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Legitimacy in the EU single market: the role of normative regulatory governance

by

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Abstract

The thesis examines European legitimacy and regulatory governance. The research analyzes the link between regulatory governance and legitimacy in EU regulation and evaluates whether governance tools in the form of qualitative administrative criteria can contribute to European regulatory legitimacy. Governance here refers to the exercise of delegated regulatory powers by the European Commission. The question of whether the adoption of qualitative regulatory governance practices can enhance the supranational regulatory legitimacy of the European Commission has been underexamined in the literature typically without distinguishing the analysis from the so-called 'democratic deficit' of the EU. Using a case study from the telecommunications sector, the thesis conducts such an examination using a documentary method.

To create the analytical context, the thesis distinguishes the theoretical concept of legitimacy for a transnational regulator from that of a national regulator of a sovereign state. The choice is made to use a form of normative regulatory legitimacy drawn from the scholarship on regulatory governance theory. An analytical model is constructed that reflects criteria and values that bear upon legitimacy so as to constitute a meaningful alternative to democratic forms of regulatory accountability. Regulation was defined in the research to cover policy instruments, in the form of measures of positive and negative integration, adopted for the EU single market under Article 106(3) and Article 114 TFEU. The analysis evaluates the regulatory governance used by the European Commission over a twenty-three year time period in which the telecommunications sector was entirely liberalized and harmonized.

Analysis revealed that, while the Commission has improved the quality of its regulatory governance in principle, its use of normative regulatory governance in practice requires further attention, notably in respect of improving the evidence base for policy proposals and in creating a meaningful form of empirical feedback in evaluating regulatory outcomes, corresponding to an *ex post* accountability mechanism. On the other hand, the research validated the premise that a transnational regulator could purposively use regulatory governance as a tool with which to construct a defensible form of regulatory legitimacy.

Declaration

I, Sandra Keegan, hereby certify that this thesis, which is approximately 101,000 words in length, has been written by me, that it is a record of work carried out by me, and that it has not been submitted in any previous application for a higher degree.

Signature.....

Date.....

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Abbreviations

AJIL	American Journal of International Law
CMLR	Common Market Law Review
Colombia LR	Colombia Law Review
Cornell ILJ	Cornell International Law Journal
CUP	Cambridge University Press
ECR	European Court Reports
EEC	European Economic Community
ELJ	European Law Journal
EL Rev	European Law Review
ELR	Edinburgh Law Review
Emory LJ	Emory Law Journal
EP	European Parliament
EU	European Union
European LJ	European Law Journal
Fordham ILJ	Fordham International Law Journal
German LJ	German Law Journal
Governance	Governance: An International Journal of Policy, Administration, and Institutions
Harvard LR	Harvard Law Review
JCMS	Journal of Common Market Studies
JEPP	Journal of European Public Policy
JPP	Journal of Public Policy
Michigan JIL	Michigan Journal of International Law
Nebraska LR	Nebraska Law Review
OJ	Official Journal of the European Communities
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
Southern California LR	Southern California Law Review
UP	University Press
Virginia JIL	Virginia Journal of International Law
Wisconsin LR	Wisconsin Law Review
Yale JIL	Yale Journal of International Law
Yale LJ	Yale Law Journal
YEL	Yearbook of European Law

Contents

Introduction

It takes no great powers of observation to detect that the European Union (EU) is facing significant and systemic problems of confidence in its present state. The point of most contention currently lies within the depths of the Eurozone crisis that began to unfold in late 2009 and is ongoing. Few EU citizens are likely to understand the complexities of the regulatory arrangements and powers created by EU Treaty provisions on monetary union. But most will appreciate that the exercise of regulatory powers by the responsible institutions of the EU has been fraught with controversy. The popular media often turn this to journalistic advantage: horsemeat was recently discovered in food products that were meant to consist entirely of beef. One commentator wrote: 'Why in a trading block notorious for regulating things like the shape of bananas and the font size on food labels, was something as simple as identifying the difference between a cow and a horse so difficult?'[1] Such comments reflect associations with both excessive and ineptly enforced regulation.

My research engages directly with the challenge that a transnational regulator faces in establishing a credible and durable form of regulatory legitimacy. That the legitimacy of the system to which the regulator belongs is contestable makes it doubly difficult as a challenge. Legitimacy enquiries in the EU, often framed in terms of European governance issues, are legion, with well-known origins. The post-Maastricht accretion of European powers and the proliferation of European regulation have furnished much fuel with which to flame the fires of the debates on an EU 'democratic deficit' and a so-called 'regulatory state'. The political choice of retaining a set of non-majoritarian institutions and practices, while enlarging the supranationality and constitutional features of the Union, continues to produce a flourishing set of legitimacy discourses in which empirical and normative arguments have thrived.[2]

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[1] A Higgins, 'Recipe for Divided Europe: Add Horse, then Stir' *New York Times* (10 March 2013) <http://www.nytimes.com/2013/03/10/world/europe/recipe-for-divided-europe-add-horse-then-stir.html?pagewanted=all> accessed 12 March 2013.

[2] Eg A Jordon, 'The European Union: An Evolving System of Multi-level Governance….or Government?' (2001) 29 *Policy & Politics* 193-208; R Bellamy, 'Still in Deficit: Rights, Regulation

This thesis does not engage with 'regime legitimacy', but nor does it dismiss the question of a democratic deficit as one of insignificance. That issue cannot be addressed or resolved within a regulatory analysis. Moreover, there is no consensus on how the resolution of such a democratic deficit should be framed.[3] The particular institutional practices with which the present analysis is concerned relate to regulatory governance i.e. the manner in which delegated regulatory powers are exercised by the European Commission (Commission). This is an under-examined but important part of the broader governance debate about the Union.

No single framing of EU legitimacy has yet proven normatively convincing. Regulatory governance as a formal EU policy emerged as an institutional response to the culmination of a series of crises (for the Commission and the Union) as well as political developments.[4] The Commission's response to its legitimacy crisis was to embrace regulatory governance as one tool among several to restore confidence in

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and Democracy in the EU' (2006) 12 ELJ 725; L Conant, 'Review Article: The Politics of Legal Integration' (2000) 45 JCMS 45-66; A Follesdal and S Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533; F Scharpf, *Governing in Europe Effective and Democratic?* (OUP 1989); G Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 ELJ 5; D Coen and M Thatcher, 'The New Governance of Markets and Non-Majoritarian Regulators' (2005) 18 Governance 329.

[3] The EU's legitimacy 'deficit' can broadly be identified within two dimensions, even if these framings are contestable: first, a legitimacy 'deficit' in the EU's 'constitutional' character is associated with the extensive nature of the delegated powers enjoyed by European institutions with the 'constitutionalized' legal effects of the European legal order. On this topic, the scholarship is vast, with little consensus. The following offer some indication of the variety of approach. N Walker, 'Taking Constitutionalism Beyond the State' (2008) 56 *Political Studies* 519; K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205; J Shaw, 'Postnational Constitutionalism in the European Union' (1999) 6 JEPP 579; P Craig, 'Constitutions, Constitutionalism and the European Union' (2001) 7 ELJ 125; JHH Weiler, 'Does Europe Need a Constitution?: Demos, Telos and the German Maastricht Decision' (1995) 1 Yale LJ 219**.** The second deficit can be found in the absence of a recognizable form of democratic governance embodying the principle of the equality of citizens, rather than an equality of states, the latter of which characterizes an international or intergovernmental organization. A lack of reconciliation between the two principles has been highlighted as a structural element of the democratic deficit. See, eg I Pernice and K Pistor, 'Institutional Settlements for an Enlarged European Union' in GA Bermann and K Pistor, *Law and Governance in an Enlarged European Union: Essays in European Law* (Hart Publishing 2004). In a ruling on the constitutionality of the German act ratifying the Lisbon Treaty, the Second Senate of the German Constitutional Court referred explicitly to the 'structural problem of the European Union', and highlighted the tension inherent in the principles of equality of states and equality of citizens reflected in the current composition of the EU. See the press release 72/2009 of 30 June 2009 of the Federal Constitutional Court anouncing the judgment of the same date of cases <http://www.bundesverfassungsgericht.de/en/press/bvg09-072en.html> accessed 3 March 2013.

[4] The resignation of the Santer Commission in 1999 was only one high-profile crisis of the relevant period. Others concerned recurrent food scandals within the EU and refusal by some Member State governments to lift their bans on the import of British beef. See G Majone, 'The Credibility Crisis of Community Regulation' (2000) 38 JCMS 273.

the EU institutions. Thus, regulatory governance needs to be seen as a tool of choice. Using a normative framing, I examine whether the legitimacy of the Commission as a regulator can be established using a constructed analytical model of normative regulatory governance.

Regulatory governance scholarship in the EU can fairly be described as a 'growth industry'. Political scientists, economists, sociologists and jurists all offer an interesting and illuminating explanation or analysis of the growth of governance practices and mechanisms in the EU. The ever-present problem of the 'democratic deficit' is a constant element of consideration, analysis or relevance. If the scholarship has already provided rich and diverse analyses of twenty-first century EU governance, then what is the added value of another? My claim is that very few existing analyses have tried to find a way of seeing if the regulation is any good or, in the terms of my research, have examined the issue of regulatory legitimacy within a framing of normative regulatory governance.

With the creation of numerous regulatory agencies and supranational networks of regulators, and the delegation to the EU of greater regulatory authority, the EU has become a regulatory titan. This carries a politically loaded message of inefficient bureaucracy ('eurocrats') failing to focus on the essentials, a notion that the UK Prime Minister channeled to controversial effect in a speech at Bloomberg on the future of the UK in the EU in January 2013:

> I want us to be pushing to exempt Europe's smallest entrepreneurial companies from more EU Directives. These should be the tasks that get European officials up in the morning – and keep them working late into the night. And so we urgently need to address the sclerotic, ineffective decision making that is holding us back.[5]

The value of the research is found in the need to find responses to the challenges facing the Commission in exercising its regulatory powers for the valid purpose of discharging its Treaty remit.

[5] D Cameron, 'EU Speech at Bloomberg' (23 January 2013) <http://www.number10.gov.uk/news/eu-speech-at-bloomberg/ >accessed 23 January 2013.

Methodology and Research Questions

The present research separates the ongoing discourse, on whether and what kind of legitimacy deficit afflicts the EU, from an enquiry into whether the legitimacy gap in the EU regulatory regime can be bridged in theory by recourse to the mechanism of regulatory governance, specifically by using normatively defined governance criteria as a proxy for the legitimacy gap resulting from non-democratic regulatory processes. The thesis is a discourse on the legitimacy of EU and wider transnational regulatory governance through the lens of a specific case study. I construct from the theoretical literature a series of normative benchmarks of legitimacy in the context of regulatory activism against which the EU approach can be assessed and I select telecommunications as the case study to which I apply these normative tests of legitimacy in order to generate conclusions from that in-depth exploration.

Using my model, I evaluate the regulatory legitimacy of EU telecommunications regulation from 1987 to 2010. Telecommunications regulation offers a lengthy period in which European regulation was developed, proposed, adopted, implemented and refined, thus reflecting several regulatory cycles and providing an empirical basis for a comparative evaluation of the evolution of regulatory governance in the EU. Telecommunications is a technology that scales well beyond the territory of a single Member State thus supporting the case, prima facie, for a European level regulatory regime. But it is also a sector where technology can outpace the regulators. Pressures from impulsion of technology can pressure the Commission to react rapidly in order to adapt to the pace of technological development, which engenders the risk of impairing the quality of regulatory governance. Furthermore, this is a sector where technological expertise is crucial. This makes it particularly challenging for regulators to get substantive decisions right or even to understand the premises underpinning the choices they can make.

I used a documentary method for the case study, which means that I examined and analyzed the relevant documents published by the European institutions, especially the Commission, that relate to the policy development and adoption processes at European level. Given the voluminous materials published by the EU institutions on issues of electronic communications, some selectivity was

used for economy of focus. The analysis offers a basis on which to draw conclusions about the link between regulatory governance and legitimacy.

For the narrow premise that all economic regulation requires a robust form of *normative* justification, I theorize that an appropriate evaluative model of regulatory governance could be an effective tool in constructing and defending the supranational regulatory legitimacy of the Commission on an ongoing basis case-by-case. A regulator's legitimacy is never definitive but must be demonstrated systematically. While national regulators typically face independent mechanisms of accountability, the Commission is not subject to meaningful evaluations of its performance *as a regulator*, nor are the regulatory assessments that are carried out by the Commission itself subject to authoritative or independent verification.

The question of whether the adoption of qualitative regulatory practices can enhance the supranational regulatory legitimacy of the European Commission has been under-examined in the literature. The idea of qualitative regulatory governance is not new. Ample literature exists on why governments regulate. But one size does not fit all. Nor can different models be compatibly combined. I construct an analytical model that draws upon governance methods often used in national contexts of delegation, as well as research on transnational regulators, and adapt the meaning of the qualitative value of these criteria to the supranational context, such as the meaning of a normative regulatory mandate. The research thus examines several related questions. The primary question is:

1. Can a regulatory governance model be constructed for a transnational regulator that reflects criteria and values bearing primarily upon legitimacy so as to constitute a meaningful alternative to democratic forms of accountability?

Secondary questions are:

2. Could such a model be based on criteria found in national regulatory systems?
3. Does the Commission's regulatory governance policy, or do two models found in the literature, offer a meaningful alternative basis for assessing regulatory legitimacy?
4. Does an analysis of the regulatory governance practices in a selected sector over a 20 year period, using the constructed regulatory governance model, provide a basis on which to draw meaningful conclusions about the normativity of the regulatory governance examined?

Thesis structure

There is a general consensus that the Commission's prerogative to propose legislation for the internal market broadly shapes the form and content of the measures adopted. Chapter 1 sets the stage by defining the context of analysis, and defining the principal terms used in the analysis. These are EU supranational regulatory governance; normative regulatory legitimacy; and negative and positive integration measures.

In the 2000s, the Commission adopted modern techniques of policy development, associated with good governance, and these are examined in Chapter 2. Given the well-established track record of using regulatory governance techniques in most OECD countries, the Commission's 'Damascus moment' came surprisingly late. Before the programs on 'better regulation' and 'smart regulation' were adopted, the Commission enjoyed considerable discretion in how it consulted on policy proposals and ideas, gathered and evaluated evidence, developed policy measures, chose regulatory instruments, adopted draft legislation and coordinated with Council and Parliament. All of these aspects of its regulatory roles are now covered by specific governance measures that are intended to deliver high quality regulatory measures. So it is opportune to take stock of the contribution of regulatory governance to legitimacy.

The Commission documents never use the word 'legitimacy' in the context of improving the quality of regulatory measures. This is surprising for three reasons. First, good governance is positively associated with regulatory legitimacy and offers a basis for the Commission purposively to construct its institutional legitimacy as a regulator without detracting from the legitimacy of other institutions. Secondly, it is surprising because the purposive approach of the present research can be used without any changes to the institutional powers of the institutions as currently constituted. That means that linking good governance with regulatory legitimacy need not raise any political hackles and can be presented simply as a matter of good administrative practice if that is more politically palatable. Third, using good regulatory governance as a basis for establishing that the Commission's exercise of

its regulatory powers for the single market is a defensible discharge of its remit need not use the politically contentious notions of input and output legitimacy *as such*. Input legitimacy is by definition not currently capable of being claimed in any form by the EU, because of the very limited role that direct elections have on the policy choices of the institutions. Output legitimacy is much more flexible and carries notions of legitimacy that do not *require* democratic institutional forms and participation in order to be deemed valid. However, on its own, output legitimacy is insufficient to establish a normative form of legitimacy. Other values need to be present. Otherwise, a harsh, inefficient and unfair set of rules could be justified by reference to the outcomes they produce and that is certainly not normative enough as a basis for supranational regulation.

Chapter 2 also examines the role of the Commission as a pro-active regulator which began in earnest with the 'the 1992 Programme'. The chapter follows the evolution of the Commission's regulatory role from its modest beginnings into its current form as a regulatory titan. The chapter examines regulatory governance theories to lay the groundwork for a constructed analytical model. The chapter also highlights scholarship on transgovernmental regulation, legitimacy and governance and analyzes its relevance to the research. The theories of two noted scholars on EU regulatory legitimacy, Majone and Scharpf, contribute theoretical aspects to be used to compare their analysis with the constructed model to identify different analytical outcomes. Chapter 2 sets out their premises and contentions.

Chapter 3 briefly examines and analyzes the EU's own 'governance turn' in 2001 with the adoption of a White Paper on Governance. By concentrating on ensuring and improving communication between the private sector and EU institutions, while strengthening the 'Community method', the White Paper gave little indication that the Commission would shortly thereafter adopt robust regulatory design tools. As such, the White Paper offered little for a normative analytical model of regulatory legitimacy. It is notable that the criteria that were included in the formal governance policy of the EU, although broadly those found in regulatory governance scholarship or national models (such as accountability, expertise and openness) largely lacked meaningful operational content. The chapter then constructs an analytical model that draws upon scholarship on national regulatory systems as

well as on some of the framings found in the scholarship on international regulatory governance, which is an area of considerable current research. The criteria selected are: (1) a valid regulatory mandate: (2) appropriate regulatory expertise; (3) regulatory efficiency; (4) procedural due process; and (5) accountability mechanisms.

Chapter 4 then introduces the early trajectory of the telecommunications regulation which started with a big bang of liberalization in 1988 and rapidly became a regime of positive harmonization. During this early phase of regulation, the Commission adapted as a regulator, progressively by emphasizing less of its role as an independent enforcement authority for competition policy, and more of its role as an institutional partner engaged in regulatory dialogue with other institutions. This may have resulted from the legislative negotiations for the first harmonization directive as well as the level of political opposition to the direct use of Treaty legislative powers for liberalization. The Commission responded to the 'Realpolitik' of the times by linking telecommunications liberalization to the 1992 single market programme, by accepting the *fait accompli* of a shift in political power to the legislator, rather than the regulator, and by downplaying but not neglecting the role of a competition enforcement authority.

More importantly, the regulatory governance of the period reflected a significant level of normativity, much of which could be based on the highly normative Treaty-based aim of establishing a single market. This appreciation covered both negative and positive integration measures, both of which were needed for the creation of the single market following the abolition of national monopolies and the necessity of harmonizing widely varying national regulations. The chapter finds a robust level of regulatory legitimacy but does not draw this conclusion on the basis of a single criterion. Regulatory legitimacy results from a cumulative appreciation of the context and policy development practices. The evaluation of a specific factual and legal regulatory context will vary from context to context, which underscores the point that legitimacy is a matter of degree and appreciation using the criteria in combination.

Chapter 5 covers the second regulatory cycle where regulation was rationalized and modernized. The Commission successfully simplified the unwieldy

legislation of the 1990s and introduced a regulatory principle of technological neutrality to reflect the growing reality of the digital world and the convergence of data, voice and media services. The imposition of *ex ante* regulatory obligations on undertakings shifted to a test of market power based on the notion of 'dominance' as defined in EU case law. Rather than apply rules mechanistically, national regulators needed to assess their national markets in order to impose obligations within their territories.

The chapter shows the pitfalls confronting a regulator trying to balance dynamism and legal security. Undertakings in a dynamic sector should be regulated only when necessary, that is, when market failures are found, and regulation should be removed when markets are competitive. But that flexibility creates its own risks. The Commission recognized a need for flexibility but also for legal security. Another part of the problem to be addressed was the difficulty for Member States initially to transpose and subsequently to implement the harmonization measures in a correct and timely fashion. The Commission's regulatory solution for flexibility and legal security was to use soft law for itself and hard law – a legally binding Commission veto – over national analyses. Both measures were controversial. Putting pragmatism aside, the chapter evaluates the normativity of important measures to find that there were significant weaknesses in certain areas of regulatory governance but that the legitimacy of the measures of modernization and rationalization was considerable. Here again, the aim of establishing a single market remained an important justification and contributed a considerable degree of normativity to the overall assessment.

Chapter 6 examines the last cycle of regulatory policy development where significant regulatory changes were made. By this time, the sector had been liberalized for many years and the internet-linked economy was significant. Broadband services had acquired political and economic importance. Much regulatory analysis focused on the long-term regulatory ambition of encouraging the kinds of investment in infrastructure and innovation that would lead to competition between different networks as well as encouraging short-term low-cost market entry. The regulatory assessment and proposals for new legislation were accompanied by two impact assessments.

In the last cycle, an intensified centralization of *ex ante* procedures was agreed, creating bureaucratized cooperation but no additional Commission veto powers *de jure.* However, the agreed legislation blurred the line between hard law and soft law, by making Commission recommendations 'binding' on national regulators with no explicit provision for sanction in case of non-compliance. An additional burdensome *ex ante* obligation, that could in principle be imposed on undertakings in the form of functional separation, was adopted yet the rhetoric of withdrawing regulation persisted, as did that of transitioning from monopoly to competition. A formal European regulatory authority was created, with a budget of €4 million and a headquarters in Riga, but was given largely advisory tasks.

The arguments in favor of these regulatory measures lacked credibility. The evidence base relied upon was weak, particularly for the European regulatory authority. The Commission had created a European Regulators Group in 2002 which could have performed, and had performed, an advisory role. When evaluated overall, the agency was meant to appear to counterbalance the additional veto powers over NRAs that the Commission proposed along with the regulatory authority. With the failure of the Commission to obtain full veto powers during legislative adoption, the creation of the authority should have been reconsidered but was not. An independent study, which concluded that the establishment of such an authority was justified, had relied upon highly speculative aims for the authority, contestable premises and unreliable, even incomplete, data. Thus the regulatory legitimacy of the latest generation of economic regulation in the telecommunications sector falls below an acceptable standard and raises questions about the correct use of regulatory governance measures adopted in the EU, along with questions as to the true nature of the trajectory that regulation is taking.

The last regulatory cycle benefitted from an internal assessment for analytical quality control that was conducted by the Commission's internal examination board (IAB). It showed an inability to exert the kind of oversight needed. A negative assessment by the IAB of an analysis of legislative proposals merely provoked a rapidly-commissioned and executed study for the added value of a regulatory authority, but did nothing to make the services reconsider their substantive proposals. The IAB did not challenge the Commission services with a 'prove to me that we

really need these specific measures using the norms laid down in the guidelines on conducting impact assessments'; rather, the board found that the *justification* for the proposals needed improvement.

For as long as there is no external authority independent of the institution to vet the regulation in practice, the Commission will be able to prepare reports on implementation, control the regulatory discourse and avoid confronting a skeptical interlocutor. The Commission needs to be independent so that the credibility of its commitment to the aims of the Treaty remains robust. But the Commission also needs to confront real outcomes and not succumb to well-known regulators' traps, which include an inability to think 'agnostically' outside of the existing regulatory configuration.

The thesis concludes that the Commission needs to improve its quality control procedures in regulatory development and design. One recommendation is that the Commission should follow up on the tentative step taken in 2012 to develop an *ex post* mechanism for verifying and evaluating regulatory outcomes. One can understand that the Commission would find such a step daunting. Regulating the EU is one of its principal *raisons d'être.* But the Commission is a public body of the EU which is confronting unprecedented levels of loss of confidence. Whatever the Commission does, debates about its legitimacy will continue. The Commission should enter into these debates more actively and adroitly than previously. An instrumental use of regulatory governance offers the Commission the opportunity to engage with legitimacy communities in constructing, enhancing and defending its own institutional authority and regulatory legitimacy, an offer it could, but should not, refuse.

Chapter 1

Governance, Regulation, Legitimacy and the EU: Where to Start?

Introduction

This thesis is about European legitimacy and regulatory governance. Much scholarly attention has been lavished on each.[1] This research analyzes the link between regulatory governance and legitimacy in EU regulation to evaluate whether governance tools in the form of qualitative criteria can contribute to European regulatory legitimacy. Governance in this context refers to the exercise of delegated regulatory powers by a non-state regulator, notably the European Commission (Commission). The question of whether the adoption of qualitative regulatory

[1] Only a small selection of the literature in different areas can be mentioned here. See eg, L Hooghe and G Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield Publishers 2001); D Wincott, 'Looking Forward or Harking Back?: The Commission and the Reform of Governance in the European Union' (2001) 39 JCMS 897; U Mörth, 'The Market Turn in EU Governance: The Emergence of Public–Private Collaboration' (2009) 22 Governance 99; A Scott, 'The Role of Concordats in the New Governance in Britain: Taking Subsidiarity Seriously?'(2001) 5 *Edinburgh Law Review* 21; J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 ELJ 1; C Scott, 'Regulation in the Age of Governance: The Rise of the Post- Regulatory State' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing 2004); G Marks, L Hooghe and K Blank, 'European Integration from the 1980s: State-Centric v. Multi-level Governance' (1996) 34 JCMS 341; M Jachtenfuchs, 'Theoretical Perspectives on European Governance' (1995) 1 ELJ 115; O Trieb, 'Implementing and Complying with EU Governance Outputs' (2008) 3 *Living Reviews in European Governance* 5; E Hysing, 'From Government to Governance?: A Comparison of Environmental Governing in Swedish Forestry and Transport' (2009) 22 Governance 647; D Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' 115 Yale LJ 1490; A Yee, 'Cross-National Concepts in Supranational Governance: State–Society Relations and EU Policy Making' (2004) 17 Governance 487; B Finke, 'Civil Society Participation in EU Governance' (2007) 2 *Living Reviews in European Governance* 2; D Wincott, 'European Political Development, Regulatory Governance, and the European Social Model: The Challenge of Substantive Legitimacy' (2006) 12 ELJ 743. As a sample of the varied scholarship on legitimacy, see R Bellamy, 'Still in Deficit: Rights, Regulation and Democracy in the EU' (2006) 12 ELJ 725; J Black, 'Legitimacy and the Competition for Regulatory Share' (2009) Law Society Economy Working Paper 14/2009, London School of Economics and Political Science, Law Department <http://www.lse.ac.uk/collections/law/wps/ > accessed 12 September 2012; D Curtin and AJ Meijer, 'Does Transparency Strengthen Legitimacy?' (2006) 11 Information Polity 109; A Héritier, 'Elements of Democratic Legitimation in Europe: An Alternative Perspective' (1999) 6 JEPP 269; A Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 JCMS 603.

practices can enhance the supranational regulatory legitimacy of the Commission has been under-examined in the literature.

Using a case study from the telecommunications sector, this thesis sets out to conduct such an examination. Telecommunications regulation offers a relatively lengthy period in which European regulation was developed, proposed, adopted and refined, re-initiating the regulatory cycle, and thus providing a significant basis for a comparative evaluation of the evolution of regulatory governance in the EU. Before undertaking such an analysis, in the terms set out in Chapters 2 and 3, this chapter describes the contours of the intellectual landscape within which the research is conducted. A first section addresses the concept of legitimacy for a supranational regulator which, by definition, will never enjoy the native legitimacy of a regulator within a sovereign state. Thus, the kinds of legitimacy to which a non-state regulator could realistically aspire are explored in the first section, with the choice being made to use a form of normative legitimacy drawn from the scholarship.

The range of usages for the notion of governance is addressed in the second section of this chapter. So many meanings have been ascribed to the concept of EU 'governance' that there is a risk of confusion. In order to situate the analysis in context, the chapter defines EU supranational regulatory governance narrowly to reflect the definitional elements of (1) the exercise of regulatory powers; (2) that have been formally and constitutionally delegated by state actors; (3) to an unelected non-state actor that is institutionally distinct from any form of government.

Thereafter, the chapter addresses the concept of regulation, another term with widely varied meanings. For purposes of the research, it is narrowly defined to reflect regulatory powers for the common market that have existed since the creation of the European Economic Community. Regulatory powers are key institutional powers of the EU, over which the Commission exerts considerable control, and are broadly subject to judicial oversight by the Court of Justice. Different kinds of regulatory measures are identified and analyzed.

In an EU context, several under-examined aspects of EU regulation are important to regulatory legitimacy, one of which is the distinction between positive and negative harmonization measures. These are associated with different levels of regulatory normativity due to their impact on national policy initiatives. Thus, much

of the discussion in this section on regulation analyzes concepts that are not new to the Treaties or to EU law but uses a framework that highlights the challenges for supranational legitimacy in the exercise of delegated positive regulatory powers. These distinctive features of regulation are distinguished in order to lay the groundwork for an analysis of regulatory governance in the narrow context of positive legislative measures for the internal market, over which the Commission enjoys the exclusive right of initiative.

The growth in European regulation, regulatory networks, mechanisms and institutions has given rise to regulatory governance issues reflected in a growing scholarship.[2] Over the past decade, the European Commission has embraced a more modern approach to regulatory design that would be commonplace in the administrative processes of most Western countries, including the UK.[3] The Commission relies on these new tools to make some contestable claims for its European regulatory role:

> The better regulation agenda has already led to a significant change in how the Commission makes policy and proposes to regulate. Stakeholder consultations and impact assessments...have increased transparency and accountability, and promoted evidence-based policy making.[4]

In the twenty-first century, stakeholder consultations can hardly be considered a significant regulatory innovation. Moreover, the Commission has used public consultations since its inception and has merely relabeled them as 'stakeholder consultations'.

