courts

The European Court of Justice commented on the issue in a number of subsequent judgements but has been reluctant to refer specifically to the *Meroni* judgement.

One of the issues at stake in *Köster*³⁷ was the role of a “management committee”, established by the Council to assist the Commission when implementing the common organisation of the market in cereals. As explained by the Council and later confirmed by the Commission, “... the detailed rules of the management committee procedure do not have the effect

of putting the powers conferred on the Commission in issue: they introduce, it is true, the deliberations of a committee but in the exercise of the powers conferred on it the Commission remains the master of its own decision: it is never obliged to follow the opinion of the Committee ...”³⁸ Concluding therefore that the function of the committee was only such as to ensure permanent consultation in order to guide the Commission, the Court found no reason to interfere.³⁹

*Romano*⁴⁰ concerned an arrangement for the social security of migrant workers and, in particular, the power of the Administrative Commission for the Social Security of Migrant Workers, an auxiliary body of the Commission, to lay down certain criteria which national authorities would have to take into account. Here, the Court held that “... it follows both from Article 155 of the Treaty and the judicial system created by the Treaty, and in particular by Articles 173 and 177 thereof, that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having force of law ...”⁴¹

In *Köster*, the Council was enabled to delegate to the Commission an “implementing”, mere executive “power of appreciable scope”,⁴² whereas the duties of the Administrative Commission in *Romano* included comprehensive law-making competences, *inter alia* dealing with all questions of interpretation arising from Regulation 1408/71/EG.

The differentiation of the unlawful delegation of comprehensive law-making, discretionary powers and the permissible kind of delegation of executive powers was upheld by the European Court of Justice in its opinion on the conformity of the “Draft Agreement establishing a European laying-up fund for inland waterway vessels”. A delegation of powers to the organs of an international body was held to be lawful as the proposed agreement “... define(s) and limit(s) the powers which the latter grants to the organs of the fund so clearly and precisely ...”⁴³

In 2005, the European Court of Justice pointed out that the differentiation set out originally in the *Meroni*

³¹ ECJ, C-9/56 and 10/56, 1957/1958 E.C.R. 133 (141), *Meroni v. High Authority*.

³² For a compendium of these conditions cf. S. Griller, A. Orator, op cit., pp. 5 f.

³³ ECJ, C-9/56 and 10/56, 1957/1958 E.C.R. 133 (149-150), *Meroni v. High Authority*.

³⁴ ECJ, C-9/56 and 10/56, 1957/1958 E.C.R. 133 (134), *Meroni v. High Authority*.

³⁵ ECJ, Case 9/56 and 10/56, 1957/1958 E.C.R. 133 (152), *Meroni v. High Authority*.

³⁶ ECJ, C-9/56 and 10/56, 1957/1958 E.C.R. 133 (142), *Meroni v. High Authority*.

³⁷ ECJ, C-25/70, 1970, 2 ECR 1161, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co.*

³⁸ ECJ, C-25/70, 1970, 2 ECR 1161 (1166), *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co.*

³⁹ ECJ, C-25/70, 1970, 2 ECR 1161 (1143), *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co.*

⁴⁰ ECJ, C-98/80, 1981, ECR 1241, *Romano v Institut National d'Assurance Maladie Invalidité*.

⁴¹ ECJ, C-98/80, 1981, ECR 1241, para 20, *Romano v Institut National d'Assurance Maladie Invalidité*.

⁴² ECJ, C-25/70, 1970, 2 ECR 1161 (1161), *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co.*

⁴³ ECJ, Opinion 1 /76, ECR 741, 1977, para 16, *Draft Agreement establishing the European laying-up fund for inland water vessels*.

judgement still applies. In *Tralli*, the Court explicitly recalled the conditions laid down in *Meroni* and upheld a conferral of power of one of the organs of the European Central Bank.⁴⁴

Meroni Reinterpreted – or Simply Re-echoed?