On the other hand, impact assessments are more recent in Europe. The Commission announced its intention to adopt the use of impact assessments to improve the 'quality and coherence of the policy development process' in 2002,[5] making good on its commitment to Member States to implement a series of better

[2] Such is the level of interest in governance that entire journals have been established addressing governance issues. See eg, *Living Reviews in European Governance*, <http://europeangovernance.livingreviews.org/> accessed 10 October 2012. See also Jordana and Levi-Faur (n 1). The scope of the literature is vast and covers legal, political, economic and social analyses.

[3] The UK was an early adopter of an evaluative approach to policy development in the Better Regulation Task Force of 1997, now the Better Regulation Commission, using five principles as a basis for designing policy proposals: proportionality, accountability, consistency, transparency and targeting. See the UK Better Regulation home page ,http://www.hmrc.gov.uk/better-regulation/index.htm>.

[4] Commission, 'Smart Regulation in the European Union' (Communication) COM (2010) 543 final, 2.

[5] Commission, 'Impact Assessment' (Communication) COM (2002) 276 final, 2.

regulation principles, including a regulatory impact assessment mechanism.[6] There is some scope for doubt as to whether the Commission has genuinely achieved the transparency, accountability and evidence-based policy making that it claims for its regulatory governance policy, although it certainly does conduct stakeholder consultations and impact assessments, albeit selectively. Why there may be a contradiction in the Commission's assertion and the reality on the ground will be analyzed in this research.

The Commission's 'governance turn' began in 2001 with the adoption of the Governance White Paper.[7] The discourse begun in the White Paper reflected an institutional recognition that the EU faced challenges to its legitimacy. While that initiative elicited considerable comment, much of which was critical, more recent, workmanlike, regulatory governance and design measures adopted by the European Commission over the past decade have elicited less comment and analysis.[8]

1.1. Can European regulatory legitimacy be constructed?

The factors that have given rise to a thriving legitimacy discourse in the EU have been well identified in the literature. Three major contributing factors can be identified: (1) an erosion of the principle of strictly enumerated powers;[9] (2) the judicial constitutionalisation of European law with parallels to the constitutional order of a federal state;[10] and (3) a move to qualified majority voting in the

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[6] ibid.

[7] Commission, 'European Governance' (White Paper) COM (2001) 428 final.

[8] There are a few notable exceptions, such as Radaelli. See C Radaelli, 'Regulating Rule-making via Impact Assessment' (2010) 23 Governance 89; C Radaelli, 'Whither Better Regulation for the Lisbon Agenda?' (2007) 14 JEPP 190; C Radaelli, 'The Diffusion of Regulatory Impact Assessment – Best Practice or Lesson-Drawing' (2004) 43 *European Journal of Political Research* 723; C Radaelli and F de Francesco, 'Better Regulation and the Lisbon Agenda' in C Radaelli and de Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes* (Manchester UP 2007). See also A Renda, *Impact Assessment in the EU-The State of the Art and the Art of the State* (CEPS 2006) <http://www.ceps.be/book/impact-assessment-eu-state-art-and-art-state> accessed 11 November 2012.

[9] JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403.

[10] Constitutionalism is the process by which European treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private. JHH Weiler and JP Trachtman, 'European Constitutionalism and Its Discontents' (1996-97) 17 *Northwestern Journal of International Law & Business* 354, 356. For discussion and analysis, see generally, T Christiansen and C Reh, *Constitutionalizing the European Union* (Palgrave Macmillan 2009); L Dobson and A Follesdal, *Political Theory and the European Constitution* (Routledge 2004); D Grimm, 'Treaty or Constitution?' in E Eriksen, J Fossum, and A Menendez, *Developing a Constitution for Europe* (Routledge 2004); N Walker, 'Postnational Constitutionalism and the

legislative adoption procedure.[11] All of these factors interact with the increase of formally delegated powers thus expanding the number and scope of binding regulatory measures.

Some fear that competences have now been transferred to the EU beyond what might have been considered strictly necessary for the establishment of a common market.[12] Even so, the establishment of an internal market remains important and continues to motivate many regulatory measures.[13] The present analysis focuses on the processes involved in the current design and adaptation of these regulatory measures for the internal market, while recognizing that the initial emphasis on economic integration that epitomized the European Economic Community (EEC) Treaty, and whose legitimacy was unquestioned, has now been folded into a European Union with a rich and complex mix of economic, social, political and financial features.[14]

The extent of changes since the founding of the EEC in the 1950s can be recognized in the evolution of the structures, powers and measures of supranational governance seen in the political, executive and judicial institutions of the Union that

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Problem of Translation' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003); P Eleftheriadis, 'Aspects of European Constitutionalism' (1996) 21 EL Rev 32; P Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 JCMS 255. JHH Weiler, *The Constitution of Europe* (CUP 1999) 4-8; K Lenaerts and P van Nuffel, *Constitutional Law of the European Union* (2nd edn, Sweet & Maxwell 2004). For a particularly trenchant critique of the judicial approach of the European Court of Justice, see H Rasmussen, *On Law and Policy at the European Court of Justice* (Martinus Nijhoff 1986); E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 AJIL 1; N MacCormick, 'Liberalism, Nationalism and the Post-sovereign State' (1996) XLIV *Political Studies* 553. For the European case law that transformed the legal system from one based on international law to a new legal order characterised by the doctrines of direct effect and supremacy, see Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 (nature of Union law; rights and obligations of individuals); Case 6/64 *Costa v ENEL* [1964] ECR 1251 (nature of Union law; direct applicability, primacy of Union law); Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 (interpretation of national law in line with Union law).

[11] The initial move to qualified majority voting (QMV) took place with changes introduced by the Single European Act. Subsequent treaty amendments have enlarged the scope of measures that are adopted under QMV. With the entry into force of the Lisbon Treaty, the ordinary legislature procedure of the Union is the co-decision procedure with QMV. See art 294 TFEU.

[12] G Majone, *Regulating Europe* (Routledge 1996) 61.

[13] The Single European Act included the creation of powers in the areas of social policy, environmental protection and foreign policy. Beginning with the Maastricht Treaty (entry into force 1993) and ending with the Lisbon Treaty (2009), new EU competences have been created in education, culture; sport; cooperation and development; employment policy; civil protection, humanitarian aid and public health.

[14] For a thoughtful insider's analysis of the historical and political contexts of the Lisbon Treaty, its impact on the democratic framework of the EU and its provisions in relation to substantive law, with a legal analysis of the EU's functions and powers as well as the treaties which govern it, see J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010).

have been created and the shift of some political discourse from the national to the European level.[15] Treaty amendments, including those in the Lisbon Treaty, have vested additional powers in the EU institutions, thus increasing the supranationality of the EU, yet regulatory legitimacy, among other things, remains problematic.[16]

The thesis explores two questions: can a normative form of regulatory governance constitute a normative form of regulatory legitimacy for a supranational regulator that enjoys little democratic legitimacy of its own? Second, could a transnational or supranational regulator use governance instrumentally to bridge the perceived legitimacy gap of extensive regulatory powers? I start with the theoretical premise that regulatory legitimacy can be examined, analyzed and evaluated through the normative lens of regulatory governance as defined herein.

Numerous approaches exist in the literature as to the legal nature and legitimacy of transnational and supranational regulators.[17] In order to situate the present research in the literature on legitimacy and regulatory governance, a definition is needed of what legitimacy represents in theoretical terms for purposes of this research. It also needs to be distinguished from other kinds of legitimacy analyses. The same will be true for the term 'governance' which takes many usages in the scholarship.[18]

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[15] For the proposition that the national political discourse in EU Member States has moved away from ignorance and apathy towards greater salience of European policies and decision-making mechanisms, see L Hooghe and G Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2008) 39 *British Journal of Political Science* 6-9. This exposition is sociologically oriented, and focuses on identity as a constraint on integration: 'Our aim has been to draw on recent advances in the study of public opinion, political parties and identity in order to frame hypotheses about preferences, strategies and outcomes of regional integration.' ibid 21.

[16] Bellamy (n 1) 725-42; Moravcsik (n 1) 603-24; D Curtin, 'The Constitutional Structure of the European Union: A Europe of Bits and Pieces' (1993) 32 CMLR 17; R Dehousse, 'Constitutional Reform in the European Community: Are There Alternatives to the Majoritarian Avenue?' (1996) West European Politics 118; PP Craig, *Democracy and Rulemaking within the EC: An Empirical and Normative Assessment*, Jean Monnet Program, Paper <http://www.jeanmonnetprogram.org/papers/97/97-02.html>.

[17] The variety of theoretical framings in the legitimacy literature on supranational and transnational regulators is considerable. See eg, A Follesdal and S Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533; a particularly synthetic analysis of supranational regulation and legitimacy is found in E Randall, 'Not that Soft or Informal: A Response to Eberlein and Grande's Account of Regulatory Governance in the EU with Special Reference to the European Food Safety Authority (EFSA)' (2006) 13 JEPP 402-19; Weiler challenges some of the implicit assumptions of supranational legitimacy within the post-Maastricht EU in JHH Weiler, 'Does Europe Need a Constitution?: Demos, Telos and the German Maastricht Decision' (1995) 1 Yale LJ 219.

[18] For an introduction to the different meanings and modes that European governance may take, see R Eising and B Kohler-Koch (eds), *The Transformation of European Governance in the European*

1.1.2. Disentangling the legitimacies

As a concept, legitimacy has both sociological and normative dimensions.[19] Normatively, it has constitutional (legal) and political (democratic) dimensions.[20] These dimensions need not co-exist. Normative legitimacy refers to whether a claim of authority is well-founded, by reference to an acceptable normative basis usually involving one or more criteria.[21] Legitimacy based on normative factors is generally a determination in an impartial or logical sense, and as such it has an evaluative dimension. This is the analytical underpinning of the approach of the present research.

Normative theories of legitimacy attempt to specify what normative factors may serve to support claims of authority. Constitutional claims refer to compliance with written norms, conformity with constitutional principles and respect for legal values of procedural justice.[22] This basis of legitimacy has also been described as 'formal' in the sense that all of the requirements of the law have been observed in the creation of the system, thus making it similar conceptually to the juridical concept of formal validity.[23] Social legitimacy is a broad empirical acceptance of a system by the society to which it is addressed.[24] Social legitimacy for a system or process may arise even if no claims of authority are made.[25] Claims for social legitimacy can be made but will be contestable.[26] When claims of authority are successful, the resulting general acceptance is an uncoerced social, empirical and cultural outcome.[27] The

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Union (Routledge 2005).

[19] Sociological dimensions relate to social factors that induce a willingness to accord or acknowledge a legitimacy claim. See J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137. Normative dimensions relate to formal factors that logically induce a willingness to accept legitimacy claims. See D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 AJIL 596-624.

[20] Black (n 19) 145.

[21] Bodansky (n 19) 601.

[22] Black (n 19) 145-46.

[23] Weiler (n 10) 80.

[24] 'Legitimacy means social credibility and acceptability...within some socially constructed system of norms, values beliefs and definitions.' Black (n 19) 144.

[25] Those accustomed to the spontaneous and orderly process of queue-forming in the UK quickly learn that this widely practiced custom is far from the norm outside of the country.

[26] Black (n 19) 144.

[27] See eg, Black (n 19) 137-164; see also Bodansky (n 19) 600; TM Franck, *The Power of Legitimacy among Nations* (OUP 1990) 24. Weiler limits legitimacy to two types, formal and social. See Weiler (n 10) 80.

analysis of the Governance White Paper of 2001 in Chapter 3 reveals that the initial aspiration of the Commission concentrated mainly on this form of legitimacy.

Democratic claims of legitimacy rely on satisfaction of some model of democracy, whether representative, participative or deliberative.[28] This basis of legitimacy is central to the model of Scharpf that will be examined in Chapter 2, but it is not the exclusive basis. Scharpf also acknowledged output legitimacy, or legitimacy achieved by results, to be a valid basis for claims to legitimacy, but only in limited circumstances. I analyze this further in Chapter 2. In sociological analyses, functional claims of legitimacy are also called 'output legitimacy', and likewise are based on claims by reference to the results of the activities engaged in by the regulatory authority, making them empirical.[29] This aspect of legitimacy claims is central to the economic model of Majone examined in Chapter 2 which conveys legitimacy beyond the limits imposed by Scharpf's model.

1.1.3. Input and output legitimacy

Exercising governmental powers and public authority finds its legitimacy in the democratic theory of consent of the governed.[30] Democratic self-determination requires that political choices should be based on the 'authentic' preferences of citizens.[31] A chain of accountability between those governing and those governed

[28] F Scharpf, *Governing in Europe: Effective and Democratic* (OUP 1999) 6-23; TM Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46-91; E Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 95 AJIL 489-534.

[29] G Majone, 'Europe's "Democratic Deficit": A Question of Standards' (1998) 4 ELJ 28; Scharpf (n 28) 10-12; Black (n 19) 145-46.

[30] '…the consent of the people…is the only lawful basis for government.' J Locke, *Second Treatise of Government*, Preface to ch 1. Within this general proposition, there is considerable disagreement as to the normativity of various forms of democratic governance, and the relationship of politics to law and of legitimate use of sovereign power. See, for a discussion of liberal versus republican constitutionalism, eg, A Tomkins, 'In Defense of the Political Constitution' (2002) 22 OJLS 157-75. His conclusions echo those of Scharpf in finding that both forms of constitutionalism attempt to secure responsible (normative) government. One approach characterizes the relationship between governed and governors as one of contract, the nature and terms of which are enforced by the judiciary; the other as a relationship of trust where those who occupy positions of power must be subjected to the processes of *political* scrutiny.

[31] A Menon and S Weatherill, 'Legitimacy, Accountability, and Delegation in the European Union' in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2003) 115; Scharpf (n 28) 6.

gives rise to government by the people and thus, in democratic theory, to input legitimacy.[32]

Since purely majoritarian governments give rise to normative problems of 'tyranny of the majority', a second form of normative legitimacy, that of outcome or output legitimacy,[33] complements the former, in order to satisfy the democratic requirement of government 'for the people'.[34] When a democratically elected government delegates powers to a national regulator for the purpose of applying statutory regulation, normative criticisms focus on public accountability, because of the loss of the traditional constitutional framework of controls, checks and balances between institutions of government.[35] Empirical criticism of regulation has focused on its failure to achieve its regulatory objectives and thus its failure to satisfy the wider social interests at stake.[36]

Much of the literature on regulatory legitimacy uses terms such as 'successful' or 'good' or 'effective' as a basis for evaluation.[37] Different strands of output legitimacy theory locate the validity of creating and exercising public regulatory authority in the democratic means by which regulatory authority is created, the conditions under which and by whom it is applied, and the results of regulation.[38] In Chapter 2, I will revisit some of the normative issues associated with input and output legitimacy in a discussion of the theories of Majone and Scharpf.

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[32] ibid. See also eg, S Smismans (ed), *Civil Society and Legitimate European Governance* (Edward Elgar Publishing 2006) 290-300; A Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan Publishers 1902) 214.

[33] Menon and Weatherill (n 31) 115; Scharpf (n 28) 6.

[34] Scharpf (n 28).

[35] Majone (n 12) 284; C Veljanovski, 'The Regulation Game' in C Veljanovski (ed), *Regulators and the Market* (Institute of Economic Affairs 1991) 16. Delegation in accordance with constitutional and legal requirements was challenged *as such* for undermining the democratic process in three ways: (1) by the act of delegating powers from accountable branches of government to national regulators; (2) by the absence of any form of public accountability of regulators; and (3) by the impairment of public welfare resulting from uncoordinated action by different regulators.

[36] See eg, RC Felleth, *The Interstate Commerce Omission: The Public Interest and the ICC* (Grossman 1970); J Turner, *The Chemical Feast* (Grossman 1970); MJ Green (ed), *The Monopoly Makers* (Grossman 1973); JR Michael (ed), *Working on the System: A Comprehensive Manual for Citizen Access to Federal Agencies* (Basic Books 1974),. See also The President's Advisory Council on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* [The Ash Council Report] (Government Printing Office [Washington DC] 1971) <http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=ED058086&ERICExtSearch_SearchType_0=no&accno=ED058086>.

[37] R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 76.

[38] Consistent normative issues found in the literature address the origin and development of regulation; reform of regulation; the standards of regulation; what body chooses the rules; enforcement; styles of regulation; accountability and measurement. See eg, R Baldwin, C Scott and C

In light of experience in US regulation in the first half of the twentieth century, some authors began to criticize not only the theoretical, democratic, objections to delegation but also the economic inefficiency of regulatory regimes.[39] As to the democratic critique, some scholarship called into question the premise that national governmental legitimacy necessitated both input and output legitimacy for all regulatory activities. Other empirical scholarship concluded that majoritarian government was not a prerequisite to regulatory legitimacy.[40] These normative and empirical arguments influenced the development of alternative framings of what is capable of constituting acceptable normative regulatory legitimacy.

Different approaches using different theoretical preconditions for legitimacy allow different normative propositions about the legitimacy of non-majoritarianism *as a principle* to be advanced. This, alongside the empirical finding that *genuine and pure* majoritarian democracy is the exception rather than the rule, highlights two conclusions: not only are legitimacy claims for purely majoritarian models of governance contentious, but also that legitimacy and democracy are not normatively the same concepts.[41] If the theoretical premise, that legitimacy requires that there must be electoral (majoritarian) control over both *ex ante* and *ex post* regulatory activities, is not well-grounded, then different models of regulatory legitimacy can be developed, using different framings of input and output legitimacy, within regulatory governance theory.

1.1.4 The legitimacies of transnational regulators: narrowing the focus

Transnational regulators typically rely on arguments based on international law for their legitimacy, pointing to state consent and legality.[42] Their claims are supported

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Hood (eds), *A Reader on Regulation* (OUP 1998) 8.

[39] RB Horwitz, *The Irony of Regulatory Reform* (OUP 1989) 27.

[40] 'Every advocate of democracy…and every friendly definition of it, includes the idea of restraints on majorities.' R Dahl, *A Preface to Democratic Theory* (Chicago UP 1956) 36. In a 1988 study of twenty five North American, European and southern hemisphere democracies, only two (New Zealand and the United Kingdom) were found to be 'mainly' but not 'pure' majoritarian democracies. A Lijphart, 'Majority Rule in Theory and Practice: The Tenacity of a Flawed Paradigm' (1991) 129 *International Social Science Journal* 488. The discussion here is necessarily compressed for economy of focus.

[41] For the proposition that democracy and legitimacy are conceptually distinct, see Weiler (n 10) 79.

[42] Bodansky (n 19) 600; also Weiler (n 10) 80. Weiler observed that the foundation of the EU system rests on the formal approval by democratically elected parliaments in Member States but it still suffers from a weakness of legitimacy because of the undemocratic ways in which powers are exercised within the system.

by arguments of inter-governmentalism.[43] However, when the boundaries between international law and domestic law are blurred, as in the EU, claims for legitimacy based on state consent and legality are debatable.[44] From a pluralistic perspective, the EU is simply one of many transnational arrangements that have been constructed as cooperative responses to common problems or norm conflicts that cannot be dealt with effectively at national level.[45] In effect, these multi-state systems constitute transnational regulatory regimes and, as such, they face legitimacy challenges to their regulatory powers, but they do not all embody the same organizational goals. This distinguishes other regimes from the EU.

Uniquely, the EU aspires to, in an open-ended manner, something qualitatively beyond a transgovernmental regulatory governance system found in international law.[46] With such seemingly unbounded goals as reflected in the Preamble to the Treaty on European Union,[47] arguments about transnational legitimacy that rely on an interpretation of state consent theory under international law carry only limited normative weight. But such arguments address foundational issues of whether the *existence* of such a supranational system is legitimate. The issue of whether an institution such as the Commission is *legitimately exercising* the delegated regulatory powers with which it has been endowed is a different analysis, and even less is it an analysis of whether the Commission is *appropriately* exercising its regulatory powers to facilitate the internal market relative to achieving objectives.

While it is based on, *inter alia,* the values of democracy,[48] the EU does not claim to constitute a recognized form of democracy and thus to enjoy legitimacy on

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[43] 'The basic claim...is that the EC can be analysed as a successful intergovernmental regime designed to manage economic interdependence through negotiated policy co-ordination.' A Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 474.
[44] Scharpf (n 28) 6-23; Weiler (n 10) 80.
[45] TA Aleinikoff, 'Transnational Spaces: Norms and Legitimacy' (2008) 33 Yale JIL 488.
[46] Art 3 TEU reads in part: '[The Union shall]…promote economic, social and territorial cohesion, and solidarity among Member States.…'
[47] 'Resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities.'
[48] Art 2 TEU reads: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

that basis. However, democratic values are relevant to any regulator, whether national, transnational or supranational. Regulation here is an activity carried out under public authority, whether directly or indirectly, and whether carried out by a national or a transnational regulator, thereby engaging the political issues related to the legitimate exercise of power. In democratic theory the legitimate exercise of power should be subject to some form of control by the society that is governed. Where a regulator is not subject to the political process in some form or another or to some form of electoral or political oversight, other mechanisms must be present in order to render the exercise of delegated regulatory power legitimate. I return to the values inherent in democratic systems of regulation in Chapter 3 because these are relevant to the regulatory governance model constructed there.

The present research is not the first attempt at framing an analysis of regulatory legitimacy. In Chapter 2, the theories of two scholars who have written extensively on their approach to regulatory legitimacy are analyzed for their relevance to the regulatory governance model used in the case study.

1.1.5 What's the problem with legitimacy?

According to some authors, a legitimacy deficit can be discerned in how the Commission has exercised the powers conferred by the Treaties, in effectively creating something that resembles a 'regulatory state'.[49] An analysis of the legitimacy of the Commission as a regulator differs from the question of whether the conferral of extensive supranational competences in overall terms is legitimate. The concern about an overall EU 'democratic deficit' forms part of broader constitutional questions on which the scholarship significantly diverges.[50]

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[49] The seminal article was that of G Majone, 'The Rise of the Regulatory State in Europe' (1994) *West European Politics* 77. His was followed by others. See eg, F McGowan and H Wallace, 'Towards a European Regulatory State' (1996) 3 JEPP 560; B Eberlein and E Grande, 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State' (2005) 12 JEPP 89. Lodge captures the institutionalist and political aspects of the overall 'rise' of European regulation but finds that the nation-state is alive and well, in M Lodge, 'Regulation, the Regulatory State and European Politics' (2008) 31 *West European Politics* 280. Some commentators argue that a regulatory state in the EU is inevitable, given the resources and powers conferred on the EU institutions. See eg, Majone (n 12) 64-66. That the European Union is not a state is a self-evident proposition. Calling it a regulatory state conveys the idea that EU regulation is overly intrusive.

[50] See eg, JHH Weiler and J P Trachtman, 'European Constitutionalism and Its Discontents' (1996-1997) 17 *Northwestern Journal of Law and Business* 354; Follesdal and Hix (n 17); K Featherstone, 'Jean Monnet and the "Democratic Deficit" in the European Union' (1994) JCMS 149; C Lord, *A Democratic Audit of the European Union* (Palgrave Macmillan 2004); A Moravscik, 'Is there a

The legitimacy examined in this thesis is relatively simple and straightforward: the legitimacy of the Commission as a regulator when exercising its Treaty-created powers to propose legislation for the internal market, using a case study in the area of telecommunications regulation. Some analysis of the Commission as an enforcement authority for negative integration measures (liberalization) is useful to reveal the relative differences in two kinds of measures and the differences in achieving normative legitimacy for the former. As a preparatory step to analyzing regulatory legitimacy, an appreciation of the analytical focus of the research provides a grounding for understanding the concept of the legitimate exercise of duly delegated powers and how that can be constructed or enhanced. This thesis does not dismiss the question of the existence of a democratic deficit as one of insignificance. That issue cannot be addressed or resolved within a regulatory analysis, nor is there any consensus on how the resolution of such a democratic deficit should be framed.[51] The particular institutional practices with which the analysis is concerned relate to normative regulatory governance and its effect on the legitimacy of the Commission as a regulator, which is an under-examined but important part of the broader governance debate about the Union.

1.2. Governance

To distinguish the meaning from other framings in the scholarship, the term 'governance' is used here to describe (1) the *exercise* of regulatory powers; (2) that have been legally delegated by sovereign states; (3) to an unelected, non-state, institution that is formally separate from any form of government.[52] My focus is on

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"Democratic Deficit" in World Politics? A Framework for Analysis' (2004) 39 *Government and Opposition* 336; C Crombez, 'The Democratic Deficit in the European Union: Much Ado About Nothing?' (2003) 4 *European Union Politics* 101.

[51] The EU's legitimacy 'deficit' can broadly be identified within two dimensions, even if these framings are contestable: first, a legitimacy 'deficit' in the EU's 'constitutional' character is associated with the extensive nature of the delegated powers enjoyed by European institutions with the 'constitutionalized' legal effects of the European legal order. On this topic, the scholarship is vast, with little consensus. The following offer some indication of the variety of approach. N Walker, 'Taking Constitutionalism Beyond the State' (2008) 56 *Political Studies* 519; K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205; J Shaw, 'Postnational Constitutionalism in the European Union' (1999) 6 JEPP 579; P Craig, 'Constitutions, Constitutionalism and the European Union' (2001) 7 ELJ 125; Weiler (n 17).

[52] There is no agreed framing in the scholarship on a definition of governance. Frequent references are made to 'modes' of governance, such as statism, corporatism, pluralism and network governance. A generic definition might be 'governance is the structured ways and means in which the divergent

the manner in which such regulatory powers are exercised by the Commission as a supranational regulator in relation to economic market regulation, which plays a central role in regulating the internal market. The 'establishment and functioning of the internal market' language found initially in the Treaty of Rome[53] remains a principal aim of the EU Treaties.[54] Regulating markets, *inter alia*, has come to be known as 'governance'.[55]

Using this definition, market regulation is a governance activity. The governance practices to be examined in the case study focus on the range of regulatory practices related to policy formation, proposal and adoption for purposes of the internal market. An ample literature has developed on post-adoption aspects of regulatory governance in the EU, which is not examined here.[56] In regulatory scholarship, the regulatory process can be disaggregated into policy stages and examined using

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preferences of inter-dependent actors are slated into policy choices to allocate values, so that the plurality of interests is transformed into coordinated action and compliance of actors is achieved'. See B Kohler-Koch and R Eising, *The Evolution and Transformation of Governance in the European Union* (Routledge 1999) 5.

[53] Art 100 of the Treaty of Rome reads as follows: 'The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market'.

[54] Art 114 (1) of the Treaty on the Functioning of the European Union contains the latest version of the article which reads as follows: 'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. The original 'or' in the Treaty of Rome has been replaced with an 'and'. Whether this represents a substantive change is not addressed here nor does there appear to be much analysis of the change.

[55] Governance can refer, eg, to the act of governing; to the managerial processes for guiding a business, ie corporate governance; to the formal and informal relationships and processes between states, organisations, markets and citizens, ie global governance. Other meanings exist. See eg, JN Rosenau, 'Toward an Ontology for Global Governance' in M Hewson and T Sinclair (eds), *Approaches to Global Governance Theory* (SUNY Press 1999).

[56] M Thatcher, 'The Creation of European Regulatory Agencies and its Limits: A Comparative Analysis of European Delegation' (2011) 18 JEPP 790; H Hofman, 'Legislation, Delegation and Implementation Under the Treaty of Lisbon: Typology Meets Reality' (2009) 15 ELJ 482; J Blom-Hansen, 'The Origins of the EU Comitology System: A Case of Informal Agenda-Setting by the Commission' (2008) 15 JEPP 208, 217; A Ogus, 'Better Regulation - Better Enforcement' in S Weatherill (ed), *Better Regulation* (OUP 2007) 107-22; F Vibert, 'Better Regulation and the Role of Agencies' in S Wetherill (ed), *Better Regulation* (OUP 2007) 387-404; EO Eriksen, 'Governance between Expertise and Democracy: The Case of European Security' (2011) 18 JEPP 1169; S Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18 Governance 431; M Flinders, 'Distributed Public Governance in the European Union' (2004) 11 JEPP 520; M Rhinard, 'The Democratic Legitimacy of the European Union Committee System' (2002) 15 Governance 185; K Armstrong and S Bulmer, *The Governance of the Single European Market* (Manchester UP 1998) 255-74; Kohler-Koch and Eising (n 52).

different analytical framings.[57] Increasing criticism of the past few decades has highlighted the contestability of international and supranational governance,[58] the latter of which some regard as a significant aspect of the EU's general decision-making and policy-development activities.[59]

The Commission began to engage directly with *regulatory* governance in a 2001 White Paper in which it adopted a formal regulatory governance policy for the EU.[60] It remains active in regulatory governance terms.[61] From 2002, new governance practices were adopted and existing regulatory practices were revised thus implementing many of the recommendations of the 2001 Mandelkern Report.[62] Such regulatory design tools are meant to improve the quality of European regulation and to simplify existing regulation.

Western countries in the latter part of the twentieth century experienced a significant growth in both domestic and transnational regulatory regimes, which created concerns about governance without government, and problems of legitimacy

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[57] For a flavour of the arguments on institutional arrangements for policy formation see Majone, (n 29) and Scharpf (n 28) ch 2. For an interest-based state-centred analysis see A Moravcsik and F Schimmelfenning, 'Liberal Intergovernmentalism' in A Wiener and T Diez (eds), *European Integration Theory* (OUP 2009) 67; for an analysis that challenges both Majone and Moravcsik's treatments of democracy, efficiency, welfare and citizenship see Wincott (n 1). At the opposite end of the regulatory spectrum, for a normative analysis of the system of 'comitology' committees that advise and supervise the Commission's exercise of delegated powers see Rhinard (n 56). For a recent synthesis of the governance consequences of European agency formation, including normative assessments of legitimacy and accountability, see B Rittberger and A Wonka, 'Introduction: Agency Governance in the European Union' (2011) 18 JEPP 780. All of these contain extensive references to the scholarship.

[58] For a variation of legitimacy challenges and framings, see eg, Bodansky (n 19) 596; Scharpf (n 28); Follesdal and Hix (n 17) 533-62; Bellamy (n 1) 725-42; Moravcsik (n 1) 603-24; C Carter and A Scott, 'Legitimacy and Governance beyond the European Nation State: Conceptualising Governance in the European Union' (1998) 4 ELJ 429-45.

[59] European Commission (n 7); D Coen and M Thatcher, 'The New Governance of Markets and Non-Majoritarian Regulators' (2005) 18 Governance 329; Flinders (n 56) 520-44.

[60] Commission (n 7).

[61] The Commission embraced 'better regulation', 'better lawmaking' and more recently 'smart regulation', with the intention of improving the quality, clarity and intelligibility of EU rules and legislation. For relevant documentation see <http://ec.europa.eu/governance/better_regulation/index_en.htm> accessed 1 October 2012.

[62] See The Mandelkern Group on Better Regulation, Final Report (13 November 2001) <http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf > accessed 15 August 2012. For an overview of the Commission's better regulation agenda, see the key documents of the policy at <http://ec.europa.eu/governance/better_regulation/key_docs_en.htm - _br> accessed on 15 September 2012.

and authority.[63] Discourses on governance emerged to conceptualize and to distinguish modern governance, in the context of the 'regulatory state' phenomenon, from traditional notions of government.[64] Despite the modern sound of governance, the examination of the notions of authority, legitimacy and governance did not originate with the rise of the 'regulatory state' even if recent analysis may be more narrowly framed.[65] The turn to regulatory governance studies reflects a desire to find normative analyses and explanations for regulation, particularly at regional and global levels. Some political science scholarship frames the enquiry as one of seeking normative mechanisms of accountability.[66] Others seek to explain and justify the emergence of regulatory governance as an adjunct to the changing role and structures of the nation-state from exogenous factors, equating governance with the rise of the 'regulatory state' phenomenon.[67] The complexity of EU governance discourse evolved from the initial economic and legal theories of neo-functionalism, 'integration through regulation', towards analyses drawn from several social sciences, such as sociology, anthropology and political economics. Concepts such as 'poly-centric regulatory regimes',[68] 'directly deliberative' models[69] and 'nodal governance'[70] have emerged to characterize multi-actor entities like the EU.

The Commission's response to the EU's late 20th century legitimacy crisis was to select regulatory governance as one tool among several to address the variety of challenges faced by the EU's institutions. Thus far, relatively little, and generally critical, scholarship has examined the institutional choice of governance to enhance

[63] Bodansky (n 19) 596.
[64] K Armstrong and S Bulmer, 'The Governance and Regulation of the Single Market' in *The Governance of the Single European Market* (Manchester UP 1998).
[65] The question of the legitimacy of state regulatory governance was examined in construing the conceptual limits of the term 'police power' as applied to private interests in the 19th case of *Lawton v Steele* 152 US 133 (1894) where the Court's statement of the limits of legitimate governance remains a classic formulation: '[t]o justify the State in… interposing its authority in [sic] behalf of the public, it must appear, first, that the interests of the public…require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals'. Latter-day students of the EU principle of proportionality will recognise this formulation.
[66] See eg, PJ May, 'Regulatory Regimes and Accountability' (2007) 1 *Regulation & Governance* 8.
[67] Armstrong and Bulmer (n 64).
[68] Black (n 19) 137-64.
[69] J Cohen and C Sabel, 'Directly-Deliberative Polyarchy' (2001) 3 EL Rev 313.
[70] C Shearing and J Wood, 'Nodal Governance and the New "Denizens"' (2003) 30 *Journal of Law and Society* 400.

the legitimacy of the EU.[71] There seems to be little research that examines the still-emerging corpus of EU *regulatory governance* practices within a normative framing of regulatory legitimacy. Political choices of the EU over the past twenty years have retained non-majoritarian institutions and practices at the same time as they re-enforced the supranational and constitutional features of the Union.[72] Not surprisingly, a flourishing set of legitimacy discourses with empirical and normative concerns remains.[73] The challenge for the supranational regulator is clear: any system that is systematically confronted with legitimacy challenges will find it difficult to achieve its objectives. Where its objectives are not met, further challenges to legitimacy will continue.

Unless the Commission can robustly establish a defensibly normative form of regulatory legitimacy, challenges will continue to undermine its authority. The Commission as a supranational regulator to date has not explicitly sought regulatory legitimacy via regulatory governance practices it adopted since 2001. Nonetheless, the present research explicitly links them by framing the enquiry in terms of whether the former can be constructed or enhanced by the latter. Theories of regulatory governance will be further explored in Chapter 2.

2.1. Defining regulation

Differently from many other contexts, regulation is used here in a narrow sense to refer primarily to European harmonizing legislation, along with the associated Commission measures created or authorized by such legislation, adopted under the Treaty for the establishment and functioning of the internal market.[74] This notion of

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[71] Scott and Trubek (n 1); P Magnette, 'European Governance and Civic Participation: Can the European Union be Politicised?'
<http://www.jeanmonnetprogram/org/papers/01/010601.html> 3-4.

[72] After the near-failure of the Nice Treaty's ratification, the European political response recognized and tried to redress the democratic deficit, in the adoption of the Charter on Fundamental Rights. At the same time, it began to reform the European institutions, to demarcate EU-Member State competences, and to establish a constitutional convention on the future of Europe. These steps were separate from, but driven by, the same concerns as the launch of a formal policy on European governance. See eg, G de Burca, 'The Constitutional Challenge of New Governance in the European Union (2003) 28 EL Rev 821. See also N Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 OJLS 599.

[73] A Jordon, 'The European Union: An Evolving System of Multi-level Governance….or Government?' (2001) 29 *Policy & Politics*193; Bellamy (n 1) 725-42; L Conant, 'Review Article: The Politics of Legal Integration' (2000) 45 JCMS 45; Follesdal and Hix (n 17) 533-62; Scharpf (n 28); Majone (n 29) 5-28; Coen and Thatcher (n 59) 329-46.

[74]Regulation has many meanings in the literature and it takes many forms. Even within the EU, there

regulation is central to the present research which analyzes the use of Commission powers to develop regulatory policy measures that are harmonized by European legislation. The legislation thus adopted is generally implemented at national level by national authorities. This form of measure, i.e. secondary law, is considered to be 'hard law'. It is legally binding and falls within the definition of 'legal acts' in Article 288 TFEU.[75] Traditional literature on regulation is extensive and often incompatible theoretically.[76] Depending on the social science concerned, the meaning of regulation varies from mere social conditioning to a coercive hierarchical 'command and control' (C&C) behavioral control.[77] Some meanings of regulation broadly recognize all mechanisms of social control and include social norms and the effects of markets in changing behaviors.[78]

The notion of regulation as 'control' includes non-public actors.[79] Private actors that engage in self-organized and effective self-regulatory activities, between other actors, with no government involvement, approval or sanction, can also be said to regulate.[80] Variations within this model include voluntary codes of practice;[81] self-

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are several forms that policy measures may take, depending on the political will, the objectives to be achieved, and the provisions of the Treaties. For a general idea of how the subject has been treated see eg, Baldwin and Cave (n 37); BM Mitnick, *The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms* (Columbia UP 1980); R Baldwin, M Cave and M Lodge, *The Oxford Handbook of Regulation* (OUP 2011); N Nic Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar Publishing 2006); R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, OUP 2012); S Weatherill (ed), *Better Regulation* (Hart Publishing 2007).

[75] Article 288 TFEU reads: 'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force.'

[76] 'The study of regulation is characterised by a kaleidoscope of lenses, notably economics, cultural anthropological theory, institutionalism and systems theory, through which regulation is viewed, though little work has been done on how they might be integrated, or whether they are instead 'incommensurable paradigms'…..[T]he incommensurability or otherwise of different theoretical paradigms applied to regulation is a debate ….that is needed in regulatory theory.' J Black, 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 163-64.

[77] 'The essence of command and control regulation is the exercise of influence by imposing standards backed by criminal sanctions.' Baldwin and Cave (n 37) 35-39.

[78] G Majone, 'The Rise of the Regulatory State in Europe' in W Müller and V Wright (eds), *The State in Western Europe, Retreat or Redefinition?* (Frank Cass 1994) 78.

[79] '…government does not have a monopoly on the exercise of power and control, rather that is fragmented between social actors and the state'. J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 Current Legal Problems 103, 108.

[80] Black (n 19) 137-64.

auditing in which assessments of compliance are made by regulated entities or third parties;[82] performance-based regimes which emphasize results rather than specific actions;[83] and management-based systems that are intended to limit regulated harms but wherein the norms are self-enforced.

Regulation can also refer to any means used to achieve regulatory goals.[84] The Open Method of Coordination (OMC) in the EU represents a primarily voluntary form of regulation using policy learning and benchmarking.[85] The OMC emerged within the EU alongside the traditional legislative forms of directives and regulations, seemingly aimed at areas of political coordination and social policy. The OMC reflects a desire, if not to improve regulatory governance, then at least to diversify it.[86] A discussion of OMC is outside the scope of the present thesis. It is nonetheless a rich source of scholarship.[87] However, the fact that it was thought appropriate to create softer regulatory mechanisms, outside of the traditional hierarchical approach to regulation in the EU, can be seen as an implicit conclusion that the traditional approach of formal methods was deemed inadequate to address the requirements and challenges of policy-making in the EU.[88]

Regulation adopted for the purposes of the internal market is designed to remove the obstacles to freedom of movement of goods, persons, services and

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[81] TP Lyon and JW Maxwell, 'Voluntary Approaches to Environmental Regulation' in M Franzini and A Nicita (eds), *Economic Institutions and Environmental Policy* (Ashgate 2001) 75-120.
[82] M Potoski and A Prakash, 'The Regulation Dilemma: Cooperation and Conflict in Environmental Governance' (2004) 64 Public Administration Review 152-63.
[83] C Coglianese, J Nash and T Olmstead, 'Performance-based Regulation: Prospects and Limitations in Health, Safety and Environmental Regulation' (2003) 55 *Administrative Law Review* 705.
[84] C Hood, H Rothstein and R Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (OUP 2001); PJ May, 'Social Regulation' in LM Salamon (ed), *The Tools of Government: A Guide To the New Governance Handbook* (OUP 2002) 156-87; M Lodge 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in Jordana and Levi-Faur (n 1) 124-44.
[85] The open method rests on soft law mechanisms such as guidelines and indicators, benchmarking and sharing of best practice. The method's effectiveness relies on a form of peer pressure and policy learning. S Regent, 'The Open Method of Coordination: A New Supranational Form of Governance?' (2003) 9 ELJ 190.
[86] 'The OMC aims to unleash the EU's social dimension from the constraints of the Community method.' S Borrás and K Jacobsson, 'The Open Method of Co-ordination and New Governance Patterns in the EU' (2004) 11 JEPP 185, 186.
[87] See eg, M Büchs, *New Governance in European Social Policy: The Open Method of Coordination* (Palgrave Macmillan 2007); C de la Porte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' (2002) 8 ELJ 38; Regent (n 84).
[88] For a discussion of the meaning of the 'shift' from 'government' to 'governance' see eg, Jordana and Levi-Faur (n 1). For a discussion of the significance of what new governance means see, eg, C Kilpatrick and K Armstrong, 'Law, Governance and New Governance: The Changing Open Method of Coordination' (2007) 13 *Columbia Journal of International Law* 519.

capital, as well as to harmonize conditions of competition to the extent necessary for the functioning of the internal market.[89] The three formal legal methods for developing European regulatory policy have remained consistent over the course of the evolution of the EEC into the EU. These are laid down in the Treaty and comprise three main forms: regulations, directives and decisions.[90] In the next section, I describe the two principal types of integration measures in the EU, positive and negative.

1.2. Positive and negative integration measures

Both positive and negative economic integration measures for the internal market, relating to two different modes of economic integration, are foreseen in the Treaties.[91] Negative integration results in the removal of intra-state trade barriers and allows the inter-penetration of national markets; it can be understood as 'market-making' or 'market-creating'.[92] Positive economic integration involves interventions in markets, *ex ante,* with the aim of achieving an identifiable form of market

[89] Art 26 TFEU is the current version of the mandate for achieving the internal market which reads in part 'The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties...'

[90] The current version of the article defining the three legal forms of policy measures is art 289 TFEU, which reads in part: '1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in art 294. 2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure. 3. Legal acts adopted by legislative procedure shall constitute legislative acts....' Art 288 TFEU reads in part: 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them'.

[91] Art 26 TFEU prescribes the adoption of positive measures for establishing or ensuring the functioning of the internal market. Some Treaty articles, such as art 28 TFEU that directly proscribes 'duties on imports and exports and...all charges having equivalent effect...', are said to be legally enforceable at national level. This follows from the holding of the Court of Justice that such articles are directly effective, and operate to prevent the enforcement of national rules in contradiction with the EU rules. They thus constitute negative integration measures. However, other equally potent measures of negative integration foreseen in the Treaties concern the Commission's power directly to enforce Treaty rules and principles as against the Member States. This is examined further below.

[92] H Wallace, W Wallace and M Pollack (eds), *Policy-Making in the European Union* (5th edn, OUP 2000) 102. The well-known case of *Dassonville* is an example of a negative integration measure. See Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

integration by harmonizing regulation, which may be described as 'market-correcting'.[93]

Negative integration may result from Commission actions or from judgments of the Court of Justice. They are unilateral decisions of an independent European institution with no need for or assurance of a broad political consensus for adoption. In contrast, the adoption of positive integration measures requires that there be some majority consensus in the EU legislature on the nature of the problem impairing the internal market and the adaptations needed. The establishment and functioning of the internal market required both negative and positive integration measures. The tensions in the use of these two different types of measure began to emerge with the 1992 programme to complete the single market.[94] A brief examination of the legal nature of these two instruments will reveal why this is so.

Whereas 'negative integration' is defined as removing rules or policies that have the effect of impeding intra-Community trade,[95] positive integration refers to the harmonization of national regulations to the extent necessary for the functioning of the internal market under Article 114 TFEU.[96] Negative integration results from the application of primary Treaty law, such as the principle of free movement of goods, while positive integration measures are a result of the EU legislative adoption process and are in consequence subject to 'consensual intergovernmental and pluralist policy-making'.[97]

The problematic features of positive integrationist measures are found in the primary and secondary nature of the legal bases for their adoption. Treaty law is

[93] See B Kohler-Koch, 'The Evolution and Transformation of European Governance' (ECSA, Sixth Biennial International Conference, Pittsburgh, June 1999) < aei.pitt.edu/2312 > p 5, n 10.
[94] The scope and ambition of removing material, tax and technical barriers, so as to create a frontier-free internal market required Member States to concede to the Community more than they had ever been ready to do in the past. K-D Ehlerman, '1992 Project: Stages, Structures, Results and Prospects' (1989-1990) 11 Mich JIL 1097, 1099. '…the legislative process...has progressively relaxed both the intergovernmental and the unanimity rules, most notably in areas relating to the Internal Market.' M Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (1994) 14 JPP 95, 104.
[95] *Rewe-Zentral AG* (n 91).
[96] Art 114 TFEU reads in part: 'The European Parliament and the Council shall...adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.
[97] Scharpf (n 28) 51.

primary and enjoys a 'constitutional' character;[98] EU legislation is secondary law, and is adopted by institutions and processes that do not satisfy a traditional model of democratic government, and where considerable discretion is facilitated by the terms and conditions under which the EU pursues the establishment and functioning of the internal market.[99] In the internal market area, the Commission, exclusively, proposes harmonizing legislation and exercises its discretion in this respect without more than general oversight by the European Parliament (EP) and without any meaningful oversight by any other institution or body.

With the 1992 programme to complete the single market, the Commission significantly shifted its approach to negative and positive integration. The Commission's earlier, highly prescriptive, approach to removing barriers to the establishment and functioning of the common market had proved unsuccessful. Such laborious and time-consuming methods were abandoned in favor of a 'new approach' that facilitated economic integration using market liberalization, building on an interpretation by the Court of Justice of the principle of freedom of movement in the well-known case of *Cassis de Dijon*.[100] The *Cassis* interpretation of primary European law has been repeatedly endorsed by the Court since then.[101]

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[98] In Case 294/83 *Partie Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339, the Court found that the European Community is 'a community based on the rule of law' and, in particular, the Treaty had to be recognized as its 'basic constitutional charter.' A broad consensus now exists that European law has a constitutional character.

[99] Art 114 TFEU is the current version of a broad legal basis for the adoption of positive harmonization measures in furtherance of the internal market. Paragraph one reads in part: 'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure... adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.'

[100] The 'new approach' elaborated on the reasoning of the *Cassis de Dijon* decision of the Court of Justice that upheld the right of freedom of cross-border movement for products legally manufactured and marketed in an exporting Member State, where the public interest at stake in the importing State could be fulfilled by less restrictive measures. The principle of mutual recognition was qualified by the admission that a regulating (importer) State is entitled to show a proportionate justification in the public interest for its rules even if they impede inter-State trade. *Rewe-Zentral* (n 91); S Weatherill, *Cases and Materials* (OUP 2007) 588.

[101] There are more than 300 European court judgments endorsing this proposition. See J Pelkmans, 'Mutual Recognition Rationale, Logic and Application in the EU Internal Goods Market' (XIIth Travemuender Symposium, March 2010) [on Oekonomische Analyse des Europarechts: Primaerrecht, Sekundaerrecht und die Rolle des EuGH]. For European court case law see eg, Case C-192/01 *Commission v Denmark* [2003] ECR I-9693; Case 270/02 *Commission v Italy* [2004] ECR I-1559; Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375; Case 178/84 *Commission of the European Communities v Federal Republic of Germany* [1987] ECR 1227 (purity requirement for beer); Joined cases 51 to 54/71, *International Fruit Company and Others v Producktschap voor groenten en fruit* [1971] ECR 1107 (licenses required for import); Case 34/79 *Regina v Henn and*

Applying the judicial doctrine of 'mutual recognition' as a measure of negative integration, the Commission successfully neutralized national rules that acted as barriers to the free movement of goods.[102] The principle of mutual recognition renders unenforceable an otherwise lawful national measure that hampers cross-border trade, whether or not the underlying aim of the measure is protectionist. Such otherwise valid national rules are expected to be disapplied by the relevant national authorities charged with the application and enforcement of national rules.[103] The legal doctrine of mutual recognition, part of the principle of the right to cross-border free movement of goods, and the doctrine of a judicial duty correctly to apply European law in national tribunals, are examples of negative integration.[104]

However, the principle of mutual recognition was only one facet of the strategy in the White Paper on completing the internal market.[105] In addition, an unprecedented number of positive integration measures, just under 300 measures of a *legislative* nature, were thought necessary in order to remove physical, technical and fiscal barriers to free movement.[106] This expansion of European regulation launched a regulatory trajectory that discomfited Member States as evidenced in the

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Darby [1979] ECR 3795 (ban on import of pornographic materials); and Case 286/86 *Ministère Public v Deserbais* [1988] ECR 4907. See generally D Chalmers, G Davies and G Monti, 'The Internal Market' and 'The Free Movement of Goods' in *European Union Law Cases and Materials* (2nd edn, CUP 2010); P Craig and G de Burca, 'The Single Market' and 'Free Movement of Goods: Quantitative Restrictions' in *EU Law Text, Cases and Materials* (4th edn, OUP 2011) 668-95.

[102] The Commission drew the following conclusions from the *Cassis* judgment: 'Any product imported from another Member State must in principle be admitted into the territory of the importing Member State if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter'. Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 'Cassis de Dijon' [1980] OJ C256, 2. The current version of the relevant Treaty article is art 34 TFEU which reads as follows: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.

[103] The Court of Justice explicitly found this legal effect resulted from the primacy of European law in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 24.

[104] Applying the principle of mutual recognition acts to neutralise or render unenforceable a national barrier to intra-Community trade in a manner that allows market forces to come into play in those markets from which they were previously excluded, because of the existence of national measures. The term 'negative integration' was introduced into the literature on integration by J Tinbergen. Kohler-Koch (n 92) 5, n 10.

[105] Commission, 'Completing the Internal Market' (White Paper) COM (85) 310 final, 18-29.

[106] ibid. The simultaneous change to QMV in the European legislative adoption procedure introduced by the Single European Act of 1986 removed the formal threat of a Member State veto in the Council, thus facilitating the adoption of positive integration measures in the form of legislation.

codification of the principles of subsidiarity and proportionality and the conclusions of the Edinburgh Presidency.[107]

The Single European Act introduced a definition of the internal market into the Rome Treaty that has remained relatively stable for a period of twenty-five years and remains faithful to the notion of the four economic freedoms (good, persons, services and capital).[108] However, the Treaties give no indication of any preference for one form of integration measure over the other nor do they indicate to what degree the four economic freedoms must be given effect. These questions are left to the decision-making institutions of the EU. This creates considerable policy-making discretion particularly for the Commission to determine what positive integrationist measures are needed for the establishment and functioning of the internal market.

Thus far, the Treaties have created no mechanism to oversee the exercise of that discretion by the Commission. Recently adopted regulatory governance measures are therefore all the more welcome in that they create a basis and use some externally developed benchmarks against which the Commission's execution of its regulatory powers may be evaluated.

Whereas negative integration measures reduce barriers to trade and thus to integration, positive integration measures create a new legal instrument and a legal regime that replaces the national one.[109] Negative integration measures can be seen as deregulatory policy measures that remove barriers between separate markets, thus combining and enlarging them, while positive integration measures can be seen as

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[107] See particularly the annex to the Presidency conclusions on the 'overall approach to the application by the Council of the subsidiarity principle and art 3b of the Treaty on European Union'. The latter reads as follows: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

[108] Art 8a EEC reads: '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.' Art 26 TFEU is similar. It reads in part: '1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. 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 the Treaties…'

[109] A Stone Sweet and J Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration' in W Sandholtz and A Stone Sweet (eds), *European Integration and Supranational Governance* (OUP 1998) 121.

re-regulatory, market-correcting, policy measures that do not necessarily alter the size of the market, although frequently the aims of regulation are to facilitate economic growth.[110]

1.2.1. Problematic features of positive integration

Part of the criticism leveled at both forms of integration, and especially positive integration measures, is that the EU legal system reinforces the centralizing and expansionist tendencies to regulate within the EU.[111] The real or apparent loss of national control over policy processes becomes problematic for Member States.[112] Scharpf observed that

> ...from a neoliberal point of view most legitimate aspirations of economic integration are realized with the completion of the common market, and further moves towards positive integration are generally considered unnecessary and dangerous. From an interventionist perspective, by contrast, the common market as such appears as a constraint that reduces the capacity of national political systems to pursue democratically legitimized policy goals.[113]

Whether seen from a neoliberal or an interventionist stance, positive integration measures carry considerable political costs. There may be a link between the disillusionment of European citizens about the benefits of the EU and the weakening of national social contracts resulting from the pressures of asymmetric negative and positive regulation.[114]

Removing every possible economic frontier to an integrated economic space is not inherently more important than other considerations that may be of a social,

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[110] Much of current EU policy and politics is meant to contribute to the aims of economic growth and job creation, two aims espoused explicitly and over-archingly since the adoption of the Lisbon Strategy for Growth and Jobs in 2000, subsequently updated in 2010 with Europe 2020. See *Europe 2020* <http://ec.europa.eu/europe2020/index_en.htm> accessed 15 October 2012. Linking regulatory governance to the aim of economic growth, the Commission noted that 'In the context of the renewed Lisbon Strategy, refocused on growth and jobs, [it] launched a comprehensive strategy on better regulation to ensure that the regulatory framework in the EU contributes to achieving growth and jobs'. See the better regulation website <http://ec.europa.eu/governance/better_regulation/index_en.htm> accessed 21 October 2012.

[111] Stone Sweet and Caporaso (n 108) 121.

[112] Pollack (n 93) 110.

[113] Scharpf (n 28) 49 footnotes omitted.

[114] ibid 122. He furthermore identifies a risk of political disaffection at national level, a subject not addressed in the present thesis.

cultural or even religious value (one could think of the 'Sunday trading' cases),[115] nor does such harmonization remove the non-economic reasons that produce imperfections in economic mobilities and transactions.[116]

With the entry into force of the Treaty of Lisbon, an even broader set of values has become part of the regulatory aspirations for the European project. A broader view of the internal market and thus of the public interest may be discerned in documents of the Commission and the European Council where '[t]he internal market is conceptualized in more holistic terms, to include not only economic integration, but also consumer safety, social rights, labor policy, and the environment'.[117] Is this broader view real or merely apparent? Criticisms of the economic order of the EU relate to the perception of incompatibility between extensive economic integration measures and national preferences that may be of a non-economic nature.[118] The creation of an internal market in European countries required some level of positive harmonization, that is, the approximation of national rules to minimize the differences that impeded cross-border trade, in order to achieve a common market. However, the nature and extent of positive economic integration measures and supranational institutionalization are not foreordained.

The original approach to positive economic integration measures in which all Member States enjoyed control by veto over the regulatory measures that were adopted at the European level changed with the Single European Act.[119] In the early years of the Community, the limited policy program of the Treaty and the unanimity rule in the Council reconciled the competing tensions between inter-governmentalism and supranationalism in order to achieve political legitimacy, but

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[115] The Sunday trading cases started with Case 145/88 *Torfaen Borough Council v B & Q PLC* [1989] ECR 3851. The Court found that a ban on Sunday trading in England and Wales under the Shops Act 1950, the effect of which was to restrict the volume of imports to the shops trading in breach of the rules, was *prima facie* contrary to article 34 TFEU. See also C-312/89 *Union Departementale des Syndicats CGT de l'Aisne v Sidef Conforama* [1991] ECR I-997 and C-332/89 *The State of Belgium v André Marchandise* [1991] ECR I-1027.

[116] J Pelkmans, *Market Integration in the European Community* (Martinus Nijhoff 1984) 3.

[117] P Craig and G de Burca, *EU Law Texts Cases and Materials* (4th edn, OUP 2008) 632.

[118] The post-war developments in many EU Member States mediated the competitive pressures of the forces of a globalising economic liberalism by developing systems of protection for their nationals. Scharpf (n 28) 122.

[119] The Single European Act amended, inter alia, the voting rule of the Treaty of Rome for the purposes of adopting of harmonisation legislation to complete the internal market from unanimity to qualified majority voting. This was the first amendment to the Treaty of Rome since its initial entry into force in 1957. For a comprehensive chronicle of the evolution of the European Treaties see <http://eur-lex.europa.eu/en/treaties/index.htm>.

this consensus no longer holds.[120] The move to QMV for the vast majority of positive integration measures in the context of a 'constitutionalised' European legal system and extension of competences to the EU, changed the legal and political balance of power of the Union.[122]

Some critics found that European positive integration measures impinged on the prerogatives of the European welfare state and on the individual national settlements within each Member State.[123] The normative economic proposition - that effective economic liberalization, despite using a non-majoritarian model, benefitted all citizens and could thus legitimate the institutional arrangements by results - was contested on the basis that economic interventions have distributional consequences, which necessarily render them political in nature.[124] Some challenged the proposition that legitimacy would be a consequence of regulation, that is, that neo-liberal market imperatives were compatible with other values that were not represented in the European policy processes.[125] The efforts of European leaders to increase democratic legitimacy through institutional reforms and successive Treaty amendments, including the mechanism of a citizens' initiative;[126] the right to petition the European Parliament and the right to apply to the Ombudsman;[127] and an early consultation mechanism of national parliaments (the 'yellow card' system)[128] have not yet produced much evidence that such efforts have been successful.