What does this mean for the European Electronic Communications Market Authority? In accordance with *Meroni* and the subsequent jurisprudence of the European Court of Justice a delegation of powers can be permissible. However, care has to be taken to distinguish exactly between the different types of powers.

It follows clearly from the restrictive approach of the Court in *Meroni* and *Romano* that comprehensive law-making powers cannot be delegated. The processes by which the Community enacts legislation are complex and the detailed provisions concerning legislative procedures in the Treaty are a clear signal for the importance of the institutional balance between Council, Commission and the European Parliament. Thus, an enlargement of the existing law-making bodies could only be reached by an amendment of the Treaty.

In *Meroni*, the Court held that a delegation of discretionary powers to bodies other than those which the Treaty has established would render the guarantee resulting from the balance of powers less effective.⁴⁵ However, *Meroni* draws a line between the permissible delegation of clearly defined executive powers and the unlawfulness of conferring “discretionary power implying a wide margin of discretion which may make possible the execution of actual economic policy.”⁴⁶

This degree of discretion is implied if it is a decision trading off all economic conditions, thus “tend(ing) to reconcile many requirements of a complex and varied economic policy”.⁴⁷

The assessment of the subsequent jurisprudence has shown that there are no general constraints arising

from the following case law to the transposability of the *Meroni* principles. However, with the trend to create European agencies increasing there have been more and more attempts to reduce the very strict limits to the delegation of powers. It has been questioned whether and to what extent the limits set out by the European Court of Justice might be loosened without abandoning their legal foundations.⁴⁸

First, the following differentiation may serve as an argument for applying the *Meroni* principles in the case of European agencies. In *Meroni*, the Court dealt with the delegation of powers from the High Authority to the “Imported Ferrous Scrap Equalization Fund”. In the case of the establishment of European agencies, with its legal basis in Art. 95 EC (or 308 EC), the Council, in co-decision with the European Parliament, should be able to delegate its powers; the Council and the Parliament, as principal institutions mentioned in Art. 7 EC, should enjoy a wider field of competence than the High Authority of the European Coal and Steel Community did. Another, less strict standard for the delegation of powers to European agencies therefore seems appropriate.

Second, it has to be noted that *Meroni* did not concern the specific problem of public satellite bodies created by the Community legislator.⁴⁹ The High Authority entrusted certain tasks falling within its responsibility to two private agencies set up under Belgian private law, which were therefore not integrated into the authority organisation of the Community. The delegation of powers to a European agency that is embedded in the administration of the Community should be possible under less rigorous conditions.

A third argument for a restrictive interpretation of the *Meroni* judgement refers to a discussion in terms of institutional balance.

Institutional Balance

According to the European Court of Justice, a system has been set up “for distributing powers” among the institutions,⁵⁰ assigning to each of them its own role in the institutional structure and the accomplishment of the tasks.⁵¹ In accordance with the role given to it, each institution is thought to represent a particu-

⁴⁴ ECJ, C-301/02 P, ECR I-4071, 2005, para. 43, *Tralli v. ECB*: “With regard to the conditions to be complied with in the context of such delegations of powers, it should be recalled that, as the Court held in *Meroni* (see [1958] ECR 149 to 152, 153 and 154), first, a delegating authority cannot confer upon the authority to which the powers are delegated powers different from those which it has itself received. Secondly, the exercise of the powers entrusted to the body to which the powers are delegated must be subject to the same conditions as those to which it would be subject if the delegating authority exercised them directly, particularly as regards the requirements to state reasons and to publish. Finally, even when entitled to delegate its powers, the delegating authority must take an express decision transferring them and the delegation can relate only to clearly defined executive powers.”

⁴⁵ ECJ, C-9/56, 1957/1958 E.C.R. 133 (152), *Meroni v. High Authority*.

⁴⁶ *Ibid.*

⁴⁷ ECJ, C-9/56 and C-10/56, 1957/1958 E.C.R. 133 (153), *Meroni v. High Authority*.