In Chapters 2 and 3, I will argue that an alternative model for creating or enhancing the native legitimacy of positive regulatory measures that is not based on tweaking EU institutional arrangements can be found in a normative use of regulatory governance.

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[120] Kohler-Koch (n 92).
[122] JHH Weiler, 'The Transformation of Europe' (1990) 100 Yale LJ 2403; D Wincott, 'European Political Development, Regulatory Governance and the European Social Model: The Challenge of Substantive Legitimacy' (2006) 12 ELJ 743, 763.
[123] Scharpf (n 28) 41-42.
[124] F Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4 JEPP 18, 19.
[125] See eg, Wincott (n 1).
[126] The citizens' initiative was created in art 11 of the Treaty on the European Union (TEU); the right of any citizen to apply to the European Parliament and to the Ombudsman appears in art 24 TFEU.
[127] Art 24 TFEU.
[128] A Protocol on enhanced subsidiarity and proportionality was attached to the Treaty of Lisbon, which came into force in December 2009. The Protocol provides for a 'yellow/orange card' mechanism that gives national parliaments an opportunity to object to legislative proposals with a view to having them amended or withdrawn.

1.3. Conclusion

This chapter has identified the terms, context and questions that will be used in the remainder of the thesis. EU supranational regulatory governance therefore means (1) the exercise of regulatory powers in furtherance of the internal market; (2) that have been formally and constitutionally delegated by state actors; (3) to the European Commission as an independent non-governmental institution. Normative regulatory legitimacy refers to an evaluative determination that regulatory authority was properly exercised, by reference to normative criteria. This form of legitimacy is based on neither input legitimacy, which requires democratic policy-formation institutions, nor output legitimacy, which depends on empirically tested and verified outcomes. It is effectively a defensible conclusion that a regulator merits to be considered legitimate when evaluated against normative criteria.

The term 'positive integration measures' refers to European legislation that creates binding European norms which prevail over inconsistent national norms. Regulation as used herein is an example of a positive integration measure referring specifically to European harmonizing legislation for the internal market and any related soft law measures. The principal question of the research is whether regulatory governance, using normatively defined governance criteria, can contribute to greater regulatory legitimacy. Questions about the legitimacy of the Commission as a regulator are distinct from those related to whether the conferral of extensive supranational competences can be deemed democratically legitimate. The latter concern forms part of the broader constitutional questions of the EU.

The value of the present research may offer some part of a response to the challenges facing the EU, and particularly the Commission, in discharging what was initially uncontroversial: regulation to facilitate the establishment and functioning of an internal market. The expansion of European regulatory competences and the development of European governance institutions and agencies have led some to label the EU pejoratively and misleadingly as a 'regulatory state'.[129] Although not a state, the EU is nonetheless viewed with some misgivings in light of the sheer growth in regulation, regulatory mechanisms and regulatory institutions.

[129] Majone (n 49); McGowan and Wallace (n 49); G Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 JPP 139.

Such doubts have caused popular, political and academic concerns, if not disillusionment and disaffection, thus creating a regulatory governance dilemma for the Commission, to which it has begun to respond - with some prodding from Member States - in the form of its better regulation initiatives. The Commission is still on a learning curve with regulatory governance. For most of its existence, the Commission has been able to exercise its prerogatives with a somewhat superficial regard to the concerns of its normative legitimacy and regulatory authority. Although they are discretionary, the present initiatives on the part of the Commission to be examined in Chapter 3 provide an important but insufficient first step in establishing a basis for evaluating the Commission as a regulator.

The present research offers an alternative approach for the Commission to achieve regulatory legitimacy to that of both input and output legitimacy theories. Moreover, it remains within the institutional powers and limitations as these are currently constructed. It may be considered a contribution to the now urgent need to find a methodology to redeem the perception of, variously, inappropriate, sub-optimal and excessive European regulatory activity, in political, popular and academic circles, in a way that responds to *some* of these criticisms and offers a normative basis to attribute a robust and defensible form of regulatory legitimacy to the development of positive harmonization measures at the EU level.

In the next chapter, I discuss regulatory governance theories and their contribution to the governance model constructed herein. I also examine and analyze the regulatory governance theories of Majone and Scharpf, contrasting their underlying premises, and showing why neither is an appropriate basis on which to base a twenty-first century approach to supranational regulatory legitimacy.

Chapter 2

Regulatory Governance: Models, Methods and Mentors

Introduction

Thus far, I have described and defined legitimacy, governance and European integration measures, both negative and positive. In this chapter, I relate them to regulatory governance. The definitional and contextual discussion of the first chapter laid the basis for this chapter and defines regulatory governance for the purposes of the research. Regulatory governance mechanisms used in other contexts, such as national and international regulatory regimes, offer models and values from which the governance model of this research draws.

This chapter begins by examining the role of the Commission as a regulator. In the mid-1980s, the Commission succeeded in re-focusing and refining the institutional mechanisms and national political will to commit to the completion of the internal market by 1992 ('the 1992 Programme'). That Programme was largely successful from the Commission's point of view. The processes that led to its endorsement also created an intergovernmental and supranational consensus on the importance of completing the internal market and on the methodology for achieving it. In the first section of the chapter, I trace the evolution of the Commission's role as a regulator from its modest beginnings into its current form as a regulatory titan. The chapter then examines traditional regulatory governance theories. In general terms, these theories relate to legitimacy shortfalls associated with national regulatory systems. Recent developments in transgovernmental regulation, legitimacy and governance, of limited direct relevance, are included briefly.

As a basis for comparison with the constructed model, I use two contrasting approaches to EU regulatory legitimacy developed by two prominent scholars, Giandomenico Majone and Fritz Scharpf. The chapter examines their theoretical premises and contentions, the theories on which they are based, and their relevance for the governance model that will be used in the case study. The normative regulatory governance model developed in Chapter 3 will draw upon criteria developed in national regulatory regimes and in recent international regulatory

scholarship, as a framing for analysis. The chapter finds that *alternative mechanisms* to national forms of *democratic* accountability, such as normatively constituted governance policies, offer a defensible basis on which to construct or enhance supranational regulatory legitimacy. That proposition will be tested in the case study.

2.1. The Commission as Regulator

In the decades following 1992, the Commission's role as a regulator was strengthened by further delegation of regulatory powers through successive Treaty amendments.[1] As the number of European harmonization measures grew, the regulatory activities and structures at both the national and European levels correspondingly expanded in tandem with the Commission's growing responsibility for oversight of the *acquis communautaire*.[2] The powers of the Commission are set out in Article 17 TEU.[3] They include four types: legislative, administrative, executive and prosecutorial.[4] One of the Commission's exclusive powers is to propose harmonizing legislation for the internal market.[5]

The European Commission is a unique creation in the world of transnational regulators. It does not operate under the aegis or mandate of a government that

[1] See P Craig and G de Burca, *EU Law: Texts, Cases and Materials* (OUP 2011) ch 1 on the trajectory of the evolution of delegated competences.

[2] 'The [Single European Regulatory Space] is composed of standing committees, committees of wise men, working groups, programmes and task forces, *ad hoc* high-level expert groups, forums, agencies, networks and Directorates-General (DGs) - all operating in a multi-level and multi-spatial architecture.' D Levi-Faur, 'Regulatory Networks and Regulatory Agencification: Towards a Single European Regulatory Space' (2011) 18 JEPP 810, 810; see also, eg D Coen and M Thatcher, 'The New Governance of Markets and Non-Majoritarian Regulators' (2005) 18 Governance 329 and M Thatcher, 'The Creation of European Regulatory Agencies and its Limits: A Comparative Analysis of European Delegation' (2011) 18 JEPP 790.

[3] Art 17(1) TEU: '1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and triannual programming with a view to achieving inter-institutional agreements.'

[4] For a detailed discussion of the range of roles accorded to the Commission and the other major European institutions in the Treaties, see Craig and de Burca (n 1) ch 4.

[5] Art 26 TFEU reads: '1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. 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 the Treaties. 3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.'

prevailed in the last election. The law governing the institution is derived from an amalgam of legal traditions, based initially on the Treaty of Rome (as amended, now the Treaty on European Union and the Treaty on the Functioning of the European Union), and which is interpreted by a multinational judicial system. Whereas in national environments the roles of civil servants, members of Parliament, governmental ministers, judges and other stakeholders are constitutionally rather stable, in the EU, the sources of influence are constantly evolving.

The impact of Member States' preferences on the policy process is now strong but this was not always the case. Inter-institutional relations have always been dynamic and the roles of major actors, most notably the European Parliament, and latterly the European Council, have evolved considerably since the initial creation of the EEC. The Commission's two roles as a regulator, proposing harmonizing legislation and enacting legislative measures under Treaty powers or under delegated powers, have always formed part of the institutional set-up. However, it is doubtful that the intention of the founders of the European Economic Community was for the Commission to turn into a supranational regulatory overlord. That it has become so is no longer open to dispute, but whether it can discharge its extensive regulatory responsibilities appropriately, convincingly and accountably is indeed contestable.

Whereas national civil servants operate under a quite well-defined set of rules and conventions and are answerable through ministers to an elected government, European civil servants are not democratically accountable in the same manner.[6] To the extent that EU action is necessitated by differences in Member State policy or practice, the Commission often seeks a compromise. The extent to which the

[6] The Commission as a College is subject to censure by the European Parliament. See art 234 TFEU. It requires a two-thirds majority of the votes cast, representing a majority of Parliament's component members, in which case the Commission must resign as a body. Individual members of the Commission may be removed from office by the Council for breach of their duties. See art 245 TFEU. Whereas previously the Council decided unanimously on the members and President of the Commission without input from the EP, the Parliament began to be consulted in 1993 and obtained a right to veto the choice for President in the Treaty of Amsterdam. The Parliament currently elects the Commission President on the nomination of the Council. See art 17(7) TEU. Art 17(8) TFEU states that the Commission 'as a body' shall be responsible to the European Parliament. However, the only institutional mechanism for parliamentary oversight of the Commission is that of a global motion of censure under article 234 TFEU. The Legal Affairs Committee of the EP produced a report on Impact Assessments in 2004 that recommended an audit body reporting to the Commission president to monitor the quality of impact assessment processes and *outcomes*, and to carry out impact assessments on amendments proposed by the EP to regulatory proposals. See CM Radaelli and F de Francesco, *Regulatory Quality in Europe* (Manchester UP 2007) 134.

regulatory processes under which the Commission operates are sufficiently transparent is a matter of contention.[8] Brussels insiders can navigate the process, but civic society may find it very difficult. Majone commented presciently on the shift in the Commission's role towards regulatory functions that has gathered momentum with the Treaty amendments adopted over the following two decades.[9]

Many of the concerns about the Commission as a regulator relate to the thick mesh of positive economic integration measures and their enforcement that are justified by reference to the establishment and functioning of the internal market. Several strands of concern have emerged, and were noted in chapter 1, about the Commission's construction of an empire-like arrangement of regulatory governance agencies, networks, consultative committees, and other bodies that characterize a centralizing trajectory of regulatory governance. Thatcher and Coen and others detect, but do not defend, the gradual centralization of EU regulatory enforcement in an environment of greater regulation generally.[10] The perception of an emerging 'regulatory behemoth' seems to corroborate Malone's earlier prediction. However, rather than create a sense of progress in furthering European integration, the growth of the Commission's regulatory empire has generated considerable malaise. It has become the 'received wisdom' that Brussels is a source of excessive and intrusive regulation. Rarely does public discourse suggest that the EU is a net positive factor for Europeans, even less so in the current Eurozone crisis. Nor does it alleviate the concern to note, as Majone did, that most of the positive regulation originated from the Member States themselves.[11]

Chapter 1 established significant qualitative differences between negative integration and positive integration measures and a correspondingly different normative appreciation of legitimacy. Positive harmonization measures constitute secondary law, whose satisfaction of democratic norms is trenchantly contested, in a context of considerable regulatory and legislative discretion as to how the EU

[8] See D Curtin and AJ Meijer, 'Does Transparency Strengthen Legitimacy?' (2006) 11 *Information Polity* 109; B Westerdorf, 'Transparency - Not Just a Vogue Word' (1998) 22 Fordham ILJ 900; L Stirton and M Lodge, 'Transparency Mechanisms: Building Publicness into Public Services' (2001) 28 *Journal of Law and Society* 471.
[9] Majone launched this scholarship in his seminal work: G Majone, *The Rise of the Regulatory State in Europe* (Routledge 1996).
[10] M Thatcher and D Coen, 'Reshaping European Regulatory Space: An Evolutionary Analysis' (2008) 31 *West European Politics* 806.
[11] Majone (n 9) 266.

facilitates the establishment and functioning of an internal market. It is precisely the Commission's power at the very centre of the positive regulatory model for the EU as the primary interpreter of the public interest that requires a high level of normative analysis and a correspondingly higher level of justification when exercising such power. The neo-functionalist, institutionalist and pragmatic (inter-governmentalist) explanations for the evolution of the European regulatory space offer no basis for an intellectually and normatively defensible evaluation of EU regulatory measures in order to determine if they should be considered legitimate, as opposed to popular. Since the Commission has assiduously pursued the establishment and functioning of the single market since the early 1990s, there is much to examine.

2.2. Disillusionment with the Project and/or the Architect?

However *politically* successful the 1992 Programme, the same was not the case for its implementation, with important implications:

> The 1992 Programme was rapidly confronted with difficulties that revealed the limits of the harmonization model....by the end of [1990] the Commission realised that only a handful of the internal market directives [a total of almost 300] had been duly transposed into domestic law by the member states....[W]rongful or incomplete transposition was only the tip of the iceberg....The capacity of national regulators to cope with the requirements introduced by European legislation [was] far from being uniform...[T]he single market programme thus revealed the existence of gaps of a new kind: although the EC was there in a growing number of areas, its interventions were often sub-optimal...[12]

Simple harmonization of the 'rules-of-the-road' cannot effectively remove all barriers to cross-border trade, thus making some form of administrative coordination unavoidable to achieve an internal market. The Commission's response to its increased responsibility was twofold: to intensify the use of regulatory networks that were primarily composed of national officials and Commission representatives, and to create an increasing number of European regulatory agencies.

The use of agencies by the Commission before the 1990s was no more than 'marginal' but 'boomed' in the post-2000 decade.[13] In 1997, there were ten

[12] R Dehousse, 'Regulation by Networks in the European Community: The Role of European Agencies' (1997) 4 JEPP 246, 251.
[13] Levi-Faur (n 1) 811.

agencies.[14] By the end of 2010, there were twenty-eight.[15] Most of these agencies are 'specialized administrative authorities or bodies, provided with legal personality, governed by a management board mainly composed of Member States' representatives and operating outside supranational institutions....'[16] Their functions are largely executive, informational and coordinative with virtually no rule-making powers.[17] They are primarily intended to facilitate convergence of administrative practices and approaches between the national regulators under the supervision of the Commission as a controlling agent. Agencies can replace or complement pre-existing regulatory networks.[18] Given the budgetary, institutional and political constraints of the 1990s, recourse to agencies may have been rational, considering the pre-existing comitology committees represented only an 'ad hoc' approach, when what was needed was a 'true community of views' to establish a 'community of action'.[19] The creation of agencies to oversee and cooperate with pan-European networks of national regulators can thus be seen as a response to the functional needs of consistency and uniformity of application. But they come at a price.

Over the years, the Commission has progressively migrated more informal, often pre-existing, arrangements for implementation and enforcement principally into the two forms mentioned above: agencies and networks.[20] This growth has altered the regulatory dynamic into one where the Commission as 'chief regulator' exerts a controlling influence over the work performed within these forums, typically composed of national officials from domestic regulatory authorities. Given that the internal market *acquis communautaire* now consists of a vast array of rules requiring consistent and uniform approaches to be effective, a networked agencies approach

[14] A Kreher, 'Agencies in the European Community - A Step towards Administrative Integration in Europe' (1997) 4 JEPP 225, 227.
[15] Levi-Faur (n 1) 811.
[16] Kreher (n 14) 227.
[17] For example, the tasks of the Body of European Regulators for Electronic Communications (BEREC) are largely advisory in two dimensions, between national regulators and between the Commission and BEREC. See <http://berec.europa.eu/> accessed 6 March 2013.
[18] Levi-Faur (n 1) 823.
[19] Dehousse (n 12) 254.
[20] For example, in the telecommunications sector, the Commission created a European level regulatory network (the European Regulators Group) in 2003 that eventually replaced the pre-existing informal network of national regulatory authorities. In 2010, this group was dissolved and a European agency for telecommunications was created. See Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office OJ L337/1.

gives the Commission the means of discharging its responsibility of oversight using both cooperative *and* hierarchical relationships in the European regulatory space.[21] Such developments characterize the transformation of the Commission's role as a regulator in that space and highlight its complexity.

The European regulatory space now contains numerous formal and informal arrangements. Furthermore, these structural developments occurred across all policy areas.[22] The complex picture of the European regulatory space has been described thus:

> The patchwork of regulatory institutions, instruments, committees, observatories, directives, rules, and networks at various levels and various arenas that together make up the [Single European regulatory space] is diversifying and expanding. The scale, depth and scope of agencification create the world's largest and probably most complex transnational regulatory system.[23]

These complex polycentric arrangements put the Commission at the centre of a vastly increased regulatory corpus and infrastructure as compared to thirty years ago.[24]

EU developments in governance are problematic in three ways: first European centralization of an increasing number of regulatory powers; second, the number and scope of positive integration measures that impact upon national prerogatives; and third the construction of Commission-controlled (centralized, non-transparent) extensive enforcement structures whose activities are not directly open to the public. Some critics have claimed that the role, powers and trajectories of European agencies put the propriety of regulatory governance from political and constitutional perspectives into doubt.[25] A primary concern is that of lack of accountability. In strong contrast to Majone's premise of depoliticizing regulatory governance that will be analyzed below, the rise of European agencies that either subsume or control regulatory networks may reflect a transfer of power to the

[21] See T Borzel, 'European Governance: Negotiation and Competition in the Shadow of Hierarchy' (2010) 48 JCMS 191.
[22] Dehousse (n 10) 247.
[23] Levi-Faur (n 2) 826.
[24] How agencies and regulatory networks inter-operate and with what capacities is now a source of some concern as to their effects on overall governance. Such concerns reflect the view that such extensive and pre-emptive regulatory regimes may not accord with notions of legitimate government. This topic is outwith the research but, on this point, see eg B Rittberger and A Wonka, 'Introduction: Agency Governance in the European Union' (2011) 18 JEPP 780, 783.
[25] M Flinders, 'Distributed Public Governance in the European Union' (2004) 11 JEPP 520.

Commission that impinges on national capacities for governing.[26] However, this view is not universal.[27]

Although addressed to a different level of the policy process, a recommendation from one commentator neatly echoes the starting point that I adopt herein:

> ...the importance of a coherent and explicit governance framework within which [the European agencies and networks] can operate cannot be over-stated.[28]

As an institution, the Commission gave little outward indication until 2001 that its regulatory governance policy was an issue of any concern. In light of the considerable increase in positive harmonization measures adopted since the launch of the 1992 Programme and further amendments to the Treaties, together with the construction of a complex matrix of enforcement authorities, that the Commission was engaging in regulatory governance practices is no more than a truism. It seemed to be institutionally unaware of it, and thus missed an opportunity during the early stages of the regulatory infrastructure building processes to develop a meaningful and normative policy of regulatory governance. That the Commission has begun to make up for lost time is to be welcomed, but progress has been piecemeal and sub-optimal. This theme will be developed further in chapter 6 when the Commission's regulatory governance policy is examined in greater detail.

The issue of whether the use of extensive positive integration measures is justified frames the discourse on EU regulatory legitimacy. The use of negative integration has been less controversial for the Commission.[29] It will be seen in the case study that the Commission's use of negative integration (liberalization) to initiate the reform of telecommunications so as to create a European market in the

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[26] ibid 541.

[27] '...the establishment of European agencies can indeed appear as a net gain in terms of legitimacy.' Dehousse (n 12) 258.

[28] Flinders (n 25) 541.

[29] The use of Commision legislative powers is less controversial only because rarely used to deregulate European markets. It will be seen below that the Commission's singular and unilateral use of negative integration to de-monopolize the telecommunications sector in the late 1980s caused considerable political controversy and resentment, such that the Commission has never resorted to unilateral measures, but has always relied on harmonization, in subsequently liberalized sectors. Negative integration is more typically associated with the Court of Justice in interpreting the provisions of the Treaties in relation to economic freedoms. The Court's judgments upholding the European norm over the inconsistent national norm have not been without controversy. But the Commission has not suffered from the controversy attached to such holdings.

sector was singularly controversial, but was largely an inter-institutional battle that the Member States effectively lost, although a pyrrhic victory in some respects for the Commission.

2.3. National Regulatory Governance and Legitimacy

National regulators face challenges as to the legitimacy of legislative regulatory delegation, notwithstanding the fact that the process of delegation may satisfy national constitutional requirements for legislative adoption.[30] The loss of legitimacy is said to result from a loss of public accountability and democratic control, by operating outside the traditional constitutional framework of controls, checks and balances.[31] Delegation in this sense therefore constitutes a violation of constitutional settlements. The comparison between legitimacy discourses for national and transnational regulators is enlightening. [33] In a national regulatory context, two forms of normative legitimacy are available to a regulator: input and output legitimacy, as seen in chapter 1. Empirical criticisms of national regimes focus on the failure of the regulator to achieve its regulatory objectives and thus a failure to satisfy the wider social interests at stake.[34]

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[30] Theories of democratic legitimation are beyond the scope of the present research. For a start on the vast literature, from various communities, on theories of legitimate government and democracy as a legitimate form of social and governmental organization, see A Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157; A Lijphart, 'Majority Rule in Theory and in Practice: The Tenacity of a Flawed Paradigm' (1991) 129 *International Social Science Journal* 483; N MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1; JHH Weiler, *The Constitution of Europe: 'Do the New Clothes have an Emperor?' and Other Essays on European Integration* (CUP 1999) 10, 317-18; N Walker, 'The Idea of Constitutional Pluralism' in R Bellamy, V Bufacchi and D Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995); S Smismans (ed), *Civil Society and Legitimate European Governance* (Edward Elgar Publishing 2006) 290-300; A Menon and S Weatherill, 'Legitimacy, Accountability, and Delegation in the European Union' in A Arnull and D Wincott D (eds), *Accountability and Legitimacy in the European Union* (OUP 2003) 113- 32; A Dicey, *Introduction to the Study of the Law of the Constitution* (6th edn, Macmillan 1902) 214; D Gaus, 'Legitimate Political Rule Without a State?' (ARENA Centre for European Studies, University of Oslo RECON Online Working Paper 2008/12) <www.reconprojecteu/projectweb/portalproject/RECONWorkingPapers.html>. Gaus submits a contentious and courageous premise: since the European Union system violates all of the traditional principles for formal legitimacy, he proposes that the criteria for assessing legitimacy simply be changed.

[31] G Majone, *Regulating Europe* (Routledge 1996) 284; C Veljanovski, 'The Regulation Game' in C Veljanovski (ed), *Regulators and the Market* (Institute of Economic Affairs 1991) 16.

[33] The closest analogue to this issue in the EU context may be the theoretical disputes between intergovernmentalists, proto-federalists, constitutionalists and Euro-statists.

[34] See eg, RC Felleth, *The Interstate Commerce Omission: The Public Interest and the ICC* (Grossman 1970); J Turner, *The Chemical Feast* (Grossman 1970); MJ Green (ed), *The Monopoly Makers* (Grossman 1973); JR Michael (ed), *Working on the System: A Comprehensive Manual for Citizen Access to Federal Agencies* (Basic Books 1974). See also The President's Advisory Council

In the EU, it is not at all a matter of consensus as to what is represented by the public interest and how it should be analyzed. Thus, with respect to the internal market, the definition of the 'public interest' has no fixed meaning. This has major implications for how the public interest should be reflected in the EU regulatory space, that is, in the extent of negative and positive integration that should apply within the internal market. If an underlying premise justifying delegation in the context of national regulation is that all those who are concerned have common interests, but that their judgments may differ for one reason or another,[35] then a major premise inherent in national delegation is absent in the EU context. Not only do judgments differ as to what problems to address, there is an absence of common interest on the part of those who are concerned or affected by EU regulation.[36] The most notable current example is the parlous state of the debtor Mediterranean Member States in the euro crisis, as compared to the position of the creditor Member States further north.[37]

In the EU, the issue of whether regulation has satisfied the public interest brings out the distinction made earlier between negative, 'market making', integration and positive, 'market correcting', integration measures. What should be understood by the notion of the 'public interest' in the EU that is satisfied by European legislative measures? Any formulation of the public interest to be served in the EU is inherently subjective even if couched in terms related to the objectives of the Treaties, whose provisions give no guidance for interpretation or for determinations of consensual agreement. The question of how much positive integration is needed in order to satisfy the public interest at stake in the EU is highly

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on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* [Ash Council Report] (Washington DC Government Printing Office 1971) <http://www.epa.gov/aboutepa/history/org/origins/ash.html> accessed on 23 March 2009.

[35] R Bellamy, 'Still in Deficit: Rights, Regulation and Democracy in the European Union' (2006) 12 ELJ 725, 736.

[36] Europe is characterized among other things by differences in the size of Member States, in social welfare models, in languages, geography and in approaches to macroeconomic management.

[37] While creating financial stability as an objective cannot be contested, the measures imposed upon the debtor states have caused contraction and deflation in those economies to the point of provoking civil unrest, severely high unemployment and the emergence of extremist politicians and political parties. Nor is it obvious that the measures adopted to date have equitably balanced the competing interests of the creditor and debtor Member States, or that the national public interest of the debtor countries genuinely corresponded to the measures adopted. The measures have undermined the goodwill of many Europeans towards the EU and created resentment against some Member States, notably Germany.

contestable. Precisely because there is no broad consensus on what constitutes the public interest in the EU, the Commission's view of positive integration represents one among many; it is far from consensual; and can be challenged by those whose view differs from that of the Commission and whose interests may be under-represented in the Commission's interpretation. When the Commission exercises its Treaty powers to adopt a legal act, the mechanism of judicial review provides oversight and accountability, even if the Court has come in for trenchant criticism of its own when reviewing Commission decisions and administrative actions.[38]

With respect to positive integration measures, does the Commission genuinely seek to discover the overall EU 'public interest', or does it pursue a particular institutional view of the internal market?[39] It is doubtful if a shared view of the public interest even exists. If there is no consensus on what the public interest means in the EU, then there is equally no - or only a weak - basis to conclude that the Commission's unilateral institutional views of and priorities for positive integration should be considered legitimate. Given this consensual weakness, a possible solution to redress the weak legitimacy of the Commission as a regulator that is attributable to its prerogative of proposing harmonizing regulation under the Treaty would be for the Commission to use regulatory governance policy explicitly to address the lack of a broad consensus on what constitutes the public interest while remaining within its Treaty remit.[40]

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[38] The standard of review often attributed to the Court when appraising the Commission's discretion is said to be overly 'deferential'. One author noted: 'the current EU competition enforcement regime, which is characterized by an administrative decision-maker with no guarantees of independence and impartiality and deferential judicial review, is unconstitutional'. R Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective' (2012) 49 CMLR 971, 1005. For the proposition, inter alia, that the Court takes an overly lax stance in evaluating Commission decisions in competition policy enforcement, see also I Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of "Light Judicial Review"' in C-D Ehlermann and M Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 407; and I Forrester, 'Due Process in EC Competition Cases: A distinguished Institution with Flawed Procedures' (2009) 34 EL Rev 817.

[39] In addition to the consensual weakness of the Commission's views, institutional incentives encourage the Commission to engage in positive regulatory activities through the legislative process. See Majone (n 31) 61-79.

[40] Majone's solution was a system of multiple controls, using an amalgam of the US agency model, with criteria unlikely to be practicable in the EU context, eg clarity of legislative objectives combined with clear performance (output) standards. My solution preserves the institutional allocation of powers and requires no Treaty amendment or legislation to put into practice.