⁴⁸ Cf. S. Griller, A. Orator, op. cit., p. 18.

⁴⁹ X. A. Yataganas: Delegation of regulatory authority in the European Union, in: Jean Monnet Working Paper 3/01, NYU School of Law.

⁵⁰ The Council, the European Parliament, the Commission, the Court of Justice and the Court of Auditors.

⁵¹ ECJ, C-70/88, 1990, ECR I-2041, 2072, para. 21, *European Parliament v Council*.

lar aspect of the wider interest.⁵² On the basis of that submission, the Court has developed the concept of an institutional balance of powers into a tool for constitutional supervision. As reasoned by the Court, "observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions."⁵³

The establishment of a European Agency on the basis of co-decision by the institutions fully respects the distribution of powers: in the process of co-decision, the inter-organisational rules of decision-making safeguard the intended balance of power among the institutions.

The concept of institutional balance between the institutions is sometimes accompanied by a "vertical dimension". This term is often referred to when describing the relationship between the Community institutions and the Member States. It is argued that it is necessary not only to give the Member States and their national institutions a voice in the legislative process, but also to allow them a degree of influence over the process of the implementation and application of Community law.⁵⁴

The idea that the principle of institutional balance has a vertical dimension as well as a horizontal one is controversial and should not be absorbed too quickly. Challenges to the vertical dimension appeal to a strict interpretation of Art. 7 EC, which refers only to Community institutions.⁵⁵ In addition, the introduction of the interests and concerns of the Member States into the notion of institutional balance is producing a rather harmful effect as it artificially strengthens the position of the Council.⁵⁶

The vertical dimension should be upheld only insofar as it should be safeguarded that a core field of very important, main responsibilities (such as law-making powers) should remain with the Community institutions and not be "outsourced" to specialised bodies. Deci-

sions concerning individual cases should be treated much less strictly than complex law-making rules that are to be observed by everyone.

The designated EECMA is far from disturbing the institutional balance. Except for a very limited decision-making power in relation to the administration of rights of use for numbers from the European Telephone Numbering Space (ETNS) the tasks of the agency are of an advisory nature. Giving advice on radio frequency harmonisation and providing a framework for national regulators to cooperate are only two of the various responsibilities that facilitate and reduce the Commission's workload. For the Commission, the possibility of delegating to an independent authority produces countervailing forces that make policy movement more rapid, stable and accurate when divergent interests are at stake. Thus, EECMA is capable of not only respecting but also enhancing the institutional balance.

Body of European Regulators in Telecom

The circumstances set out above all argue for a restrictive interpretation of the existing case law when exploring the possibilities of delegating power to regulatory agencies such as EECMA. It is hard to forecast whether the European Court of Justice will have difficulties in this situation in adapting its case law by loosening the limits. A different, decentralised regulatory approach could avoid the uncertainties.

Arguing that an EECMA as proposed by the Commission could hinder European competitiveness by adding a large bureaucracy and thus impeding the introduction of better regulation, a rapporteur proposal within the European Parliament⁵⁷ suggests the establishment of a "Body of European Regulators in Telecom" (BERT), an independent expert advisory body.

As the proposal relies on a decentralised system of independent regulators, BERT has a lighter structure than the proposed EECMA:

- A Board of Regulators as the governing body of BERT would be composed of the representatives of the 27 national regulatory authorities and chaired by one of the members appointed by the Board of Regulators for a term of one year. The Board of Regulators would take all decisions related to BERT's functions by a qualified (two thirds) majority.
- In order to enhance the accountability, transparency and visibility of BERT, the post of a Managing Director would be created, who would be responsible for

⁵² ECJ, C-138/79, 1980, ECR 3333, 3360, para. 33, *SA Roquette Frères v. Council*.

⁵³ ECJ, C-70/88, 1990, ECR I-2041, 2072, para. 22, *European Parliament v Council*. However, the Treaty itself indicates that the principle of institutional balance cannot be applied without constraints. Art. 211 EC provides for a "conferral mechanism", stating that "(...) the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter."