National regulators operating within a national political environment at least have a claim that their regulatory appreciations reflect a broadly consensual view of the public interest, in addition to which the national regulators are not designing their own remit. Moreover, where the activities of national regulators do not reflect a broad consensus, the national political processes in principle offer democratic corrective mechanisms.[41] No basis exists for the Commission to claim a consensual view of what constitutes the public interest in the EU, nor is there any equivalent correction mechanism at the EU level, for which a political consensus would be needed, and which is far from the case at present.[42]

The Commission's judgments and choices may reflect institutional and structural factors that reflect incentives for the Commission to regulate, which are not present in the national context or, if present, do not significantly distort the public interest choices of national regulators, or are correctable within national political processes.[43] The existence of a broad national consensus on what constitutes the public interest in no way alleviates the need for national governments to address the point of principle of delegation. Delegation dilutes the input legitimacy of the national regulatory regime.[44] This is problematic because legitimate national government requires both input and output legitimacy. So how do national governments address the issue?

States often use regulators, for reasons related to transaction costs, policy commitment and asymmetric levels of information. Alternatives to electoral accountability, such as binding administrative codes of conduct and judicial review

[41] Considerable scholarship is devoted to public interest and regulatory failure theories. See B Horwitz, *The Irony of Regulatory Reform* (OUP 1989); JO Freedman, *Crisis and Legitimacy: The Administrative Process and the American Government* (CUP 1978). In the 1930s, US government reports began to identify structural regulatory failures in numerous reports on investigations of regulatory performances. Horwitz 27. See also President's Advisory Council on Executive Organization (n 33).

[42] In the current climate of euro crisis, much discourse focuses on survival of the EU and certainly none at all on fine-tuning its regulatory prerogatives. That is likely to continue for many years to come, given the uncertainty of the draft Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. See 'Editorial Comments: Some Thoughts Concerning the Draft Treaty on a Reinforced Economic Union' (2012) 49 CMLR 1.

[43] The Commission's powers are primarily regulatory. It has few or no powers in the budgetary (disbursement) and social welfare areas.

[44] Scharpf conceded that it may be possible to use functional alternatives to electoral accountability where its use could lead to undesirable outcomes or would be insufficiently effective because the social and institutional preconditions for legitimacy were lacking. See F Scharpf, *Governing in Europe Effective and Democratic?* (OUP 1999) 14-15.

of regulatory decisions, were created in national regulatory space to ensure the effective control of the use of discretionary rules by national regulators.[45] These alternatives were first adopted in the US and are now widespread in Western administrative and regulatory practices in various regulatory constellations. The administrative procedural approach in the US relies on elaborate forms of due process and judicial oversight.[46] The US model of regulatory governance is far from ideal though, plagued as it is by long delays, and with no more certainty of serving the public interest than other approaches. Nonetheless, the US model and experience have heavily influenced the development of governance scholarship and practices elsewhere in the industrialized world.[47]

Two distinct but related notions should be clarified at this point. While legitimacy is a normative characteristic of a regulator,[48] effectiveness is an empirical feature of regulation.[49] Social scientists and economic theories of regulation tend to infer the former from the latter. Both conclusions are highly contentious especially for a transnational regulator like the Commission. Determining the legitimacy of a regulator requires a balancing of different factors, different forms of gains and losses, and different interests.[50]

Lack of consensus on what constitutes regulatory legitimacy has not prevented states from adopting notionally 'good' regulatory governance criteria.[51] Baldwin and

[45] R Baldwin, *Rules and Government* (OUP 1995) 36-37.
[46] RB Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669.
[47] M Lodge and L Stirton, 'Accountability in the Regulatory State' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010) 351. Delegation to independent federal agencies was premised on *excluding* policy-makers/politicians from following their short-term preferences. Independence, not accountability, was the normatively desirable criterion for agencies. Accountability could actually *undermine* their effectiveness. These premises are clearly reflected in Majone's work, below.
[48] See eg J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137.
[49] Considerable debate characterises the notion of what constitutes 'effectiveness'. See eg R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 76; R Baldwin and C McCrudden, *Regulation and Public Law* (Weidenfeld and Nicholson 1987) ch 3; Baldwin (n 45) ch 3. In *Rules and Government*, Baldwin noted that the attempts to establish effectiveness are essentially looking for a 'coherent' basis for evaluating governmental and administrative procedures, which he characterised as serving a broad array of values, at 37. Many authors bemoan the lack of effectiveness studies as they are seemingly something of a 'Cinderella' in regulatory scholarship.
[50] Coen and Thatcher (n 1) 339.
[51] OECD, 'Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest' (9 November 2011) <http://www.oecd.org/document/6/0,3746,en_2649_37405_49018758_1_1_1_37405,00.html>.

Cave identified five benchmarks to determine the legitimacy of regulatory action and what constitutes 'good regulation', by asking the following questions, (the higher the number of positive answers, the greater the legitimacy):

- is there a legislative authority or mandate for the regulation?
- is there some form of accountability?
- are procedures fair, accessible and open?
- is the regulator acting with sufficient expertise?
- is the regime or action efficient?[52]

Baldwin and McCrudden identify the same five criteria for identifying legitimate agency action.[53] By satisfying some or all of the above criteria, in whole or in part, regulatory legitimacy has come to mean 'worthy of support' in governance theory rather than 'entitlement to rule'.[54] Thus the premise, that control mechanisms in the national regulatory space may be regarded as *alternatives* to purely democratic accountability mechanisms, has come to be broadly accepted.[55]

Modern scholarship tends to focus on *several* normative criteria that contribute to, but do not alone constitute, regulatory legitimacy. In economic theory, regulatory credibility and policy commitment are linked with independence but regulation may lack control and accountability mechanisms or these may be ineffective. Other criteria of legitimacy than those above may be included but would be contentious for different reasons. The output legitimacy of a regulatory regime would necessarily depend on the effectiveness of the regulatory intervention, that is, by reference to the results it achieved.[56] However, Baldwin and Cave found effectiveness was too contentious a criterion to measure and thus excluded it. By using all of the five criteria together, those to whom the national regulator is accountable may make reasonable inferences.[57]

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[52] Baldwin and Cave (n 49) 76-85.
[53] Baldwin and McCrudden (n 47) 33-52.
[54] R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) LSE Law, Society and Economy Working Papers 3/2008 (London School of Economics and Political Science, Law Department) 25 n 125 < http://ssrn.com/abstract=1091784>.
[55] Baldwin (n 45) 36-37.
[56] Majone referred to this as 'accountability by results'. See G Majone, 'From the Positive to the Regulatory State: Causes and Consequences of the Changes in the Mode of Governance' (1997) 17 JPP 139, 161.
[57] Effectiveness as a concept has accepted meaning, and depends entirely on the frame of analysis, and what specific aims are intended to be achieved. Regulatory mandates are notoriously broad and considerable discretion is accorded to regulators, thus undermining the ability to reach incontestable conclusions about effectiveness. See eg, Baldwin and Cave (n 49) 78.

With few exceptions,[58] most models of regulatory evaluation do not include the criterion of proportionality, that is, the principle that the means to be employed in regulation should be proportionate to the objective pursued.[59] This is a constitutionally important principle for the EU.[60] Proportionality is difficult to evaluate in a regulatory context as it involves a subjective appreciation of relative values. For national regulators, it can be regarded simply as an aspect of efficiency, that is, of achieving the objectives of the regulatory mandate with the least use of input resources for maximal output.[61] However, the objectives of the regulatory mandate for the Commission, ie the establishment and functioning of the single market, are singularly open-ended, leaving much room for discretionary appreciation. Furthermore, even though the Court has jurisdiction to determine if a legislative act has infringed the principle of proportionality,[62] earlier case law suggests that the Court is generally willing to accord wide discretion to the European legislator, thus making a finding of infringement of the principle highly unlikely, other things being equal.

Of course, policy instruments *should* generally reflect the use of minimally effective measures in the achievement of regulatory objectives. The problem with the EU regulatory design process is the level of Commission control or influence over all phases of regulatory policy development and refinement. With institutional incentives to define single market problems in ways that require European rules and structures of enforcement, and with a vague definition of the principle, proportionality can generally appear to be satisfied. Nonetheless, the perception of an

[58] One such exception is the UK.
[59] Proportionality is one of the Principles for Good Regulation identified by the UK Better Regulation Task Force (BRTF). Five principles comprise the UK model: (1) transparency; (2) accountability; (3) proportionality; (4) consistency; and (5) targeting. See *Regulation – Less is More Reducing Burdens Improving Outcomes*: *A BRTF Report to the Prime Minister* (March 2005) 11 and Annex B < http://www.bis.gov.uk/files/file22967.pdf>.
[60] It was codified in the Maastricht Treaty reflecting a desire on the part of Member States to avoid over-regulation when harmonization was thought to be needed. There is little guidance and even less restraint on the application of this principle in relation to harmonization legislation. 'Only legislative choices that verge on the absurd are likely to be condemned as manifestly inappropriate.' S Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising:* How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal* 827, 844.
[61] Baldwin and Cave (n 49) 83 n 26.
[62] Treaty of the European Union, Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2010] C83/206, art 8.

emerging 'regulatory state' phenomenon remains that is problematic for European legitimacy.

A key premise in all regulatory theories for national regulators is that regulatory control mechanisms make the regulator accountable to a recognized legitimacy body or community, independent of the regulator, such as a national executive, parliament or ombudsman. The EU presents particularly difficult issues of accountability. Regulatory accountability is important in three contexts all of which are observed in the EU. The first is in situations where the regulator's mandate is imprecise. The second is where the interests of those who are affected by or interested in the regulation are diverse. Accountability becomes *crucial* in the third instance, when there are 'fundamental disagreements about the purposes of regulation - whether, for instance, economic efficiency should be the sole aim...or whether social objectives should be taken on board'.[63]

The above three factors are all present in the European regulatory context in different but still significant degrees. The Treaty lays down broad, open-textured aims, and not only fails to give the Commission any guidance on how to exercise its discretion in initiating regulatory policy, but also gives no guidance on integrationist priorities, or on how to balance the widely diverging interests of states, regions, industry and citizens, whether as public actors, or workers, consumers or private individuals. With the introduction of broader objectives into the Treaties, the prerogative of interpreting the meaning of the public interest relative to the single market becomes fraught with uncertainty. Despite repeated amendments of the Treaties from 1992 to 2009, no accountability mechanisms for regulatory discretion have ever been introduced into the Treaties, on how to use positive integration measures, or how to balance the interests that may be affected by such measures. The dilemma is substantially one of design.

A tension between regulatory independence and accountability is an inherent part of the setup of national regulators and is a consistent theme in regulatory governance.[64] When a regulator is seen as unduly close to the national government or the oversight body, it risks being considered unreliable. When a regulator is seen to be independent to a degree that its decisions are tainted by ideological policy-making

[63] ibid 286.
[64] See eg, Majone (n 31).

concerns, this undermines its accountability. Regulators have to walk a kind of 'tightrope' between an excess of independence that jeopardizes their accountability, on one side, and excessive forms of accountability that jeopardize their professional independence, possibly even their effectiveness, on the other. Good regulatory governance tries to address the inherent tension by including elements that take account of both of these values.

The purpose of using normative criteria to construct a legitimacy analysis is to create a defensible basis for having public confidence in a regulator; it is not a basis for creating public popularity. No single criterion would be sufficient to establish the legitimacy of a national regulator but satisfaction of these criteria in whole or in part heightens the regulatory legitimacy of the regulator. Not all of the criteria can be completely satisfied given inherent tensions between some of the underlying values, for example, between efficiency and due process. Nonetheless, the combination of these criteria can be considered justificatory to an extent that is greater than the individual parts. Combining the criteria leads to a 'collective justificatory power' that underpins a normative assessment that a regulator is entitled to be regarded as legitimate.[65] In effect, normative legitimacy may justifiably be attributed to a regulator, whether or not it is popular or socially acceptable.

2.2. Criteria of appreciation

This section analyzes five qualitative criteria linked to values associated with legitimacy for reasons which I explore in this chapter.[66] I explain the regulatory criteria below, bearing in mind that the economic regulation to be evaluated in the European context is simply one of many different types of regulation bearing different justificatory rationales.[67] I return to the relevance of the point that the present research evaluates the legitimacy of European economic regulation in the sections below.

[65] Baldwin and Cave (n 45) 78-84.
[66] ibid ch 6.
[67] Examples of other types of regulation would be environmental protection legislation, public safety regulations, health and safety at work regulations, and data and consumer protection regulation. These are by no means exhaustive. For a review of the types of regulation and strategies that may be used to employ them, see eg Baldwin, Cave and Lodge (n 45) 105-36.

2.2.1. Authority

In a regulatory context, authority has a normatively different meaning from that of a democratically established government.[68] In the national regulatory governance context, authority principally refers to the right or prerogative *to exercise powers* of regulation which are delegated, generally taking a statutory form in national law.[69] Authority responds to the question of whether regulatory power can be justified by reference to an identifiably normative basis.[70] All regulators require some form of authority.[71] Regulatory authority is important, even if no consensus exists on the fundamental nature of the regulator's authority or the locus of its origin, that is, whether a regulator's authority comes from a social or normative basis.[73] Whatever the nature of the authority that is recognized, regulators that do not enjoy some form of authority will constantly encounter resistance or challenges to their regulatory choices and decisions. Even the coercive resources of a sovereign state would struggle to overcome a systemic failure of compliance with the applicable norms.

In the EU, authority is crucial for the Commission because it enjoys a monopoly on positive policy proposals.[75] The Treaty formulation of its mandate, however, as well as the definition of the internal market are both open-textured and the Commission uses its prerogatives with no guidance or mechanisms of meaningful accountability. The Commission rightly enjoys a high level of authority, as a general

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[68] A traditional Western consensus is that states enjoy supreme power above which there is 'no higher or superior authority'. N MacCormick, 'Democracy and Constitutional Culture in the Union of Europe' in R Bellamy and V Bufacchi (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995) 198. Governments therefore enjoy authority and legitimacy in the political science sense, roughly expressed as the 'people's consent to the structures of power and the processes for exercising power'. Weiler (n 30) 80.

[69] Baldwin and Cave (n 49) 77; Baldwin and McCrudden (n 49) ch 3.

[70] An early statement of the proposition that all federal regulatory activity must be mandated was laid down by the US Supreme Court for purposes of US administrative law, to the effect that the national constitution creates '*no inherent* administrative powers over persons and properties. Coercive controls on private conduct must be authorized by the legislature….[which] must promulgate rules, standards, goals, or some 'intelligible principle' to guide the exercise of administrative power.' *JWHampton & Co v United States* 276 US 394, 409 (1928).

[71] D Bach and AL Neuman,'The European Regulatory State and Global Public Policy: Micro-Institutions, Macro-influence' (2007) 14 JEPP 827, 831. These authors also argue that three factors are essential to a regulator: authority (usually statutory), expertise and coherence.

[73] Freedman (n 41) 10 note omitted. In this regard, Freedman cited and concurred with Weber's argument that the authority of any institution ultimately rests upon a popular belief in its legitimacy. This reflects a sociological analysis: an examination not of whether a regulator should be considered legitimate, but whether a regulator was as a matter of empirical determination actually considered to be legitimate.

[75] Currently, the Commission's legislative mandate to propose positive harmonisation measures for the internal market is found in art 26(3) TFEU.

principle, for the achievement of the internal market. Without the constitutional value of its independence to pursue that general aim, the importance of the regulatory task assigned to it would be undermined and other institutional actors or even Member States acting alone might be tempted to thwart the Commission's focus on the internal market. It is another matter entirely for the working out of its single market commitment, for the nature and number of specific legislative proposals. These are a matter of institutional judgment, which are subjective appreciations of the individuals concerned, and require careful balancing of interests. When the Commission's judgment is disputed, as it routinely now is, it weakens the Commission's authority and legitimacy.

National regulators frequently have to demonstrate to their executives or parliaments how they have complied with national criteria of governance, laid down by a body that is independent of the regulator, such as the Better Regulation Commission in the UK.[76] In the EU, regulatory governance practices in respect of the Commission's role as a regulator have been defined and applied by the Commission itself and that only recently. Current Treaty provisions fail to create mechanisms to give either meaningful *ex ante* guidance or *ex post* feedback specifically on the Commission's discharge of its regulatory duties.[77]

2.2.2. Expertise

Expertise is the possession by regulators of professional competence and any specialized knowledge or skills needed either to pursue the regulatory aims that have been prescribed, or to serve the interests that have been identified.[78] Expertise is usually accompanied by a regulator's independence, for the same reason that expertise is valuable in the economic model of regulation, ie in order to minimize political bias from regulatory decision-making.[79] Much justificatory power for

[76] Better Regulation Commission <http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/policies/better-regulation/reviewing-regulation/better-regulation-commission>accessed 28 March 2013.
[77] In the US, the Office of Management and Budget, among other things, evaluates the effectiveness of federal agencies' programmes, policies and procedures. It is a cabinet-level body reporting to the US President. See <http://www.whitehouse.gov/omb/>. Discussion of these extra-Treaty possibilities is beyond the scope of the thesis.
[78] Baldwin (n 45) 45-46; Freedman (n 41) 52.
[79] Majone links expertise, independence and credibility as crucial to the effectiveness and legitimacy of economic regulation pursued for public interest, general welfare creating, purposes. He refers to this as 'the logic of delegation'. See G Majone, 'Europe's "Democratic Deficit": A Question of

economic regulation rests on the theoretical premise that intervening in markets needs to be carried out for long-term benefits that do not correspond well with short-term political agendas and that regulators should be isolated from short-term political pressures.[80] Independent expert regulators are said to be better at problem-solving in their decision-making.[81]

Better problem solving skills combined with political neutrality theoretically produce greater levels of overall fairness in the economy.[82] Thus, in an economic model of regulation, expertise is important because of its association with regulatory rationality, and with impersonal, non-partisan, assessments based on scientific knowledge.[83] However, these theoretical assumptions may not be reflected in actual practice since:

> Experts have an unfortunate tendency to overlook issues that are legitimate worries for ordinary folk. People's everyday contact with doctors, lawyers, and other professionals means they are well aware that experts can make mistakes or overlook the dilemmas facing those they are supposed to serve. Their use by politicians to bolster unpopular decisions has also resulted in their being scarcely distinguishable from their political masters. Certainly, episodes such as [bovine spongiform encephalopathy, ie 'mad-cow disease'] and the French blood scandal have somewhat tarnished technocracy in the eyes of European citizens.[84]

Thus theoretical assumptions about the positive qualities of experts are not necessarily empirically confirmed.[85] Real-world critique of regulatory outcomes is relevant to regulatory governance by showing that regulation requires empirical *ex post* assessments, discussed below. It also highlights the necessity of using several

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Standards' (1998) 4 ELJ 5, 16-19. I discuss expertise and its relevance to the economic theory of regulation below.

[80] Three examples of the desirability of independent regulators can be seen in the constellation of agencies and regulators in the UK: the Office of Communications (Ofcom), responsible for regulating the media and communications industry; the Office of Fair Trading (OFT), responsible for protecting consumer interests; and the Civil Aviation Authority (CAA), responsible for all aspects of civil aviation in the UK. For a complete list of the regulatory bodies in the UK see <http://regulatorylaw.co.uk/List_of_regulatory_bodies.html> accessed 19 November 2012.

[81] Majone (n 9) 56.

[82] The theory argues that faith in the neutral administrative process protects powerless consumers, effects rationality and achieves greater fairness in the economy. See Horwitz (n 39) 25-26.

[83] This normative association is particularly linked with public interest theory. See ibid 24-25.

[84] Bellamy (n 35) 740.

[85] Freedman identified several problematic issues with experts as: the expert regulator as a person who is out of touch with the common reality; the expert regulator as a distant participant in daily life such that a practical understanding of the job to be done eludes him/her; the expert regulator as embodying paternalism; and the expert regulator as being strong on rhetoric and short on performance. See Freedman (n 41).

criteria in combination for regulatory evaluations and, where needed, adjusting the value ascribed to each in different regulatory contexts, for example, in a situation such as that currently in the UK in respect of press regulation.[86]

Expertise is typically associated with economic theories of regulation in which allocative efficiency is the objective.[87] This is reasonable because economic analyses are required for regulators to carry out a proper evaluation of how to construct and apply economic regulation, that is, regulation in furtherance of macro-economic public interest, where the benefits accrue to all in theory.[88]

The contribution of expertise to regulatory legitimacy can be enhanced in some circumstances. This is the case, for example, (1) when the issues at stake are polycentric, and opinions and values differ, but where a balanced judgment is needed; (2) where the applicable rules or guidelines cannot be overly prescriptive, nor can the reasoning and justifications given for regulatory choices be exhaustive; (3) where the performance of the expert regulators improves over time with experience; and (4) where non-specialists find the underlying premises of regulation, and determining success in applying expertise, difficult.[89] These considerations are all relevant to economic regulation in the EU and will be considered within the analysis of regulatory governance practices examined in chapters 4 to 6.

2.2.3. Efficiency

Efficiency as a criterion is usually found in economic theories of regulation but these do not entirely agree on its precise meaning.[90] It refers either to the twin premises

[86] Note that this example is currently (but may not be in future) a relevant example of the ineffectiveness of the current regulatory framework for the print media and more particularly newspapers. The Press Complaints Commission as of December 2012 is an independent body through which the British press regulates itself. The final report of the Leveson enquiry can be found at <http://www.levesoninquiry.org.uk/about/the-report/> accessed 7 March 2013.

[87] The term allocative efficiency is a concept of industrial productivity referring to the choice of a combination of labour and capital inputs so as to produce a given quantity of outputs at minimum cost. See eg TJ Coelli and others, *An Introduction to Efficiency and Productivity Analysis* (Springer 2005) 5.

[88] For a description of the traditional model, see Stewart (n 46). For a rebuttal see C Velajanovski, 'Economic Approaches for Regulation' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010).

[89] Baldwin (n 45) 45.

[90] Velajanovski (n 88) 19. Moreover, the economic theory of regulation has many detractors. For a start on the critical literature, see eg M Feintuck, 'Regulatory Rationales Beyond the Economic' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010); M Feintuck, *The 'Public Interest' in Regulation* (OUP 2004); AV Katz (ed), *Foundations in the Economic Approach to Law* (OUP 1998); C Leys, *Market-Driven Politics: Neoliberal Democracy and the*

that 'no-one-is-harmed' by the application of the regulatory measures and that resources are optimally allocated as an outcome of regulation, or to the premise that a cost-benefit test is satisfied by reference to the gains exceeding the harm done by regulation.[91]

In public interest theory the State acts in the public interest to remedy market failures or imperfections.[92] Economic regulation generally is justified by the public interest in enhancing overall economic welfare.[93] Economic regulation, as a systematic form of state intervention in markets and the economy, first developed in the US in the last quarter of the nineteenth century, and expanded considerably during the period that industrial processes, as well as large-scale capitalism, were evolving in scale and complexity.[94] Horwitz noted that many businesses supported federal regulation during this period, not for reasons of controlling the content of regulation, but, inter alia, to remove inconsistent State and local regulations.[95] This point of view parallels that of European industry in the period to complete the internal market by 1992.

Occasionally regulatory efficiency may be defined within the regulatory mandate itself. More often, mandates are insufficiently precise or entirely neglect the value. Thus a finding of efficient regulation within regulatory governance can be both difficult to establish and contestable.[96] Likewise, in situations where the mandate includes a broad scope for regulatory discretion, and where one regulator's mandate overlaps or is adjacent to another's, efficiency will be difficult to determine.[97]

Public Interest (Verso 2001); BM Mitnick, *The Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms* (Columbia UP 1980).

[91] Velajanovski (n 88) 19-20.

[92] Baldwin and Cave (n 49) 19.

[93] Public interest theory developed to explain the origins of much US economic regulation that began in last quarter of the nineteenth century. Horwitz (n 41) 23-24. Feintuck challenges the premise of economic theory that economic regulation coherently and systematically pursues values based on public welfare rationales and urges that regulatory rationales for economic and other kinds of regulation should explicitly expand beyond market economics. See Feintuck (n 87).

[94] Initially, economic, and particularly anti-monopoly, regulation was adopted as a response to popular perceptions of unremedied wrongs and abusive market behaviours; in addition, the courts of the period could be and were pressured or politicized. Horwitz (n 41) and E Glaeser and A Schleifer, 'The Rise of the Regulatory State' (2001) 41 *Journal of Economic Literature* 401. Public interest theory developed during this period to explain the origins of much US regulation. Horwitz (n 39) 23-24.

[95] Horwitz (n 41) 33.

[96] Baldwin and Cave (n 49) 81; Baldwin (n 45) 81.

[97] Baldwin and Cave (n 49) 81; P Craig, 'The Monopolies and Mergers Commission: Competition and

Baldwin and Cave identify two kinds of efficiencies that may be ascribed to national regulation.[98] In the first, efficient regulation is that which uses the least possible level of inputs and costs and achieves productive efficiency. The second kind of efficiency derives from an evaluation of regulatory results on the basis of criteria that are developed independently of the specific regulatory mandate. The first kind of efficiency suffers from distinctive weaknesses associated with public interest theories,[99] imprecise legislative mandates and incoherent regulatory objectives.[100] The second involves recourse to arguments about allocative efficiency and dynamic efficiency.[101]

The efficiency challenges for the Commission as an economic regulator are multiple: the mandate for the internal market provides no precise guidance on how to serve the public interest by balancing conflicts of interest. When pan-European markets are created, there are inevitably undertakings that thrive and others that decline, thus creating winners and losers. Unless the circumstances of the market are so unambiguous before and after market intervention, so as to render the changes therein readily detectable and attributable to regulation, any evaluation of efficiency will be contentious.[102] Some contend that regulation particularly in the area of utilities, to which telecommunications belongs, should in no case be evaluated against any standard of efficiency.[103] Notwithstanding, it will be seen in following

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Administrative Rationality' in Baldwin and McCrudden (n 47).

[98] Baldwin and Cave (n 49) 81.

[99] All theories of the origin of regulation are theories of 'interest' - although the term 'interest' has no single agreed meaning - and all theories assume that satisfaction or attainment of some "interest" is sought through the mechanism of public regulation. BM Mitnick, *The Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms* (Columbia UP 1980) 84. Public interest theories have corresponding regulatory failure theories. These are outwith the scope of the thesis. For discussion, see Horwitz (n 41); M Bernstein, *Regulating Business by Independent Commission* (Princeton UP 1955); T Lowi, *The End of Liberalism: Ideology, Policy and the Crisis of Public Authority* (WW Norton & Co 1969) 31; G Kolko, *The Triumph of Conservatism: a Reinterpretation of American History, 1900-1916* (Free Press 1963), 3.

[100] On the latter see CG Veljanovski, 'Cable Television: Agency Franchising and Economics' in Baldwin and McCrudden, *Regulation and Public Law* (Weidenfeld and Nicholson 1987).

[101] Baldwin and Cave (n 49) 94. See also R Cooter and T Ilen, *Law and Economics* (Pearson 1988) 17-18; R Baldwin and M Cave, *Franchising as a Tool of Government* (Centre for the Study of the Regulated Industries 1996) s 4.1.

[102] A principal task in the early decades of the European Economic Community was to construct an internal market. In market-creating contexts, efficiency may be easier to detect than in re-regulatory contexts, where changes to the structure of the market can less readily or less reliably be attributed to market intervention.

[103] T Prosser, *Law and the Regulators* (OUP 1997) 15-24.

chapters that efficiency can indeed play a role in regulatory governance analysis for telecommunications.

Relative to efficiency, a national regulator will be assumed to share a view of what constitutes the public interest in exercising his regulatory discretion.[104] The Commissions inability to claim that the positive integration measures that it proposes represent a broadly shared consensus on what constitutes the public interest makes the application of efficiency as an evaluative criterion even harder than for national regulators.

The Commission faces a fourfold dilemma in achieving efficiency in its regulatory governance practices: first, its general regulatory mandate is broader than most national regulators, and given without guidance; second, as an institution, its status guarantees its independence, thus running counter to the important value that regulators exercising delegated authority should receive some form of feedback;[105] third, because its authority as a legitimate regulator is derived from the democratic credentials of the Member States, the Commission is susceptible to being influenced in its judgments by the views of national authorities, a vice that its independence was meant to pre-empt. Finally, without consensus among citizens and states of the Union as to what constitutes the public interest, a link between regulating and serving that interest is difficult to establish.

Despite its theoretical drawbacks, efficiency can contribute positively to a coherent model of regulatory governance for the Commission if its weaknesses can be strengthened in combination with other governance criteria and if its value, relative to other criteria, is adjusted to take account of any non-economic considerations if appropriate. This requires a specific governance approach to each regulatory case and its unique commercial, social and structural contexts.

2.2.4. Procedural due process and transparency

Rules and procedures are well-established benchmarks used in evaluating the legitimacy of a national regulator and its regulation.[106] Policy processes necessarily

[104] I am grateful to Professor Andrew Scott for this observation (August 2009).
[105] Baldwin and Cave (n 49)78-79.
[106] Some commentators combine transparency and due process. Others separate them. Baldwin and Cave identified five tests in total for legitimacy of which the *combination* of procedural fairness and openness was third. Other normative values such as participation are said to be facilitated in open

involve methods of carrying out regulatory activities by a variety of public and private actors who define problems, identify solutions, evaluate policy, propose harmonizing measures, adopt binding legislation, apply or enforce the norms thus established and then re-start the policy process. It can be thought of as a regulatory 'life cycle'. Procedure and practice determine who participates, in what capacities and with what influence over the aspect of policy that is involved at any given stage of the cycle.

A regulator is largely responsible for the quality of the executive processes over which it has control. Therefore qualitative due process enhances regulatory authority. Furthermore, aspects of due process such as transparency, accessibility and fairness align with authority and fit with values associated with democracy. A process is legitimate or illegitimate in the sense that certain values are said to be satisfied or not.[107] A legal theory of regulatory legitimacy posits that clear, pre-established norms and rules, complemented with judicial processes to protect individuals' procedural and substantive rights, with no particular emphasis on efficiency, conveys a maximum of legitimacy.[108] Within this framing in a national setting, a legislature delegates its powers, but constrains the exercise of regulatory discretion using administrative processes. This contributes to regulatory legitimacy on the basis that those affected by the rules have been treated fairly and given a right to be heard, and that interested parties are entitled to provide input into a transparent rule-making process. Openness, ie the level of visibility within regulatory processes, and transparency, ie access to relevant regulatory information used in regulatory processes, are both important.[109]

Can there be too much emphasis on procedure? Criticisms of procedural due process as a major rationale for legitimacy focus on the possibilities of sub-optimal decision-making by impairing regulatory expertise and independent judgment.[110] Reliance on procedure does not guarantee that norms and procedures actually

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procedures. All of these facets of regulatory procedures are relevant to an evaluation of the contribution of due process to regulatory legitimacy. See Baldwin and Cave (n 49) 79 for a largely procedure-based rationale to regulatory legitimacy see Stewart (n 46).

[107] Baldwin (n 45) 42.

[108] ibid 17.

[109] Some authors make little distinction between openness and transparency. See eg Baldwin and Cave (n 49) 79.

[110] ibid.

address the collective or social issues involved; nor does it necessarily ensure that regulation in practice corresponds to the legislative mandate: it may distort the development of expertise and the exercise of expert judgment.[111]

The importance of due process within regulatory governance derives from its actual use within regulatory policy processes. An evaluation of the fairness, accessibility and transparency of policy processes is the basis for attributing greater or lesser legitimacy to the regulation that emerges from the process. In this respect, the legitimacy conferred by due process can be imputed along the entirety of the regulatory processes of problem definition, assessment and refinement. This will be seen through the empirical examination of the case study.

Legitimacy based on procedural transparency and accessibility resonates with the notions of input and output legitimacy seen in Chapter 1. Transparency can operate to introduce democratic values in developing positions and taking decisions.[112] Openness can contribute authoritative weight to the legitimacy of regulatory decisions taken. But due process should be used meaningfully. The value of the contribution of due process in the form of transparency and accessibility depends on how and when used and the resulting impact on the regulatory outcome.

Allowing free public access to information collected and relied upon by public authorities enhances transparency. Few would want to reproduce the heavy administrative machinery of the US agency system, and its associated delays and costs. Yet the influence of the American model cannot be doubted.[113] More openness could be introduced into the EU procedures of regulatory formulation.[114] The institutions, and notably the Council, have relinquished the privacy of their deliberations, albeit only partially.[115]

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[111] Baldwin (n 45) 44.
[112] D Curtin and AJ Meijer, 'Does Transparency Strengthen Legitimacy?' (2006) 11 *Information Polity* 109, 114.
[113] For a critical view of the heaviness of US administrative procedures, see Stewart (n 46). For a positive view of US agency practices, see G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP 2009) 85-88.
[114] European governance practices will be examined in greater detail below. Prior to 2001, the Commission services varied widely in their approach to open policy making and legislative drafting.
[115] Art 15 TFEU, previously art 255 TEC, requires institutions and agencies to 'work as openly as possible'. The provision reads: 1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible. 2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

2.2.5. Effectiveness

Effectiveness is another criterion found in the scholarship on regulatory governance.[116] Effectiveness has been used to mean compliance, implementation, enforcement and impact.[117] For some authors, effectiveness means that the defined policy objectives of regulation are achieved.[118] It is different from standards-setting regulation or performance-based rules.[119] Frequently empirical effectiveness is either equated to or constitutes the basis for a conclusion of output legitimacy.[120] Such a conclusion requires an empirical demonstration of a positive relationship between the market outcomes and the market intervention measures.

Effectiveness is not universally a normatively necessary criterion of regulatory governance.[121] Without an examination of effectiveness *ex post,* some authors argue that regulation can be 'justified', that it carries a significant level of authority, even if it is not necessarily 'right'.[122] This over-relies on the contestable premises of the economic theory of regulation, that no one is harmed and that properly executed economic regulation creates overall welfare benefits. Regulatory

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[116] PJ May, 'Regulatory Regimes and Accountability' (2007) 1 *Regulation and Governance* 8-26; G Skogstad, 'Legitimacy and/or Policy Effectiveness?: Network Governance and GMO Regulation' (2003) 10 JEPP 321. Majone theorised that the prima facie substantive legitimacy of a regulator depends on several factors, all of which must be present to create and maintain regulatory legitimacy. These factors are: precision in relation to defining the efficiency-enhancing purposes of the regulator; regulatory expertise; credibility; fairness and independence. A regulator can thereafter be made accountable by results. See Majone (n 31) 294; Scharpf also accepted that output could constitute a mechanism for legitimation of regulation, in theory, but argued that the legitimizing force of this approach was more contingent and more limited than that for thick identity-based majoritarian systems. See Scharpf (n 42) 10-11.

[117] F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 MLR 19, 24-25. Snyder noted that the scholarship often considers this criterion as a distinct phenomenon whereas these values may refer to different perspectives of the same thing. He nonetheless observed that there is no consensus on what it means, notably in relation to European law, with little empirical research on the subject of the effectiveness in the EU.

[118] Skogstad (n 116) 322.

[119] The criterion of effectiveness as an empirical assessment of traditional governmental regulation is distinguishable from regulation that sets performance-based standards, which may or may not be subjected to empirical evaluations. See C Coglianese, J Nash and T Olmstead, 'Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Regulation' (2003) 55 *Administrative Law Journal* 705.

[120] See eg,Skogstad (n 116) 325; Majone identified a traditional model of regulation as one where delegation to independent regulators was justified for reasons of efficiency and effectiveness. See Majone (n 79)16; Scharpf (n 42) 11.

[121] 'Certain arguments have force in debating whether this or that regulatory action or regime is worthy of support (is 'legitimate'). These arguments involve reference to one or more five key tests.' None of the tests mentioned concern empirical effectiveness. See Baldwin and Cave (n 49) 77.

[122] ibid 82.

governance should reduce the contestability of regulation. If regulation is justifiable with reference to criteria and democratic values that resonate with the broader society, regulation is less *contestable*. Nonetheless, at the re-evaluation and feedback stages of the policy processes, effectiveness is relevant and its total absence would be problematic.

The policy development phase could be used to define a relevant legislative meaning of effectiveness, using defined values and priorities. This re-enforces the point that a regulatory governance model is not a 'one-size-fits-all' approach. For the purposes of my case study, for example, because of the focus on policy development, the criterion of effectiveness *initially* offers little that would enhance the Commission's legitimacy as a regulator. However, as regulation evolves, effectiveness should become more relevant, along with clearly defined regulatory objectives. I return to this point in Chapter 6.

2.2.6. Concluding Remarks for Regulatory Criteria

The above criteria reflect a broad consensus that reliable benchmarks exist for evaluating regulation. They are used to engage with issues of regulatory quality, accountability and legitimacy. The criteria offer a normative assessment, not a social one. How the criteria are used and weighted is not pre-determined. Views on how they are used in an assessment, as well as how trade-offs between different criteria are handled, will certainly vary. The tensions inherent in the legitimacy of the Commission-as-a-regulator are particularly striking. Regulatory governance is an administrative tool that can be used instrumentally but it cannot establish the Commission's regulatory legitimacy in a 'once-and-for-all' definitive construction. Rather, if used rigorously in adapting national experiences of what constitutes 'good' regulation, and applied to the EU context, regulatory governance criteria could enhance the Commission's regulatory legitimacy in specific regulatory regimes. In my construct, supranational regulatory legitimacy results from the positive contribution of several factors.

In the next section, I examine the scholarship of two leading authors in the field of transnational regulatory governance, particularly their criteria for regulatory governance. The purpose of this discussion is to identify and compare the

implications of their approaches for my construction of a governance model for the Commission. Designing accountability mechanisms to evaluate how a regulator has discharged its mandate requires an appreciation of what mechanisms are useful and what level or stage of the regulatory process is under evaluation.

2.3. Majone's Model: No Democracy Please, We're Economists

Giandomenico Majone is one of the most prolific authors writing on European regulatory affairs. His work covers much more than regulatory governance. He has written extensively on the EU democratic deficit, the link between the lack of democratic legitimacy and regulatory legitimacy in the EU, and historic inter-governmental, non-traditional, and non-democratic sovereignty-sharing precedents. The present research focuses on Majonian scholarship that is based on an economic theory of regulation to justify the delegation of powers to an independent and non-majoritarian supranational regulator such as the Commission.

Although this research does not examine the numerous structural models of political governance used by Majone when analyzing the 'democratic deficit' of the EU and its regulatory activities, a notable and somewhat unusual feature of Majone's work is his argument that the EU does *not* require a democratic arrangement for its legitimacy, neither for its regime, nor its regulatory, legitimacy.[123] Thus, his political governance models, which are outside the remit of the present research, are not variations of majoritarian democracy, as is suggested by some authors,[124] but an alternative to it.

Majone's model reflects a form of technocratic legitimacy that is independent of democratic institutions, these being not only unnecessary in the EU context, but also undesirable. In this area, Majone's work draws heavily on the US administrative law system that was developed in relation to US federal regulatory agencies, which relies heavily on procedural due process and judicial review. A simplified way to

[123] Variously, Majone analogizes the EU to relational contracts, a mixed government model, a consociational model, and an agent-trustee model for, *inter alia,* the proposition that the EU is not genuinely *sui generis*. Majone (n 113) ch 4. Majone eschews a democratic model in any EU legitimacy context, unless and until the European states are ready and willing consensually to move to a federal majoritarian model impelled by economic, legal and market integration. ibid 64.
[124] The contrasting model with Majone that is used in the present research, that of Fritz Scharpf, who argued precisely for more majoritarian and democratic structures in the EU.

frame Majone's model is to ask 'Does technocracy convey more legitimacy than democracy in the supranational regulatory realm?'

2.3.1. Integration Theory and Regulatory Criteria

Majone follows a considerable body of scholarship that identifies neofunctionalist reasoning[125] as the point of departure for delegating regulatory powers in the foundational period of the EEC: 'The grant of autonomous powers to the European institutions, too, is best understood in functional terms....In particular, the important powers given to the Commission are justified by the functions attributed to that body'.[126] Moreover:

> the Commission's right of legislative initiative – which...is regarded by many as the root cause of the democratic deficit – is best understood as a way of ensuring that EC policies are directed towards the advancement of the general interests of the Community.[127]

Delegation to independent institutions was thus a deliberate choice by the European founders to create and convey policy credibility and commitment.[128]

In the context of economic regulation in the interest of overall greater welfare, Majone argued that:

> [R]eliance upon qualities like independence and credibility has more importance than reliance upon majority rule...we must look for new standards of legitimacy and accountability.[129]

He answers the question of whether government by technocratic experts and judges is compatible with democratic accountability in the following terms: yes, provided the relevant courts require the regulatory process to be open to public input (i.e.

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[125] Functionalism and neofunctionalism comprise a considerable scholarship of integration theories. For some varieties of treatment and analysis, see eg L Hooghe and G Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2008) 39 *British Journal of Political Science* 1; W Sandholtz and A Stone Sweet, 'Neo-functionalism and Supranational Governance' in *The Oxford Handbook of the European Union* (OUP 2012); M Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (1994) 14 JPP 95; I Bache and M Flinders, *Multi-level Governance* (OUP 2004). The fundamental flaw in neo-functionalism was the failure to distinguish between different policy types and between regulatory and direct expenditure programs, particularly in relation to their structural costs and characteristics. Regulatory policies' costs are borne by firms, individuals or governments in complying. Thus, the economic, political and administrative costs of implementation are borne by Member States or parts thereof. L Conant, 'Review Article: The Politics of Legal Integration' (2007) 45 JCMS 45.

[126] Majone (n 79) 23

[127] ibid.

[128] Majone (n 113) 64.

[129] Majone (n 79) 18.

accessible) and to public scrutiny (ie transparent), and to act on the basis of competent analyses, that is, expert and independent judgments.[130]

Efficiency and effectiveness are important here. A commitment to efficiency in problem-solving, rather than a bargaining style of decision-making, and to accountability by results substantially legitimates the choice of politically independent regulators. Thus delegation in such circumstances is democratically justified in Majone's framing.[131] Majone's model of normative economic regulation substantially relies on output legitimacy, or accountability by results.[132]

2.3.2. Substantive and Procedural Legitimacy

Majone deconstructs regulatory legitimacy into substantive and procedural elements. For substantive legitimacy, Majone refers to

> ...the expertise and problem solving capacity of the regulators, their ability to protect diffuse interests, a rational selection of regulatory priorities, the congruence of agency actions with statutory objectives and, most important, the precision of the limits within which regulators are expected to operate.[133]

Nothing in Majone's model requires these important regulatory capacities to be demonstrated *as such* separately from outcomes. Procedural legitimacy requires independent regulators to be created by democratic methods, enjoy a defined legal authority, and pursue legislatively mandated objectives.[134] Regulatory decision-making should follow the US model which is characterized by:

- public participation and deliberation;
- peer review;
- policy analyses that justify regulatory priorities coupled with elaborated regulatory reasoning of decisions;
- judicial review; and
- monitoring by political principals.[135]

[130] ibid 20.
[131] ibid162
[132] ibid 13.
[133] ibid 21
[134] Majone (n 54)160.
[135] Majone (n 79) 20.

Majone identified two modes of controlling the regulatory discretion of regulators: (1) oversight mechanisms, such as hearings, parliamentary reviews, non-partisan investigations, budgetary evaluations, and sanctions; and (2) procedural constraints in regulatory processes.[136] The first type of control creates considerable costs for the overseers and risks undermining the credibility of the regulators, while the second although indirect is less costly.[137] Majone endorses the latter.

In Majone's framing, when the creators of the EEC created the institutional set-up, there was little or no concern about the potential for over-regulation. The tendency towards regulatory expansion was part of the neofunctionalist design to create a process where economic integration would lead to political integration. The founders explicitly rejected parliamentary democracy and the separation of powers model, and thus created no accountability structures.[138] The European polity was simply too politically immature to be ready for a more federalist arrangement.[139]

Majone identified considerable risk in expanding the European regulatory remit:

> ...the Treaties are considerably more explicit than national constitutional documents in identifying the public good: the four economic freedoms, a system of undistorted competition, prohibition of discrimination on the basis of nationality or gender and, since the Single European Act, the protection of non-commodity values like environmental quality. By the same token, *an unlimited expansion of Community competences* is the most serious threat to the legitimacy of EC institutions since it undermines the credibility of such functional justifications [emphasis added].[140]

In terms of economic theory, the regulatory objectives for the internal market are to correct some form of market failure or imperfection, whether from market organization or regulatory differences in Member States. Regulation at the EU level can thus be justified by improving market efficiency or ensuring the viability of markets.[141] As long as the tasks assigned to supranational levels are both limited and

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[136] Majone (n 113) 85.
[137] ibid.
[138] ibid 44.
[139] ibid 44-46
[140] Majone (n 79) 23. It will be seen below that Scharpf's model of regulatory legitimacy also identifies a cut-off point beyond which theories of legal or formal legitimacy (in the sense of Weiler's definition of formal or constitutional legitimacy. See Weiler (n 29) 80 (cannot legitimate positive economic integration measures).
[141] Majone (n 54)141. Note that this rationale is a standard justification for economic regulation. See

precisely defined, non-majoritarian sources of legitimacy - expertise, procedural rationality, transparency, and accountability by results - are theoretically sufficient to justify the delegation of powers.[142]

2.3.3. Qualifications to the Majone Model

Majone also identified a troubling trajectory increasingly to centralize powers and implementation structures to the European level with an assortment of EU agencies, working groups and committees such that an 'urgent' case existed for creating a single set of rules and procedures to be followed in regulatory decision-making.[143] Thus Majone saw a need for some form of common regulatory practices to be developed and applied across the board in EU regulatory activities. Nonetheless, differing from the US procedural-constraints-as-accountability model, Majone's model accords regulatory legitimacy by results. This highlights the tension between accountability and effectiveness. Majone's point here is that the task of applying economic regulatory policies can legitimately be delegated to regulators, provided an appropriate system of accountability is in place which, in the EU context, he posits as effectiveness.

He does not argue for *political* accountability as would be the case in a national context, but rather equates the outcome to the normative equivalent of political accountability. This is simply an output legitimacy model to which is added the qualitative criteria of the regulator (independent expert) and procedural rules as trappings. Sources of legitimacy that are grounded in the technocratic approach, ie expertise, procedural rationality, transparency and accountability by results, should be sufficient to justify the delegation of the necessary powers. This analysis can only go so far in the EU. Bellamy asserts that Majone 'overplays' the domestic independent regulator analogy.[144] In practice, national politicians do find ways to influence national regulators. In the EU context, Bellamy finds the 'plurality of principals and the ability of the Commission to develop a complex network of overlapping agencies, all reduce this [political] influence while introducing the dangers of conflicting forms of accountability. Meanwhile, the possibilities for

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eg, Baldwin and Cave (n 59) 15-16.
[142] Majone (n 79) 28.
[143] ibid 22.
[144] Bellamy (n 35).

regulatory capture are increased by the closeness of EU regulation to various "stakeholders"—notably business and unions'.[145] Thus Bellamy contests the premise that qualitative criteria can overcome the dangers of regulatory influence and failures that have arisen elsewhere. However, my purpose is not to analyze whether Majone's governance criteria can themselves be validated. The model of regulatory governance developed in Chapter 3 uses the concept that regulatory criteria can genuinely contribute to a normative form of regulatory legitimacy for a supranational authority.

In Majone's technocratic vision of what good governance should mean in the EU, delegation to a body independent of the government serves an important interest: it is way of signaling credible policy commitments. For Majone, this point is especially relevant in the EU to bolster the reputation of EU regulation. This overcomes to some extent a lack of credibility of some national authorities as seen in their domestic markets and as perceived by their regulatory peers in other states. However, all that integration in the EU seems to require is uniformity, achieved largely by positive integration measures.[146] In other words, the EU needs to define and verify what is a 'successful' outcome.

Majone is partly right: it is precisely in those areas where the credibility of policy commitment is most important that the logic of delegation is strongest. Few disagree that delegation can be justified. When that is the case 'then we must look for new standards of legitimacy and accountability'.[147] However, no consensus exists on how much delegation to independent supranational authorities is legitimate. Majone argued that democratic theory plays a positive role by assigning political responsibility for identifying which tasks may legitimately be delegated to independent bodies, and which tasks should remain under the direct control of political principals.[148] This argument resolves to a formal definition of legitimacy.

Overall, Majone's approach offers only some 'bits and pieces' for a robust model of regulatory governance for the Commission as a policy making regulator. His model bears too much resemblance to its American administrative forbearer and

[145] ibid 738.
[146] R Dehousse, 'Regulation v. Integration? On the Dynamics of Regulation in the European Community' (1992) 30 JCMS 383, 386.
[147] Majone (n 79)18.
[148] ibid 28.

it fails to address the inadequacies of the US model. Procedural justice cannot guarantee substantive justice.[149] The US administrative law is not plausible as a defensible model of regulatory governance for the EU. Nor does Majone analyze the different phases of regulation. The US model has some strengths but it also suffers from considerable weaknesses particularly the procedure-as-accountability rationale.[150] These gaps will be outlined in more detail in the next section where I analyze the regulatory theory of Fritz Scharpf and compare some of the implications of his views with Majone's.

2.4. Scharpf's Model

Much of Scharpf's scholarship analyzes the legitimacy relationships in the EU primarily from a political science perspective using republican political philosophy and liberal political philosophy.[151] The republican concept focuses on government as acting primarily in pursuit of the common good of the polity (from classical thinking), and equal participation in collective choices to create representative democracy (from Rousseau).[152] The liberal concept focuses on the inclusive aspect of government, where maximizing inputs from civil society contributes to legitimacy.[153] Scharpf accepts the premise that, from the perspective of economic theory, trade liberalization is always justified by the benefits that accrue to consumers but, he argues, from a political perspective, the conclusion may be more ambiguous.[154] While Scharpf considers negative integration measures as market-making, in agreement with many authors, he regards positive integration as a 'reconstruction of a system of economic regulation at the level of the larger economic unit', such that positive integration measures may be either market-making or merely market correcting.[155]

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[149] Baldwin (n 45) 27.
[150] A recent argument of procedure-as-accountability was formulated by Prosser who asserted that regulatory decisions involve values, often conflicting ones; legitimacy can more usefully be established by recourse to 'procedural values' to produce a process of 'regulatory deliberation'. T Prosser, *The Regulatory Enterprise: Government, Regulation and Legitimacy* (OUP 2010) 7-9.
[151] F Scharpf, 'Legitimacy in the Multilevel European Polity' (MPIfG Working Paper 09/1, 2009) <http://www.mpifg.de/pu/workpap/wp09-1.pdf> accessed on 7 March 2013.
[152] Scharpf (n 42) 5.
[153] ibid.
[154] ibid 44.
[155] ibid 45.

In the early years of the Community, the limited policy programme of the Treaty, in combination with the Commission's right of initiative and the unanimity rule in the Council, could reconcile the competing paradigms (of inter-governmentalism and supranationalism) in order to achieve political legitimacy, but this consensus has long since unraveled.[156] The changes to the Treaties and the deepening of the original Community into the EU re-calibrated the calculation and the logic of European legitimacy. Sharpf found a loss of political legitimacy in many Western countries since the historic fall of the Berlin Wall in 1989 and the so-called 'triumph' of Western democratic values in the inability of political systems to solve problems, the latter of which was caused by two related phenomena of European integration and economic globalization.[158] Recognizing that there are shared problems that require transnational cooperation, Scharpf accepted many of the premises inherent in the rationality and legitimacy of delegated powers to a supranational authority, but notably limited the type of legitimacy to which such delegated systems could aspire to output-based legitimacy .

2.4.1. Output and Input Legitimacy[159]

Scharpf associated democratic values with input (government by the people) and output (government for the people) legitimacy.[160] Input legitimacy reflects the will of the governed in political choices. Output legitimacy promotes communal welfare in political choices. Thus the preconditions differ in respect of each.[161] Input legitimacy is undermined when decisions are taken simply by majority rule, thus removing the normativity of consensus through participation. Majority rule leads to indefensible outcomes on its own due to its tendencies to aggregate the self-interest of individuals and to ignore the interests of minorities.

The legitimacy claims for political choices that are made by majority decision cannot be based solely on input legitimacy *unless* a collective belief exists of a duty

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[156] B Kohler-Koch, 'The Evolution and Transformation of European Governance' (ECSA – Sixth Biennial International Conference, Pittsburgh, June 1999) <aei.pitt.edu/2312>.
[158] Scharpf (n 42) 2.
[159] Scharpf's views in this section are largely drawn from ibid 6-42.
[160] ibid 6.
[161] Scharpf also found that the conditions for input legitimacy, as he defined it, do not at present exist in the EU, notwithstanding the democratically elected EP, the institutional changes introduced by the Maastricht, Amsterdam and Nice and, Lisbon Treaties. ibid 11 and n 4.

to accept personal sacrifices in the interest of the collective welfare of all.[162] Such willingness to accept collective, majoritarian, choices made on behalf of all, but which are sub-optimal for some individuals in the group, requires the existence of a 'thick' collective identity between the people in a society.[163] Weiler described this thick identity as a 'demos' or a 'volk'.[164] The precondition of a collective identity for legitimate majority rule is not present in the EU and this lacuna underpins the *democratic* deficit which constrains the extent of output legitimacy.[165]

While Majone's theory of regulatory legitimacy extends in principle to properly constructed economic regulatory measures, Scharpf belongs to a group of skeptics that doubts the premises of a pure economic theory of regulation based on public welfare.[166] These authors disagree with the assumptions that economic regulation in the public interest is cost free; that it is capable of achieving optimal allocative efficiency; and that it has few distributional consequences, thus justifying the premises that only experts isolated from politics should be responsible for its application.[167]

Efficiency cannot be used as an evaluative benchmark of regulatory legitimacy in as much as efficiency as a value is *not* independent of distributional considerations.[168] Unless the value of efficiency is legislatively mandated, the requirements of efficiency and the distributional implications of regulation are likely

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[162] ibid 8, citing C Offe, 'Demokratie und Wlhlfahrtsstaat: Eine europäische Regimeform undter dem Stress der europäischen Itegration' in W Streeck (ed), *Internationale Wirtschaft und nationale Demokratie: Herausforderungen für die Demodratietheorie* (Campus 1998).

[163] Scharpf (n 42) 28

[164] JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 ELJ 219. Weiler intertwines the notions of demos and volk, both for individuals and for societies. He disagrees with the proposition of the German Federal Constitutional Court that the existence of a demos or a 'volk' is the sole means of bestowing legitimacy on democratic majoritarian rule-making. ibid 238.

[165] In this theory, the EU suffers from a deep structural democratic deficit because it lacks a demos, yet it imposes the acceptance of decisions that are taken by majority rule. Scharf (n 148) 9-10.

[166] Feintuck argued that regulation only appears to raise predominantly administrative law issues, as Majone suggested. There are also issues of constitutional significance. Once underlying concepts such as 'public interest' are unpacked, a set of core values that are essentially political and contestable is laid bare, embedded in legal discourse and even possibly within the democratic settlement. One should evaluate the claims of public interest underlying regulatory choices to establish the constitutional and democratic legitimacy of such claims, and thus their normative power. See Feintuck (n 87) 57.

[167] Velajanovski (n 88) 19-20. See also Bellamy (n 35) 737.

[168] Regulation is not cost free, but some normative economic theories make this a theoretical assumption. See RH Coase, 'The Problems of Social Costs' (1960) 3 *Journal of Law and Economics*1. For an acknowledgement that a conflict exists, see also Baldwin and Cave (n 49) 81.

to conflict. Scharpf and others find clear-cut theoretical distinctions between regulation and redistribution difficult to accept.[169]

2.4.2. A Political View of Output Legitimacy

Scharpf's initial premise for the *scope* of output legitimacy is one that Majone would endorse: output legitimacy results from and reflects beneficial effects of governmental measures that solve a collective social problem not otherwise addressable.[170] Thus, Scharpf agrees that a public welfare justification is applicable to at least some economic regulation in the EU context. But Scharpf identifies structural limits to output legitimacy: the collective identity of those on whose behalf the measures are adopted must be linked to a recognizable class of problem-solving concerns and must be territorially limited.[171] This means that there is 'no conceptual difficulty in defining the European Union as the appropriate constituency for the collective resolution of *certain classes* of common problems [emphasis added].'[172] In this formulation, Scharpf implicitly captures the legitimacy dilemma for the Commission in its institutional interpretation of the meaning of the public interest inherent in the internal market.

Scharpf strongly doubts that the breadth of interests to be served in the EU can be satisfied with a technocratic approach to economic regulation. The interests and preferences in the Member States vary hugely. Thus:

> ...if European policy networks[173] [could] assure win-win solutions that satisfy all interests affected, output-oriented legitimacy would be assured and the democratic deficit would cease to matter….however, the range of policy problems for which this can be expected tends to be severely limited.[174]

According to Scharpf, significant weaknesses in both policy formation and regulatory legitimacy follow from this feature of the EU regulatory landscape:

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[169] While not contesting the broad construction of differences in regulation for the general welfare and redistribution as a zero-sum game, Bellamy finds the theoretical argument of a 'no wealth effects'. [Majone (n 31) 294-96] implausible. Bellamy (n 35) 737.
[170] Scharpf (n 42) 11.
[171] ibid11.
[172] ibid.
[173] This describes European processes of policy formation and implementation. ibid 24.
[174] ibid 25

> ...output-oriented legitimacy depends on institutional norms and incentive mechanisms that must serve two potentially conflicting purposes. They should hinder abuse of public power and they should facilitate effective problem-solving - which also implies that all interests should be considered in the definition of public interest, and that the costs and benefits of measures serving the public interest should be allocated according to plausible norms of distributive justice.[175]

The Commission does not try to claim either that its view of the public interest is democratically valid, or that European regulatory measures necessarily accommodate all interests equally, even assuming that it could identify them. The costs and benefits of European regulatory measures are meant to increase overall welfare and economic regulators do not engage with norms of distributive justice, by assuming they need not be addressed.