⁵⁴ M. Everson: Independent Agencies: Hierarchy beaters?, in: *European Law Journal*, Vol. 2, No. 1, 1995, pp. 180-211.

⁵⁵ B. de Witte: The Role of Institutional Principles in the Judicial Development of the European Union Legal Order, in: F. G. Snyder: *The Europeanisation of Law: The Legal effects of European Integration*, pp. 83-100.

⁵⁶ S. Prechal: Institutional Balance: A Fragile Principle with Uncertain Contents, in: T. Heukels, N. Blocker, M. Brus: *The European Union after Amsterdam: A legal Analysis*, pp. 273-294.

⁵⁷ Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, COM(2007)0699 – C6-0428/2007 – 2007/0249(COD).

implementing the annual work programme under the guidance of the Board of Regulators.

- To cover the administrative needs a secretariat would be established.

BERT would act as an independent expert advisor in order to promote a consistent regulatory approach across the European Union. The proposal ensures a closer link between the body and the European Parliament than in the case of the EECMA. BERT would be in charge of the adoption of common positions and opinions on specific matters regarding electronic communications, such as global and cross-border telecommunications services, in order to increase regulatory consistency and promote a pan-European market and pan-European rules. BERT should contribute to consistency and promote a harmonised application of the provisions of the Framework Directive and the specific directives. As envisaged for the EECMA, the body would additionally perform specific administrative, registering and monitoring duties related to pan-European matters.

As it is held that security matters should already be dealt with effectively by ENISA and spectrum issues by the Radio Spectrum Policy Group, those matters are not embedded in the catalogue of BERT's key tasks.

The legal basis for the establishment of BERT is Art. 95 EC.

BERT would receive an autonomous budget in order to guarantee its full autonomy and give it greater authority in the respective Member States. One third of its budget would be contributed from the Community budget and two thirds from the national regulatory authorities. Provisions would be made in each of the Member States to ensure that the national regulatory authorities have sufficient funding to be able to contribute properly to BERT.

Joint Body of National Regulatory Authorities

We now present a third proposal: an alternative bottom-up approach that would neither create an authority at EC level nor delegate the decision-making powers of EC institutions.

The "Joint Body" of national regulatory authorities would be set up as an association of national regulatory authorities that would not have an independent legal personality, i.e. in particular, this body would not be part of the direct or indirect Community administration. Rather, the approach stipulates an obligation under secondary law that national regulatory authorities take utmost account of the Joint Body's common positions in order to foster harmonisation in exercising

the regulatory powers originally vested in national regulatory authorities.

In contrast to a regulatory agency, the focus of the strategy pursued here is to create a procedure of joint decision-making incumbent upon national regulatory authorities subject to national law (albeit binding as secondary sources of Community law which confer certain rights upon national regulatory authorities). This regulatory approach avoids uncertainties under EC law arising from the Meroni ruling of the European Court of Justice⁵⁸ and the resulting restrictions on the delegation of the Community's decision-making powers to bodies the existence of which was not contemplated by the Treaties establishing the European Community. The Joint Body of national regulatory authorities would neither create an authority at EC level nor delegate the decision-making powers of EC institutions.

Accordingly, the Framework Directive does not specifically regulate the internal structure of the Joint Body in order to avoid creating an indication for points of substantive law that might suggest it is an administrative unit of the Community. The Joint Body would regulate its internal organisation by adopting its own rules of procedure.