The democratic and electoral mechanisms that prevent abuse of public power in national regimes are not available in respect of the Commission. Furthermore, irrespective of output legitimacy, and somewhat presciently in light of the current Eurozone crisis, Scharpf noted the risk to continued popular commitment to European integration if the national settlements in Member States were to be jeopardized by positive integration:

> In most member states of the European Union, citizens have come to consider these achievements [social welfare benefits] of post-war welfare states as constitutive elements of a legitimizing social contract. If they should now be revoked under the pressures of economic globalization or the asymmetry of negative and positive integration in the European Community, there is indeed a danger that rising political disaffection will again undermine either the political legitimacy of democratic governments or their political commitment to economic integration. It may not be by accident, therefore, that the radical ring-wing opposition in several European countries is also radically anti-European.[176]

This implies that aspirations for positive integration measures should reflect the fact that European capacities for greater integration are inhibited in areas where national interests diverge because no consensus exists on the meaning of the public interest at EU level. The legitimacy of positive integration measures rests on a contestable meaning of what constitutes the public interest in the EU. Getting to the essence of what the public interest means is something all regulators do, by engaging with their

[175] ibid 13.
[176] ibid 122 footnotes omitted.

'legitimacy communities' in numerous and interactive ways.[177] Legitimacy discourse plays an important role in defining, refining and revising rules as circumstances or needs change. Not only is this equally true at the national and supranational levels, it is also a necessary part of effective policy design. If a regulator fails to appreciate how the public interest has evolved, either as a result of regulation or as a result of external factors over which it had no control, then its policy analyses may be impaired, if not fundamentally flawed.

2.5. Conclusion

Messieurs Baldwin, Cave, Majone and Scharpf have provided this chapter with a regulatory smörgåsbord of methods and models for interrogating the legitimacy of transnational market regulators. Baldwin and others established the basic premise that regulators can be evaluated by reference to a number of benchmarks, both qualitative and procedural, in order to reach a conclusion not that the regulation is right but that the regulation is *justified.* Majone provided the premise that insulation of economic regulators from the political process is necessary for their legitimacy. In the case of a supranational regulator, democratic structures such as political accountability mechanisms, would be detrimental to the regulator's effectiveness, and this in turn would jeopardize its ability to achieve the aims of regulation, and thereby undermine its sole claim to legitimacy, ie successful regulatory outcomes of higher overall public welfare. Scharpf's political analysis established a sharp cleavage between the legitimacies of positive and negative integration, finding that the political consequences of extensive European regulation that deprived national governments of policy options were toxic for Member States' own democratic legitimacy. Some limited positive integration measures can be justified to establish a single market even in supranational regulatory arrangements. Beyond that, the EU does not enjoy the political legitimacy needed to regulate further because of the redistributive effects of economic regulation in practice, as opposed to theory. Thus, the legitimacy of much economic regulation beyond market creating measures carries a Sharpfian presumption of illegitimacy.

[177] Black (n 46).

The next chapter takes forward the qualitative criteria identified in the scholarship as elements of a constructed model of regulatory governance analysis. Before that, the chapter looks briefly at the 'governance turn' taken by the Commission in the 2000s and the regulatory governance practices that it adopted throughout that decade.

Chapter 3

This chapter bridges the theories of regulatory governance in Chapter 2 and the empirical examination of the case study in Chapters 4, 5 and 6 by constructing an analytical model of regulatory governance that draws upon those theories. The chapter also bridges three phenomena to which the Governance White Paper of 2001 was a response: (1) the academic discourse launched by Majone and Scharpf who focused on European governance in critical terms; (2) the implicitly critical political discourse of the Member States; and (3) explicitly disaffected EU citizens a phenomenon reflected in low voter turnouts for European elections and the Irish 'no' vote in a 2001 referendum on the Treaty of Nice (signed on 26 February 2001).

The model of regulatory governance developed in this chapter will be used as a template empirically to examine the Commission's regulatory governance practices in developing European telecommunications policies. The model consists of substantive and procedural criteria against which the changes over time in the Commission's practices in the sector are analyzed. The chapter first evaluates the regulatory governance criteria of the White Paper and concludes that they offer little for analyzing the regulatory governance of the Commission in any normatively meaningful way. The Chapter finds that a more meaningful examination can be undertaken by using a regulatory governance policy that is 'tailor-made' for the Commission as a transnational regulator using normative governance criteria. The constructed model consists of five criteria: (1) authoritative regulatory mandates; (2) regulatory expertise; (3) efficiency; (4) due process; and (5) accountability mechanisms. While overlap exists with the criteria of Chapter 2, these are adapted in light of the differences between national and supranational regulatory arrangements.

3.1. The Governance White Paper of 2001 and an Analytical Model

Before 2001, the Commission gave little indication that its institutional practices in respect of regulatory governance required attention or were sub-optimal. It addressed these issues in the Governance White Paper.[1] The regulatory governance model there overlapped with several qualitative criteria found in regulatory governance theory seen in Chapter 2. When examined closely, however, its approach reflected a

[1] Commission, 'European Governance' (White Paper) COM (2001) 428 final.

fundamental misunderstanding of how to construct normative regulatory governance. I will combine the analysis here with the discussion in Chapter 2 before constructing the model to be applied to the case study.

3.2. The White Paper of 2001: Origins

In the 1990s, the Commission focused on improving the quality of drafting in European legislation, simplifying and codifying the *acquis*.[2] Many elements dealt with the implementation of regulation, including a call for European regulatory agencies. Few aspects of that focus concerned policy development practices. The quality of legislation remains the focus today.[3] But what changed the Commission's orientation from concerns about quality of regulation to focus more on the qualities of the regulator and resulting regulation?

The scholarship of Majone, Scharpf and others in the 1980s and 1990s augured a gathering storm of political and public debate about the emerging regulatory landscape of the late twentieth century EU. The debate still continues and the scholarship on governance grows, some of which was seen earlier. Codifying the principles of subsidiarity and proportionality was a political signal that Member States had become uncomfortable with the Commission's regulatory activism as early as 1992. The *Tobacco Advertising* case reflected an unwillingness to accept the proposition that the power existed at EU level to harmonize virtually anything that

[2] See Commission, 'Report of the Commission on the SLIM Pilot Project, Simpler Legislation for the Internal Market'(Communication) COM(1996) 559 final <http://ec.europa.eu/internal_market/simplification/docs/com1996-559/com1996-559_en.pdf> accessed 6 December 2012; 'The Inter-institutional Agreement on common guidelines for the quality of drafting of Community legislation (1998) and the Inter-institutional Agreement on an accelerated working method for official codification of legislative texts' (1994) <http://ec.europa.eu/governance/better_regulation/key_docs_en.htm> accessed 6 December 2012.

[3] Commission, 'Smart Regulation in the European Union' COM(2010) 543 final. The Commission relies for its approach to governing the internal market on those whose diagnosis of what the internal market needs fails to acknowledge that there may be other issues, let alone that they need to be addressed. For example, the 2010 Monti Report by an ex-commissioner to European Commission President Barroso on a 'new strategy' for the internal market identified a variation of the 'usual suspects' that hamper the potential of the internal market. Monti's analysis is that 'integration fatigue' which erodes the 'appetite' for a single market and 'market fatigue', which reflects less confidence in the role of the market, are the culprits. The policy prescriptions are, unsurprisingly and unvaryingly, to 'strengthen' or build a 'strong' internal market. The 'discontent' that the report identifies is with enforcement and that needs to be strengthened too. M Monti, 'A New Strategy for the Single Market at the Service of Europe's Economy and Society: Report to the President of the European Commission, José Manuel Barroso' (9 May 2010) 95-103 <http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf> accessed 8 March 2013.

touched upon free movement of goods, a challenge that came from Germany, a Member State unreservedly committed to European integration. While the Commission did not engage with the *academic* debate launched by Majone et al, it was ultimately unable to avoid the political difficulties when national referendums periodically rejected an amending EU treaty, particularly the Treaty of Nice signed in February 2001. A sense of political and popular disillusionment, along with growing academic criticism, finally provoked an institutional response in 2001.

In the aftermath of the controversial ratification of the Nice Treaty, however, the Governance White Paper of 2001 emerged as a major framework within which to engage European civic society with the EU institutions and suggested that improvements were needed in regulatory governance:

> Reforming governance addresses the question of how the EU uses the powers given by its citizens. It is about how things could and should be done. The goal is to open up policy-making to make it more inclusive and accountable. A better use of powers should connect the EU more closely to its citizens and lead to more effective policies.[4]

While the White Paper explicitly sought greater popular support for the Union, to date, there is not much evidence of success.[5] In this section, I examine the principles that the Commission sets out in the White Paper and whether and how they might be relevant to a model of regulatory governance for the case study. The Commission's approach to these principles as outlined in the White Paper offered few elements for constructing a normative tool regulatory for policy development and contributed little to a conceptual model for analyzing the regulatory legitimacy of the Commission in the telecommunications sector. The Commission has since begun more seriously to use regulatory governance tools, as discussed in Chapter 6 below.

3.1.2. EU Governance Principles: Much Ado About Nothing?

The principles adopted for EU regulatory governance policy codified in the White Paper were: (a) accountability; (b) coherence; (c) effectiveness; (d) openness; and (e)

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[4] COM (2001) 428 final 8.

[5] A survey from 2010 commissioned by the Directorate General for Communication revealed a trend of dissatisfaction with the EU as follows: 'The latest results show that support for EU membership has fallen to 49% (-4 points since autumn 2009), which is close to the lowest levels recorded in the last decade. The proportion of Europeans who consider their country's membership a bad thing now [ie August 2110] stands at 18% up from 15% in autumn 2009.' See 'Eurobarometer 73, Public Opinion in the European Union, First Results' (August 2010) <http://europa.eu.int/comm/public_opinion/index_en.htm>.

participation.[6] These criteria are intended to operate as 'political principles to guide the Union in organising the way it works'.[7] It will be recalled that the major benchmarks identified in national regulatory theory were regulatory authority, a legislative mandate, expertise, efficiency, procedural due process, and mechanisms for accountability. The apparent overlap between national and EU criteria is eliminated, however, when EU governance principles are examined closely in relation to the definition and function of the criteria.

3.1.2.1. Accountability

For the EU to define accountability as a principle of governance is potentially a powerful basis on which to claim legitimacy.[8] As defined by the Commission, accountability is a 'light-touch' control mechanism, *intended primarily to clarify the roles* of the EU institutions in the legislative and executive processes and to require each institution to 'take responsibility for what it does' [emphasis added].[9] When defined in this manner, accountability could be construed simply as a measure of communication and clarification. Although some flexibility must be inherent in the notion of accountability at a supranational level, even a flexible notion of accountability does not remedy fundamental definitional weaknesses.

Nonetheless, even within the Commission's open-ended definition of accountability, ie each institution taking responsibility for what it does, there is scope for that to be further elaborated more meaningfully, especially in relation to the Commission's role as regulator. In policy development for positive integration measures, the Commission's responsibility for what it does could reflect the need to account for its discharge of duty in determining the public interest within the broader aims of the Union. Governance of the internal market is decisive for the legitimacy of the European Union as well as the Commission. The current Treaty remit is to establish 'a highly competitive social market economy'.[10] If the Commission pursues

[6] COM(2001) 428 final, 10. I have re-arranged the criteria into alphabetical order to de-politicize their presentational aspects. The White Paper presented them as: (1) openness; (2) participation; (3) accountability; (4) effectiveness; (5) coherence.
[7] ibid 32.
[8] Two benchmarks were associated with accountability earlier, ie output evaluations and due process, meaning regulatory procedures that are non-discriminatory, accessible and open.
[9] COM (2001) 428 final, 10.
[10] Art 3(3) TEU reads in part: The Union shall establish an internal market. It shall work for the

the neo-liberal model of achieving an internal market in a 'perfectionist' way,[11] then taking responsibility for what it does within its governance policy should include explaining how it addresses the criticisms that question its implicit neo-liberal economic model of what constitutes the public interest, as well as how it satisfies the non-economic and social interests in the Treaty.

3.1.2.2. Coherence

Coherence is not much found in the literature as a regulatory governance criterion but it does appear with regard to regulatory *discourse* used by sociologists.[12] The way it is used by both is identical. The Governance White Paper defines it as:

> [Union] policies and action must be coherent and easily understood…. Coherence requires political leadership and a strong responsibility on the part of the Institutions to ensure a consistent approach within a complex system.[13]

The reference to comprehensibility and consistency here fits with the long-standing Commission goals of improving the quality of regulation and the regulatory environment, both of which were subsumed within the governance agenda. In this formulation, coherence is not a result of an assessment of the Commission's – or even the Union's – regulatory philosophy as it relates to implementing the internal market, which would be fraught with political risk. The meta-theme of the Governance White Paper is European integration: stability, peace and economic prosperity, that is, the founding vision of the European Economic Community. Economic integration in Europe has given way not only to larger, more open-ended goals, but the Treaties acknowledge explicitly the *democratic* value of taking decisions 'as closely as possible to the citizen'.[14] But the vision of the White Paper seems to translate into citizens watching closely, rather than participating directly.

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sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

[11] F Scharpf, 'Democratic Legitimacy under Conditions of Regulatory Competition: Why Europe Differs from the United States' (2000) Estadio, Working Paper 2000/145, 16 <http://www.march.es/ceacs/publicaciones/working/archivos/2000_145.pdf> accessed 8 March 2013.

[12] V Schmidt, 'Democracy and Discourse in an Integrating Europe and a Globalising World' (2000) 6 ELJ 277.

[13] COM (2001) 428 final,10.

[14] Art 1 TEU.

Coherence is used by the Commission as a criterion of regulatory governance when it should more properly be used by the Commission as a tool within the regulatory narrative of the Union. Genuine coherence in policy design could have a beneficial effect of re-aligning the institutional approach to policy development, what might be called in the UK 'joined-up government', meaning that the combination of activities and regulations occurring at the EU level and interacting with national actors, would reflect regulatory consistency across all areas. This ambition is certainly unrealistic in the abstract. Even national governments are susceptible (presumably unintentionally) to undermining their own policies, such as subsidizing non-renewable energy production while under-stimulating the production of renewable energy production.[15] Regulatory coherence is more generally evaluated as a result of a cumulative use of the regulatory benchmarks of national governance, linking logically to the value of efficiency, ie achieving regulatory aims using a minimum of resources.

Coherence is a meaningful value within legitimacy discourse because regulatory incoherence implies that the regulatory mandate and the problem are mismatched, or that the regulator has followed inconsistent patterns or procedures of decision-making, or that the mechanisms of accountability to evaluate the regulator's performance have been erratic. Because regulatory incoherence can take many forms, and because coherence has no fixed meaning in regulatory governance theory, it usually fails to merit a separate appreciation.[16] The inclusion in the EU governance policy and particularly the definition of the concept, pointing to 'political leadership' and institutional responsibility for 'coherent and easily understood' policies, reveal the true intention as being one of political and popular persuasion. The lack of a normative content makes the concept inappropriate for a normative model of regulatory governance.

[15] 'Recent estimates suggest that worldwide consumption subsidies amount to more than US$400 billion....On the other hand,...The IEA has estimated that global renewable-energy subsidies increased from $39 billion in 2007 to $66 billion in 2010.' L Rubini, 'Ain't Wastin' Time No More: Subsides for Renewable Energy, the SCM Agreement, Policy Space, and Law Reform' (2012) 15 *Journal of International Economic Law* 525, 526-27.
[16] Schmidt (n 12) 281.

3.1.2.3. ***Effectiveness***

The third principle is effectiveness, which was identified but not uniformly endorsed as a criterion of regulatory evaluation in national governance models, although it is important to some economic models where regulators are legitimated by results.[17] In the White Paper effectiveness was conflated with expertise such that the former meant that:

> policies must be effective and timely, delivering what is needed on the basis of clear objectives, an evaluation of future impact and, where available, of past experience. Effectiveness also depends on implementing EU policies in a proportionate manner and on taking decisions at the most appropriate level.[18]

When this meaning is broken down, effectiveness contains several layers. EU policies should deliver 'what is needed' on the basis of clear objectives. It also means that policies being considered should be evaluated for their future impact and in light of past experience. Finally, effectiveness means that implementation of regulatory policies should be proportionate and decisions taken at the most appropriate level. When scrutinized, the definition is problematic in several respects all of which highlight tensions with the Commission's power as a regulator. 'What is needed' is open-textured. What the 'clear objectives' will be are for the Commission to identify. The language was meant to reassure the wider public but also concealed an underlying controversy of institutional politics. In the EU, the Commission itself largely defines what the single market 'needs' and what the regulatory objectives will be, and is only constrained by the provisions of the Treaty for a legal basis.[19] But that constraint seems more apparent than real.

Identifying regulatory impact assessments as a desirable design tool was positive. However, an evaluation of future impacts and past experiences with regulation forms part of the criterion of expertise which does not appear in the White Paper. Conclusions about regulatory effectiveness based on outcomes have proved so

[17] Majone's model offered as a matter of theory the proposition that political principals could use the results achieved by regulators exercising delegated powers as a matter of ex post control and accountability.
[18] COM (2001) 428 final 10.
[19] For the proposition that the limits of EU legislative competence are dangerously vague, see S Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising:* How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 *German Law Journal* 827.

contentious that leading authors have simply declined to include the criterion in regulatory governance models. If it is at all appropriate to be part of the regulatory governance model of the EU, effectiveness would be a conclusion to be drawn by the body or person charged with evaluating the Commission's performance as a regulator and the specific regulation under consideration. I return to this in chapters 6 and 7.

As to the Commission's follow up on this aspect of effectiveness, thus far, only an *ex ante* regulatory assessment procedure, which will be examined in chapter 6, was introduced in 2002.[20] An equally important measure, *ex post* assessments, seems to have disappeared entirely from the regulatory agenda. The White Paper elsewhere called for a reinvigoration of the Community method,[21] ie strengthening the Commission's policy-defining role. In effect, the role of Commission as regulator-in-chief would be re-enforced using such a definition. This would add to the normatively problematic features of the EU, in terms of regulating the single market.

The White Paper also bundles the principles of proportionality and subsidiarity into the notion of effectiveness,[22] but the resulting formulations add little to existing Union law. The Commission remains the institutional actor making the assessment of subsidiarity, with the attendant normative weakness of its views on the meaning of the public interest, and the bias in institutional incentives that favor harmonization measures. Although Parliament and the Council may disagree with the Commission, its view is decisive, but subject to judicial review by the Court of Justice with subsidiarity now a codified Treaty principle (Article 5 TFEU). The principle that implementation of regulatory policies should be done in a proportionate manner is no more than a truism; to do otherwise would violate the *acquis.*

When these points are compared to national regulatory criteria, there is only a modest substantive overlap. The *role of the criteria* in national governance is directly

[20] The Commission impact assessment that was introduced in 2002 replaced the previous single-sector type assessments. See Commission, 'Governance, Better Regulation, Impact Assessment' < http://ec.europa.eu/governance/better_regulation/impact_en.htm> 6 December 2012. Ch 6 will identify a growing consensus on the need to improve the quality of the Commission's *ex ante* assessments.
[21] COM (2001) 428 final, 34.
[22] 'Effectiveness also depends on implementing EU policies in a proportionate manner and on taking decisions at the most appropriate level.' ibid.

linked to more general assessments of whether the regulation is well suited to solving the problems it was designed to address. Many strands of meaning can be unpacked from the notion of effectiveness in the White Paper. It inappropriately bundled expertise with effectiveness and made effectiveness dependent on subsidiarity and proportionality, which are concepts meant to inform the policy process *ex ante,* not to form part of *ex post* assessments of effectiveness. Via effectiveness, the White Paper proposed to strengthen the Community method and solidify the Commission's position as regulator-in-chief. Such an approach smacks of regulatory politics rather than regulatory governance.

3.1.2.4. Openness

Openness in the White Paper is seen primarily as the quality of communications between European institutions and the wider world that brings about public confidence in the institutions themselves.[23] The definition suggests the primary agenda here is communications: a repeated emphasis on improving communication with wider civic society reflects a perception that the real problem lies in getting the public relations message right. The White Paper recommended four practices for implementing openness:

> (1) to provide timely online information on the 'preparation of policy' through all stages of decision-making;
> (2) to enhance dialogue with regional and local governments at 'an early stage in shaping policy';
> (3) to adopt minimum standards for consultations on EU policy, as defined centrally by the Commission; and

[23] In the White Paper the Commission stated '[EU institutions and Member States] should actively communicate about what the EU does and the decisions it takes. They should use language that is accessible and understandable for the general public. This is of particular importance in order to improve the confidence in complex institutions.' COM (2001) 428 final, 10. The notion of openness recurs throughout EU documents and overlaps with 'better regulation' and 'better lawmaking' policies promoted by the Edinburgh European Summit (Dec 1992) which endorsed the Commission initiative on 'better regulation' and 'better lawmaking'. Guidelines were agreed at the 1992 summit to implement 'measures to increase transparency and openness in the decision-making process of the Community'. The White Paper's proposed measures to increase transparency amounted to creating opportunities for greater outreach to and communication with constituent parts of the Community which, until then, would have had limited influence in the determination of most Community policies, ie the national parliaments, the Council of Ministers itself, and the general public, using a variety of consultative mechanisms. The more 'open' Community would be achieved by public access to the work of the Council, information on the role of the Council and its decisions, and simplification of and easier access to Community legislation. Subsequent summits endorsed these principles. The White Paper comprised the more elaborated measures to improve the different stages of the legislative development cycle, from policy conception to implementation, including the principle of openness.

(4) to include more flexibility in EU legislation by considering regional and local conditions.[24]

Starting with the last proposal, the White Paper gave no indication of how this would be done in practice, or how to square such flexibility with the legal principle of the primacy of EU law; nor how this approach would be compatible with the uniformity rationale for harmonization measures in the internal market. Any view of what the Commission meant or how it intended to apply this feature of openness was conjectural. If it is true that the Commission considers flexibility in implementation of harmonization to be a legitimate aim of regulatory governance - with the potential that it might have to undermine, at least the appearance if not the reality, of the principles of uniformity and primacy of EU law - then it has also introduced the possibility of flexibility as to how it more directly exercises its powers as a policy developer. By calling into question at least implicitly the 'holy grail' that EU law must be uniformly interpreted and applied to take precedence over national law, the White Paper created an opening to question other fundamental aspects of the working of the EU legal system in the pursuit of regulatory openness. When properly considered, openness has little to do with regulatory flexibility. To the extent that flexibility properly defined is a desirable feature of regulation, it would need to be considered within a framing of regulatory expertise, related to problem definition, identifying suitable regulatory options, and evaluating the best mix of substantive and procedural measures to achieve regulatory objectives.

A final criticism of openness is to contrast it with transparency. Transparency is important to governance because it facilitates informed participation and decision-making. In the Commission's framing of openness, a key conceptual value of transparency found in national models has been removed, that of transparency as a way of participating in decision-making. Participation is discussed in the next section. It will be seen there that the White Paper takes a traditional approach to non-institutional participation in EU regulatory development, so the criterion plays, at most and as usual, only a modest advisory role in the EU. The White Paper separated the concepts of openness and participation but gave neither of them a normative meaning.

[24] COM (2001) 428 final, 4.

3.1.4.5. Participation

The White Paper calls for greater involvement of national actors to shape, apply and enforce Community rules and programmes to create more confidence in the end results and in the institutions which deliver policies.[25] This means that national and regional actors participating in policy processes should be prepared to inform the public about those policies thus reinforcing the communication dimension.[26] The European Parliament should play a prominent role in a Europe-wide culture of consultation and dialogue by reinforcing its use of public hearings, another communication dimension.[27]

Member States should follow 'an inclusive approach when *developing and implementing* EU policies'.[28] But the relevant actors in the EU policy development phase are not Member States. The European Council sets broad overarching goals for the EU which are more visionary than regulatory.[29] Thus, while the European Council provides political guidance, Member States do not formulate regulatory policy measures. As to participation by national actors in applying and enforcing EU norms, it would appear to suggest no more than their traditional roles and duties under the Treaties.

Participation in civic society means being consulted as part of the regulatory process. Emphasizing the non-political and primarily communicative objectives of the criterion, the White Paper stated that 'Participation is not about institutionalising protest. It is about more effective policy shaping….'[30] The model of participation reflected in the White Paper is one where civic society participants contribute to a

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[25] 'The quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely "[to] create more confidence in the end result and in the Institutions which deliver policies".' Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies.' ibid 10.

[26] ibid 34.

[27] ibid 16.

[28] ibid 10.

[29] With the entry into force of the Lisbon Treaty, and the creation of the offices of the President of the European Council, and the High Representative of the Union for Foreign Affairs and Security Policy, the European Council has evolved towards a more operational institution. Its powers in relation to positive integration measures remain in the realm of overall guidance. Art15(1) TEU reads: 1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

[30] COM(2001) 428 final, 15.

discursive, but not a decisional, process. Even in most national regulatory regimes, such views are not binding on the regulator. However, by comparison, US federal agencies are held to a high factual standard in justifying a decisional outcome that does not accord with the evidence and comments submitted.[31]

The White Paper unsuccessfully sought to re-frame the legitimacy discourse of the EU. The failure lay mainly with the Commission's problem definition, ie that European citizens did not adequately understand the system that was set up for their benefit. Even though the Commission identified several important principles of regulatory governance theory, the meanings that it ascribed to them fell far short of a normative standard, thus depriving them of the capacity to contribute to regulatory legitimacy.

3.2. A Regulatory Governance Model for the Commission

In this section I bring the discussion of the White Paper criteria together with the analysis in Chapter 2 and construct a regulatory governance model to be used in the case study. Regulatory governance, it will be recalled, addresses the dimension of impaired democratic accountability when governing powers are delegated to non-accountable bodies. Where a transnational regulator such as the Commission is subject to little or no institutional accountability, then regulatory governance itself becomes part of an evaluative mechanism. Admittedly this is contestable as a self-referencing set of criteria, caricatured as an accountability mechanism that the Commission establishes with itself. This criticism is valid, but incomplete. If the model of governance were limited to the Commission's own definition of the meaning and value of the criteria, which the White Paper reflected, then the model's value is minimal. I suggest that the Commission should self-define the meanings,

[31] There, all information used by the regulator in a rule-setting procedure must be publicly available. If a decision of a federal agency were to rely on considerations or factual elements that were not in the public record, or if the decision failed to explain why facts that appeared in the record were not considered relevant, it would constitute grounds for judicial reversal. The court reviews the information relied upon by the agency which, by law, must be available to the public. See Administrative Procedure Act, 5 USC s 556, s 556(d), s 557 and s706(a)(2). See generally D Hall, *Administrative Law Bureaucracy in a Democracy* (4th edn, Pearson 2009).

usage and application of such criteria in a way that takes account of the relevant scholarship on regulatory governance theory.

Three stages of policy development need to be distinguished: design, enforcement and revision. The analysis in my case study focuses on the design stage. Revision of policy is analytically similar to design but the evidence base relied upon should be somewhat different, because of experience with enforcement. Not all governance criteria can apply equally within these phases. Each requires consideration of, or emphasis on, different factors in light of the contextual circumstances. The five regulatory criteria of my analytical model are: (1) a valid regulatory mandate; (2) regulatory expertise; (3) regulatory efficiency; (4) procedural due process; and (5) accountability.

3.2.1. Regulatory Mandate

A national regulator exercises delegated governing powers from a national parliament and therefore typically has a legislative mandate. In the national context, this is a crucial basis for its authority and therefore for its legitimacy. The equivalent principle for the Commission is the mandate in the Treaties. Starting with the aims of the Union, the TEU states: 'The Union's aim is to promote peace, its values and the well-being of its peoples'.[32] The Union's values are stated as: 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[33] The economic aims of the Union, commingled with social and environmental aspirations, are currently that

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.[34]

[32] Art 3(1) TEU.
[33] Art 2 TEU.
[34] Art 3(3) TEU.