The Joint Body can, on its own initiative, or – if this is expressly provided for in the directives of the framework – adopt opinions and common positions in the field of tasks allocated to the national regulatory authorities by virtue of the law on directives. As such, common positions have the same binding character as Commission recommendations, the guidelines set forth within the framework of Art. 15 para. 3 of the Framework Directive and the opinions of other regulatory authorities pursuant to Art. 7 para. 5 of the Framework Directive, i.e. national regulatory authorities must take utmost account of the common positions issued by the Joint Body of national regulatory authorities when adopting their decisions. If, notwithstanding this, a national regulatory authority deviates from a common position, it will need to provide a reasoned justification for its decision to the Joint Body of national regulatory authorities ("comply or explain"). Decisions taken by the Joint Body will generally be taken by a majority vote, with each national regulatory authority having one vote. Provision can be made in the law on directives for unanimous decisions to be taken in individual cases. The Joint Body can itself make provision in its rules of procedure to facilitate a coordination process with the Commission or for the Commission to participate in the Joint Body's decision-making process, acting in an advisory capacity.

⁵⁸ European Court of Justice Reports 1958, pp. 36, 75.

The Joint Body is, in particular, to submit opinions to the Commission in line with Article 7 procedures and will adopt common positions on market regulation, particularly in relation to the imposition of *ex ante* obligations (remedies). Furthermore, the current proposal envisages involving the Joint Body in defining cross-border markets and in the resolution of cross-border disputes. As they have been incorporated into the Framework Directive, additional participation rights of the Joint Body of national regulatory authorities could be implemented by making a simple reference to them in the directives of the framework.

The Joint Body would be obliged to submit a report to Parliament and the Commission once a year.

Under secondary EC law, the Joint Body of national regulatory authorities constitutes a solution within the framework of legal harmonisation, i.e. the establishment is based on the harmonisation competency ensuing from Art. 95 EC. It is true that there is no evidence of any precedents that might cover in full the model described in the foregoing. Nonetheless there are practical examples of legal instruments adopted by the Council that cover partial areas of the envisaged provisions of the Decision. The European Parliament and the Council set up and organised the European Administrative School, *inter alia*, by adopting Decisions 2005/118/EC and 2005/119/EC. Art. 4 of Decision 2005/118/EC newly established a dependent part of the Community administration. The staff of the newly established administrative unit would be assigned to the European Communities Personnel Selection Office.

As Art. 283 EC allocates regulatory competence for laying down the Staff Regulations of officials of the European Communities and the conditions of employment of other servants of those Communities under primary law, there are no objections to the Council's also taking decisions in individual cases that either deviate from existing staff regulations or modify them.

A Secretariat/Office of the Joint Body shall be created by a separate legal act, i.e. a Decision of the Council and the European Parliament, which provides staff and office functions. It would be a dependent part of the direct EC administration (not necessarily of the Commission administration), without a legal personality and would provide its resources exclusively to the Joint Body. The office is likely to require approximately 20 full-time staff as it would be entrusted primarily with the coordination and preparatory tasks whereas the actual technical work would be performed by the national regulatory authorities in the Joint Body's working groups.

In order to ensure the Joint Body of national regulatory authorities is not dependent on funding and furnishing of material resources by the Member States, finance must be facilitated by the Community. The Joint Body would require human and material resources (staff, office space, meeting rooms, office equipment) in the form of a secretariat/office.

The Joint Body does not have a legal personality, hence any direct allocation of funds has to be ruled out. Funding for the Joint Body must therefore be provided through "indirect" financing primarily by the provision of material resources by the Community in the form of relevant administrative resources. The EC would be acting as a contracting party for the procurement of the necessary resources and would provide the Joint Body (exclusively) with these resources (as a natural resource). The latter could be implemented within the framework of the Council decision by delegating direction powers for premises under employment law to the Joint Office.

The three proposals for the institutional organisation of regulation outlined differ substantially. The only common denominator in relation to the proposals is that Article 95 EC provides the legal basis.

Joint Body v. BERT

The Joint Body of national regulatory authorities and BERT both provide a set-up that relies on a decentralised system of independent regulators in which the national authorities play a decisive role. Such a decentralised solution is preferable, because the market conditions in national markets vary considerably. This can be attributed, for instance, to the widely diverging network topographies, the various relations of fixed and mobile substitution and the different broadband infrastructures that have developed over time in the Member States. In accordance with the basic principle of the legal framework, according to which the market regulation process should enable a problem solution to be found that is tailored optimally to the competitive problems of each individual market, differences in using remedies between the Member States are hence less a sign that the regulatory framework has failed than indicative of diverging market conditions.

However, compared to the Joint Body model, BERT reveals a characteristic leading to the assumption that the implication of the legal status has not been fully scrutinised. According to the rapporteur proposal within the European Parliament BERT would be set up by a regulation and replace the ERG. In the justification of the proposal it is explicitly said that more powers should be dedicated to the body "... by giving it

legal personality and therefore independence”.⁵⁹ Consequently, BERT implies the same uncertainties and conflicts arising from the Meroni ruling as the EECMA does. The Joint Body model, in contrast, avoids these uncertainties and thus the resulting restrictions on the delegation of decision-making powers.

Joint Body v. EECMA

According to the Commission proposal, the EECMA would only be able to take binding decisions in the area of numbering administration for European services. In all other respects, the EECMA would be confined to performing preliminary work for the considerably expanded decisions by the Commission, particularly within the framework of the consultation and consolidation process. However, measures implemented by the EECMA itself would not be binding for national regulatory authorities (with the exception of competency for numbering administration). In contrast, the proposed Joint Body of national regulatory authorities has the power to adopt binding (in the sense of taking into utmost account) common positions on all regulatory issues. The national regulatory authorities would be obliged by virtue of the Framework Directive to take utmost account of the common positions of the Joint Body of national regulatory authorities when adopting their decisions.

This bottom-up model of a Joint Body could potentially overcome the conceptual weakness of the European Regulators Group (ERG) identified by the Commission without limiting the regulatory flexibility in individual cases, and at the same time there would be no need to expand the Commission's veto to remedies that would go hand in hand with a clear administrative expansion. The Joint Body would also further evolve the ERG, which would render the need for basic changes in the regulatory system superfluous and in particular avoid a shift towards a centralised administration system.

With the EECMA model, the Commission would retain responsibility for decision-making (with the exception of decisions relating to numbering administration). By contrast, the national regulatory authorities would be required to take joint decisions within the Joint Body – as a rule by a majority decision. The limitations associated with the coordination requirement within the Joint Body would at the same time compensate their rights of participation and co-decision-making; this binding character of taking the utmost account of

the common positions of the Joint Body therefore represents a (collective) commitment.

Conclusion

All the benefits of a Joint Body model can hence be summarised as follows. The joint body of national regulatory authorities:

- would lead to a direct coordination of the application of the law by the national regulatory authorities – a desirable move particularly in respect of future transnational markets;
- would leave the decision-making powers at national level in individual cases;
- would leverage the expertise of the national regulatory authorities directly at Community level;
- would have efficient decision-making mechanisms (majority decisions) and would ensure binding decisions are actually implemented (“comply or explain”);
- could subsume all the tasks the Commission plans to allocate to the EECMA in the market regulation process;
- would render it unnecessary to expand the Commission's powers in the “Article 7 procedures” as any consistency problems that are likely to arise would be addressed immediately;
- would render any duplication of regulatory administration superfluous at Community level;
- would fit into the decentralised regulatory system of the regulatory framework and would avoid the change of system required by the EECMA;
- represents a solution that would be compatible with the principle of subsidiarity and proportionality;
- would be a consistent further development of the present ERG.

The institutional setting and governance principles outlined would be one example of a consistent continuation of the previous decentral regulatory system. Facing the lack of a common vision of the role and function of regulatory bodies, the European Commission recently called for an inter-institutional working group to “develop a clear and coherent vision on the place of agencies in European governance”.⁶⁰

Whether these efforts will lead to a coherent approach in the regulatory field of telecommunications still remains difficult to forecast.

⁵⁹ Justification to Amendment 6, Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs, 2007/0249 (COD), 18.4.2008.

⁶⁰ Press release: Commission seeks common approach on the future governance of European Agencies, 11 March 2008, IP/08/419.