The original Treaty mandate of 1957 has evolved with the repeated amendments of the Treaties.[35] The current formulation of the aims for the internal market 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 the Treaties.[36]

However, the formulation of the Treaties, specifically with regard to the positive harmonization measures for the internal (or common) market has changed remarkably little and remains extremely broad. Compare the provision of the Treaty of Rome:

> The Council shall... issue directives for the approximation of such provisions laid down by *law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.*[37]

With the current mandate:

> The European Parliament and the Council shall....adopt the measures for the approximation of the provisions laid down by *law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*.[38]

The regulatory mandate is open-ended with only general indications of how the Commission's discretion should be exercised.[39] Given the Court's jurisprudence on the scope of Union competence to adopt positive integration measures, this discretion is broad.[40] In terms of its regulatory mandate, the governance issue for the Commission is not whether it has a legitimate mandate for regulation but if the

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[35] The 1957 Treaty of Rome referred to a 'common market' rather than an internal market. That Treaty laid down foundational measures, inter alia, for a common commercial policy and a common customs tariff, thus reflecting the considerably different starting circumstances of the TEU and TFEU Treaties, compared to the Treaty of Rome.

[36] Art 26(2) TFEU.

[37] Art 100 EEC.

[38] Art 114(1) TFEU. I have deliberately removed the provisions related to the respective legislative processes which have changed considerably but are not the focus of the present research.

[39] Art 26 TFEU states in part: '1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties...'Also relevant to the Commission's mandate is Article 27 TFEU which states in part: 'When drawing up its proposals with a view to achieving the objectives set out in Article 26, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain for the establishment of the internal market and it may propose appropriate provisions. If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the internal market.'

[40] For cases endorsing this point, see eg Wetherill (n 19).

Commission's interpretation of its mandate can be considered legitimate by reference to normative standards. This evaluation needs to be made at each stage of policy development. The question of whether the Commission legitimately exercises the powers that have been delegated to it - the focus of the present research - is not the same as whether or not the Commission is exercising *legitimately delegated* regulatory powers. This distinction was implicitly part of Scharpf's critique of EU positive integration powers and measures. The construction of a regulatory governance model in order to analyze the legitimacy of the Commission as a regulator needs to focus on the former in terms that I discuss below.

3.2.2. Expertise

Certain regulatory functions positively require expert judgments to evaluate complex issues related to, eg competition, science, health and consumer protection. Consideration of multiple or conflicting aims, such as those involved in technical and financial issues or risk assessments, in order to come to a balanced judgment supports the necessity of an expert regulator. The context in which the Commission exercises its regulatory functions is one of complexity and enormous variation. However, the existence of variation is not sufficient on its own to justify recourse to positive harmonization measures. Expertise should play a considerable role in evaluating the value of harmonizing measures. The quality of such evaluations should reflect a capacity for understanding the complexities of regulation.

Expertise nonetheless has limitations. The broad discretion of a regulator and the expertise required for a proper consideration of some of the specialized aspects of regulation should not pre-empt an assessment of whether decisions reached by the regulator are appropriate.[41] It is hardly controversial to suggest that a regulator should have the discretion both to interpret its mandate and to make use of any expertise needed in discharging that mandate. Expertise is particularly useful in individual decisions where complex and technical arguments must be evaluated. Less, but nonetheless considerable, reliance on expertise should be placed on rule-

[41] For example, in October 2011, the UK offshore oil exploration industry expressed strong reservations about the Commission's proposals for offshore regulatory safety, arguing that replacing decades of global experience with centralized EU regulation would be unacceptable, a position with which the UK Government agreed. The industry particularly criticized the Commission's impact assessment. See <http://www.oilandgasuk.co.uk/ProposedEURegulation.cfm> accessed 10 December 2012.

setting decisions if there are complex issues of analysis or competing values to be weighed. This is the case in the EU where the Treaties are imprecisely drafted and simultaneously aspire to different economic and social objectives, not all of which are mutually compatible.[42]

3.2.3. Efficiency

Efficiency and effectiveness are quite different by definition but they share the quality of being empirical features of regulation, not qualities of a regulator. Majone's model inferred the existence of several positive features of a regulator from its expertise and (economic) efficiency in achieving regulatory goals.

Considerations of efficiency should extend to more than the achievement of the internal market, using the breadth of the Treaty objectives as a reference. Contentious definitional and evaluative questions would need to be considered, which involve an appreciation of what constitutes the public interest of the EU. The use of regulatory discourse here should bring out the variable and contestable meaning of the public interest. The Commission requires regulatory discretion for its broad mandate but refining the meaning of the public interest inherent in the mandate can be more openly determined, more participatively, even if the public view is not decisive. Giving attention in regulatory discourse to views contesting a neo-liberal approach to the internal market is a legitimating measure. How this discourse is constructed and reflected would require both expertise and political maturity, to appreciate the underlying purpose of using regulatory discourse as a legitimating action.

Efficiency can contribute positively to a model of regulatory governance for the Commission in combination with other governance criteria. A particular difficulty with efficiency in the national context is the lack of precision as to what efficiency means and therefore a difficulty in constructing evaluative metrics. The Commission itself initiates proposals for economic regulation and could include in its proposals some indications of efficiency by reference to the objectives of the regulation concerned. Adoption by the EU legislature would increase the legitimating value of the criterion.

[42] Consider the wording of art 3(3) TEU in relation to sustainable development based on economic growth and price stability and a highly competitive social market economy.

The preparation of an independent audit evaluating how well the regulation satisfied the legislative definition of efficiency would add more weight. The case study will analyze whether regulatory measures reflect a meaningful level of efficiency in achieving the Treaty mandate.

3.2.4. Procedural Due Process

Due process is related to both openness and transparency. The underlying value links to the democratic influence that participation can have over regulation which contributes to legitimacy. Particularly in the US, the rule-making function is characterized by high levels of regulatory participation that may lessen efficiency and effectiveness in achieving the regulatory mandate. A normative standard of procedural due process for the Commission as a regulator should include this factor, but the US approach is neither comparable nor transferable to the Commission context. US governance is directed towards legal and procedural safeguards in constraining the discretion of federal regulators, thus emphasizing the accountability function of governance. The Commission context is not directed towards substituting procedure and judicial or parliamentary oversight for the exercise of delegated governing powers. It discharges a supranational mandate for economic and other forms of integration in a system of delegated powers where there is *more than one* sovereign, where there is huge diversity of interests between Member States and where there is no consensus on the meaning of the public interest.

The White Paper emphasized public consultations; current practice combines public consultations, updating and simplifying the *acquis*, improving accessibility and simplifying and improving the regulatory environment.[43] Systematic public consultations in the rule-making phase of European regulation have only been introduced recently. At this advanced stage of the internal market, regulatory governance should reflect both regulatory independence that signals a credible policy commitment and a willingness to construe the public interest more broadly. The Treaty gives the Commission the authority to pursue values and objectives that are broader than those defined by economic efficiency. The impact assessment guidelines recognize that one of the 'problems calling for a solution' would be a

[43] See Commission, 'Governance, Better Regulation, Impact Assessment' < http://ec.europa.eu/governance/better_regulation/impact_en.htm> 6 December 2012.

conflict between an existing situation and one of the fundamental objectives of the Union.

Where possible, regulatory problems should be framed as broader than that of allocative efficiency, so the policy options identified include measures with objectives broader than the primarily economic even if this carries risks.[44] Using the tool of discourse, and without diminishing its status as an independent regulator, the Commission could calibrate the broad goals of the Treaties more participatively and reflect these in its regulatory policies, within the limits of its powers. For policy development, a combination of a broader framing of the problem-identification phase could contribute to a more inclusive consultation phase. A widening of the terms by which problems are identified could address two related criticisms: the lack of flexibility of the Commission's appreciation of what level of positive integration is appropriate for the internal market and the consensual weakness inherent in the Commission's view of the public interest, the reverse side of which is the positive value of its independence. This richer approach to discourse would be a more effective regulatory governance tool in the context of public consultation.

3.2.5. Control/Accountability

Control and accountability are fundamental to national regulatory governance. Delegation to a national regulator is usually based on a desire to avoid the high information and transaction costs of decision-making. Fundamentally it is an appreciation of relative efficiencies. The logic of delegation to the Commission follows a somewhat different rationale. The Commission's regulatory *raison d'être* is based on the premise that, without independence, little credence could be given to the policy commitments in the Treaties made by national governments because Member States would succumb to short-term political pressures. The independence of the Commission as a principle is central to the credibility of the system. Does regulatory governance need to address the issue of control and accountability? I argue that it needs to engage with the criticism that its interpretation of the public

[44] Scharpf's remedy for the redistributional effects of economic regulation focused on limiting the scope for national regulatory competition rather than trying to find mechanisms within the regulatory governance practices of the Commission that permit the Commission to validate its views of what constitutes the public interest. There may well be merit in Scharpf's approach, which reflects a preference for negative rather than positive integration measures. I do not discuss it further here.

interest is ideologically biased. And that it should be subject to some meaningful and independent feedback.

Equally importantly, regulatory governance needs to engage with the issue of legitimacy. The Commission continues to adopt new and adapt existing regulatory governance measures. In doing so, it does not seek explicitly to establish or enhance its regulatory legitimacy. This research links the two and argues that the Commission should do likewise. I suggest that normative governance tools that could usefully contribute to creating a broader consensus are already present in the regulatory mix but need to be assembled into a coherent discourse and set of normative practices. A properly constructed discourse can open the policy discussion by asking in what terms problems can be identified and analyzed by reference to the wider goals of the Union. The level of civic disillusionment with the EU has increased significantly in recent years.[45] While it is true that the EU is characterized by deep cleavages of economic development, of public values and of notions of social justice, there is now a clear, post-Lisbon, mandate for the Union to aspire to aims beyond the economic within the limit of its powers.

3.3. Conclusion

The Commission should use its developing regulatory and managerial capacities to construct a broader discourse of regulatory policy and a wider framing of the problems that may or may not require a regulatory solution. Even more importantly, the Commission needs to construct a coherent and rigorous model of regulatory governance reflecting the standards expected and practiced in national regulatory regimes. The model of regulatory governance that I have constructed to analyze the Commission's legitimacy within the case study combines the substantive criteria of authority, expertise and efficiency, in the senses that I have used them above, with the procedural due process standard of open public consultation, all of which use a

[45] The Eurobarometer Survey from May 2012 reflected on average a 50% disapproval rating of the EU; only 12% of respondents from the 27 Member States associate the EU with economic prosperity while 41% attribute most importance to the freedom of movement to study and work. See Eurobaromètre Standard 77, 'Printemps 2012, L'Opinion Publique Dans L'Union Européene' [Spring, 2012, Public Opinion in the European Union] 54-56 <http://ec.europa.eu/public_opinion/archives/eb/eb77/eb77_publ_fr.pdf> accessed 10 December 2012.

regulatory discourse that reflects the wider aims of the Union and the issue of how to interpret the mandate for those aims.

Nonetheless, the essential element of accountability must also form part of supranational regulatory governance, while recognizing the importance of independence in the exercise of institutional discretion. I consider that there is scope in regulatory governance for an *ex post* evaluation of the empirical outcomes of regulation that need not impinge on the independence of the institution. Like the Commission's 'name and shame' approach to identifying transposition shortfalls by Member States, an empirical 'regulatory scorecard' could be fashioned for EU regulation, not by the Commission, but by an independent body whose assessment would affect the credibility of the Commission. Given the contestability of methods of evaluation, as Baldwin and others showed, such an assessment would also be subject to challenge but it would have the merit of an outside view. For a supranational regulator whose credibility is a primary asset, and whose legitimacy is systematically contested, control via reputational damage may be sufficient.

In the next chapter, and the two following, I will apply these criteria in combination, and analyze the Commission's use of regulatory governance throughout.

Three distinct phases of policy development can be distinguished in telecommunications. The first, covered in the next chapter, begins in 1987 and ends in 1990. During this short period, national telecommunications monopolies were dismantled on the basis of general principles of the European Treaties.

Chapter 4

The 'Europeanization' of Telecommunications Regulatory Policy

Introduction

This chapter examines the first phase of telecommunications regulation, from the initial stage of State-owned monopoly industries in all Member States to the creation of a partially liberalized sector with partially harmonized regulation. This was the transformational phase of European policy: the sector was brought within the Treaty principles applicable to other commercial sectors. The chapter examines the emerging governance practices of the Commission as a regulator, distinguishing between the Commission's actions as a positive regulator and a competition policy enforcement authority, the latter of which is outside the scope of this research. At the initial stage of policy development, the Commission's strategy blended the two types of regulatory action and thus blurred regulatory governance aspects.

The chapter describes both negative and positive integration measures with emphasis on the regulatory governance practices. Autonomous competition policy enforcement was a catalyst that created the political conditions to agree positive regulatory measures. When its initial regulatory strategy of using competition policy enforcement proved highly controversial politically, the Commission shifted its emphasis away from unilateral negative integration to positive integration measures. This politically informed choice to adapt its regulatory strategy and its regulatory discourse is not always apparent in the narrative of transformational liberalization.

Using the regulatory governance framing that was defined in Chapter 3, the chapter analyzes the normativity of the first phase of regulatory governance in this sector. A robust level of the normativity of regulatory governance of the initial phase of policy can be inferred, given the Treaty mandate, Commission powers, and the changing circumstances of the sector, all of which supported the aim of creating an integrated market, even in a traditionally monopolized sector like telecommunications. The chapter concludes that the regulatory governance procedures of the initial policy phase were sufficient to accord normative legitimacy to the Commission's actions as a regulator.

4.1. Regulatory Strategies and Policy Shifts

Throughout the 1970s and early 1980s, European economies were in decline. Microelectronics created competitive pressures from outside of Europe.[1] European industry lost ground while Member States supported their national industrial champions. Post-War France had adopted economic *dirigisme,* in which the State intervened or influenced the economy either by guidance or control.[2] The Commission's early telecommunications policy embodied a classic, corporatist, French-style approach.[3] Following the creation of the European Economic Community in 1957, the Commission considered that competition arising within newly integrated European markets would suffice to achieve appropriate levels of industrial restructuring. Until the end of the economic growth period of the 1960s, and the episodes of oil price rises in the 1970s, overall growth in Europe was robust, standards of living rose, European industry prospered and the wider public benefitted.

For many years, European interventions in telecommunications markets were limited to collaborative transnational projects between companies.[4] In a 1979

[1] See eg TR Reid, *The Chip: How Two Americans Invented the Microchip and Launched a Revolution* (Random House 2001).

[2] See eg VA Schmidt, 'The Decline of Traditional State *Dirigisme* in France: The Transformation of Political Economic Policies and Policymaking Processes' (1996) 9 Governance 375; SS Cohen, *Modern Capitalist Planning: The French Model* (University of California Press 1997).

[3] At this stage of European integration, the Community enjoyed no Treaty competence to engage in or formally to propose European-wide policies for industrial promotion or development of European industry. A European competence in the area of industrial policy was created in the Treaty of Maastricht, now art 173 TFEU. Before Maastricht, Member States pursued largely uncoordinated and unilateral national industrial policies, using a 'wide-ranging ill-assorted collection of micro-based supply-side initiatives…designed to improve market performance in a variety of...ways...directed (in the main) at firms'. See PA Geroski, 'European Industrial Policy and Industrial Policy in Europe' (1989) 5/2 *Oxford Review of Economic Policy* 20, 21. From the mid-1970s until the mid-1980s, the Commission focused on restructuring industrial sectors in crisis. The adoption of the Single European Act in 1986 re-focused the Commission's priorities on achieving a single market within a decade, gave the Commission more flexibility to pursue integration, and carried the seeds for a radical revision on policy thinking in the Commission, albeit with the potential for ideological conflicts. See W Sauter, *Competition Law and Industrial Policy in the EU* (Clarendon Press 1997) 70-72.

[4] See eg Commission, 'Recommendations on Telecommunications' COM(80)422 final; Commission, 'Communication from the Commission to the Council on Telecommunications - Lines of Action' COM(83)573 final; Commission, 'Communication from the Commission to the Council on the Status of Community Telecommunications Policy' COM(85)276 final; Commission, 'European Society Faced With the Challenge of New Information Technologies: A Community Response' COM(79) 650 final; Commission, 'Telecommunications, Communication from the Commission to the Council' COM(83) 239 final; Commission, 'Progress Report on the Thinking and Work Done in the field and Proposals for an Action Programme' COM(84) 277 final.

Communication the Commission described the challenges and made suggestions for actions:

> European society will be obliged to apply [electronic] technologies on an immense scale. They are essential to the competitiveness of its industry in world markets ... But whether the process is a painful one, or a positive one that generates new economic growth, new social possibilities and hope will depend on how the new revolution is handled, on the social, industrial and political choices that are made.....[T]here is a need to mobilise and coordinate the efforts made by Member States ...to make use of the Community's normative powers and the purchasing power of public authorities to catalyse bilateral and trilateral industrial collaboration... It is therefore proposed that the Community: ... (b) create a...European public market for telematic equipment and services through *Council decisions* [emphasis added] which:
> - commit the telecommunications administrations to introduce common harmonised services on the new digital networks from 1983, and to purchase for them only harmonised equipment from 1985;
> - establish the principle of an open Community market for terminals...
> - commit the....Member States from 1983 to buy informatics equipment and software only when it conforms to harmonised standards....
> (d) Foster industrial and user collaboration by:
> ... - providing a catalytic framework for ad hoc collaboration between industrial companies on a bilateral or trilateral basis, with a view to specialisation agreements or joint development of products such as peripherals
> - ensuring that Community industry has access to the latest micro-electronic technology in the mid 1980s by promoting development of the key equipments and computer aided design technologies....[5]

The measures of technical harmonization, coordinated public procurement, collaborative, transnational, subsidized research and specialization agreements between undertakings constituted a fundamentally industrial policy approach to telecommunications policy.

4.2.1. Policy Shift: Industrial to Regulatory

In a 1987 Green Paper (the 'Green Paper'), the Commission introduced a new, and legally significant, interpretation of the EEC Treaty:

> While provision of network infrastructure [ie the equipment that carried signals over a physical infrastructure, that is, the Public Switched Telephone Network] generally requires the physical presence of the provider in the geographical area in question, provision of services and

[5] COM(79) 650 final, 2-7.

> equipment [such as, telephone terminals and handsets to receive and convert the signals at origin and destination] in most cases does not, with the result that the latter [ie equipment and services] are largely *tradable* [emphasis added]....[6]

For the first time, the Commission suggested that the general Treaty principles of economic freedom were applicable to some telecommunications markets. 'While provision of network infrastructure generally requires the physical presence of the provider in the geographical area in question, provision of services and equipment in most cases does not, with the result that the latter are largely tradeable....' A 1985 judgment of the Court of Justice, in a case dealing with abuse of dominance by British Telecommunications (the '*BT case'*), had endorsed the principle of the applicability of competition rules even to State-owned national utility monopolies when engaging in commercial activities.[7] The Green Paper reiterated the Court's finding:

> [National telecommunications operators are]....commercial undertakings since they supply goods and services for payment which are subject to the application of Community competition law, an opinion confirmed by the Court of Justice...[8]

If telecommunications services and equipment were 'tradable', then the competition provisions of the EEC Treaty, the economic freedoms, the common commercial policy and the harmonization of national laws for the establishment and functioning of the common market were applicable.[9]

The Commission found that, with changing markets and technologies, the Treaty rules on free movement and competition were fully applicable to the services and equipment of the telecommunications sector, where national incumbents enjoyed a complete monopoly and where different national standards effectively insulated the national markets. These needed to be addressed and dismantled. The legal analysis of economic freedoms was softened with a discourse on gradualism, on cooperation and

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[6] COM(87) 290 final, 180.

[7] Case 41/83, *Italian Republic v Commission of the European Communities* [1985] ECJ 873, in which the Court held that the business activities of a national telecommunications undertaking could be subject to the prohibition of art 102 TFEU. The Court's judgment was handed down in March 1985.

[8] COM(87) 290 final, 181.

[9] ibid 8.

collaborative standard-setting activities in forums with the major industrial and political actors and reassurances about revenues.[10]

4.2.2. Regulatory Mandate Endorsed

The Green Paper launched an extended consultation.[11] The Commission's use of a Green Paper followed the highly successful White Paper on completing the internal market.[12] The extended consultation gave experts, industry, Member States and users an opportunity to provide comments. The proposals in the Green Paper were broadly endorsed across the board.[13] Not coincidently, the Commission's policy agenda meshed with the programme and timetable to complete the single market by 1992.[14] Linking the 1992 programme to the newly defined pro-competitive aims of the telecommunications sector coincided with consideration in national capitals of how to address the continuing decline of national telecommunications and IT industries; for example, the UK had already begun a liberalization process.[15]

In 1988, the Commission outlined an extensive policy programme.[16] The strategy was to open up the industrial and competitive potential of a continental-sized

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[10] Eg '[T]he current and future integrity of the basic network infrastructure must be maintained or created. This implies in particular a continuing strong role for Telecommunications Administrations in the provision of network infrastructure and strong emphasis on Europe-wide standards in this area. It also implies safeguarding the financial viability of Telecommunications Administrations in order to ensure the build-up of the new generations of telecommunications infrastructure and the necessary level of investment.' ibid 11.

[11] The Commission published the telecommunications Green Paper in June 1987 and then reported on its conclusions in a follow-up communication in February 1988. The intention behind the consultation was clearly to engender a broad debate at all levels of the interested communities and to give stakeholders an opportunity to digest the 250 plus pages of the consultation documents.

[12] COM(1985) 310 final.

[13] '...the Commission has received a wide range of comments. The broad consensus apparent from these comments now seems to give a strong basis on which to define further a determined campaign to develop the Community s telecommunications market, with the overall objective of fully achieving a Community-wide open competitive market by 1992.' Commission, 'Towards A Competitive Community-wide Telecommunications Market in 1992, Implementing the Green Paper on the Development of the Common Market for Telecommunications Services and Equipment: State of Discussions and Proposals by the Commission' COM(88) 48 final, 4.

[14] 'Given the overriding aim of achieving the Internal Market before the 31st December 1992, the obligation fully to apply the Treaty to the sector and the broad consultation process, a strong basis now exists for the opening of the Community's telecommunications market, according to defined deadlines and according to the following principal measures [emphasis in original].' COM(88) 48 final, 16.

[15] See Department of Trade and Industry, 'Communications Liberalisation in the UK: Key Elements, History & Benefits' (March 2001) <http://www.wto.org/english/tratop_e/serv_e/symp_mar02_uk_com_e.pdf> accessed 13 December 2012.

[16] COM(88) 48 final, 4.

market for new telecommunications and IT services underpinned by standardized equipment and technology. The Commission announced an intention to use Treaty authority to liberalize terminal equipment in 1988.[17] Adopted shortly thereafter, a Commission directive liberalized the entirety of the European terminal equipment market (hereafter the 'Terminal Equipment Directive'), by abolishing all special and exclusive rights[18] to import, market, connect, bring into service and maintain terminal equipment.[19] The Directive was vigorously challenged,[20] notwithstanding an explicit Council endorsement to promote liberalization of terminal equipment.[21] In legal terms, the Terminal Equipment Directive was a straightforward exercise of the Commission's competition enforcement powers, albeit without precedent as to its legal scope. The Court of Justice subsequently upheld the action as a legitimate exercise of the legislative powers conferred upon the Commission in the Treaty.[22]

4.2.3. A Regulatory Authority Develops

The significance of the Terminal Equipment Directive for the Commission as a positive regulator lay in its catalytic effects. It was adopted outwith the control of the Member States that created a new dynamic for a European regulatory space in

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[17] '...the Commission will, before end-March of 1988, [emphasis in original] issue a Directive under Article 90 (3) regarding the liberalisation of the terminal equipment market. The progressive opening of telecommunications services from 1989 onwards and the problem of separation of operational and regulatory functions will be dealt with by a Commission Directive to be presented before mid-1988 and to be adopted before end-1988 [emphasis in original]. COM(88) 48 final, 22.

[18] The rationale was a legal analysis that did not find such rights to be compatible with Treaty provisions on free movement of goods and with art 37 of the EEC Treaty, now art 37 TFEU.

[19] Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment [1988] OJ L131/73. The relevant Treaty provisions, art 37(1), now art 34 TFEU, read in part: '1. Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States'.

[20] Even with a general consensus on the desirability of liberalising terminal equipment, the Commission's use of Treaty powers in this manner represented a challenge to the Council's role as European legislator, as France, Italy, Belgium, Germany and Greece argued before the Court of Justice. If the Commission enjoyed such legislative powers, other monopolised public services could equally be the object of such Commission initiatives. See Case C-202/88 *French Republic v Commission of the European Communities* [1991] ECR I-1223.

[21] Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment [1986] OJ L217, 21. Some language in the preamble suggests the intention may have been more gradualist than the Commission intended: 'Whereas it is necessary to set up a Committee, with the task of assisting the Commission in implementing this Directive and in progressively implementing the mutual recognition of type approval for terminal equipment'.

[22] *French Republic* (n 20).

telecommunications. The Commission's adoption of a liberalization Directive crystallized a willingness for Member States to agree positive harmonization measures. Such willingness may have been intended to modulate the Commission-controlled negative integration measures.

Inter-institutional consensus emerged that both harmonization and liberalization were needed and the Commission combined both regulatory roles. In 1990, the Commission adopted a second liberalization directive[23] and simultaneously the Council adopted the first harmonization directive (the ONP Directive).[24] Both dealt with telecommunications services, liberalizing services and harmonizing the regulation of access (using the concept of 'Open Network Provision' (ONP)).[25] The harmonization Directive created a broad framework for further adoption of detailed measures.[26]

The Commission's governance practices as a regulator using both harmonization and liberalization were initially conjoined.[27] With a move towards harmonized regulation, discussions shifted to a formulation of rules and norms for liberalized markets. The public and the private sectors, industry, incumbents and Member States had an interest in shaping the outcome of the legislative process, as well as the detailed rules elaborated thereafter. Positive harmonized regulatory measures for a functioning competitive market in telecommunications were treated as a matter of setting some basic principles of access to infrastructure and delegating the detailed working out of the norms to technical experts.[28] As a policy entrepreneur, the Commission combined the roles of an enforcement authority and

[23] Commission Directive was 90/388/EEC on competition in the markets for telecommunications services [1990] OJ L192/10.

[24] This was 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 [1990] OJ L192/1 (ONP Directive). The Commission Directive was 90/388/EEC.

[25] The Commission had used the term 'workable competition' drawing on case law. The meaning was that network infrastructure operators would be obliged to offer access to anyone without discrimination, including subsidiaries and divisions within their own corporate entities. N Higham, 'Open Network Provision in the EC: A Step-by-Step Approach to Competition' (1993) 17 *Telecommunications Policy* 242, 243.

[26] ONP Directive, annex III.

[27] For an analysis of the competition policy aspects of liberalisation of telecommunications and other utility industries, see eg Sauter (n 3) 170-200.

[28] The widely criticized EU comitology committee system was introduced into telecommunications regulation during the early legislative phase for the elaboration of detailed norms to be applied by national regulators on a case-by-case basis. See ONP Directive, arts 9-10.

regulator to link widespread support for the programme to complete the Internal Market with telecommunications.

The 1990 ONP Directive committed in general terms to liberalize all telecommunications equipment and services yet restrained the Commission's prerogative by ensuring that any further measures of a meaningful nature would follow the legislative harmonization procedure.[29] Principles were introduced into the legislation as general criteria[30] to be used by technical regulatory committees ('comitology committees') to determine the specific terms of access.[31] The pace of liberalization was conducted through harmonization. Under the terms of the two legislative instruments adopted in 1990, all services but voice were liberalized, while access principles for new entrants were harmonized.[32] These provisions provided a framework to be developed and applied.

4.2.4. Policy Gives Way to Politics

The Commission's regulatory focus throughout the initial regulatory period remained full liberalization as identified in the 1987 Green Paper. The Services Directive (1990) excluded only voice telephony from liberalization, and even that was subject to re-consideration. In 1992, the Commission proposed liberalization of the highly remunerative retail voice services.[33] A compromise was reached in 1993 to liberalize voice telephony in 1998.[34] Setting the later date for full liberalization of all

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[29] See ibid arts 4-6, in which the principles of open access (ie liberalization) were defined by legislation and comitology procedures, and specific services were liberalized by subsequent Council directives.

[30] The relevant provision read: '1. Open network provision conditions must comply with a number of basic principles set out hereafter, namely that:
- they must be based on objective criteria,
- they must be transparent and published in an appropriate manner, [and]
- they must guarantee equality of access and must be non-discriminatory, in accordance with Community law'. ONP Directive, art 3(1).

[31] ibid arts 4 and 9.

[32] These covered: access to technical interfaces; third-party access to frequencies and interconnection with networks; and defined tariff principles for interconnection between network infrastructure and new entrants. See ibid art 2(10).

[33] Commission, 'Proposal for a Council Directive on the application of open network provision (ONP) to voice telephony' COM (92) 247 final.

[34] Council Resolution of 22 July 1993 on the review of the situation of the telecommunications sector and the need for further development in that market, [1993] OJ C213/1. It established, inter alia, the liberalization of all public voice telephony services as a major goal for Community telecommunications policy by 1998. It has been reported that the Commission used its leverage as a competition enforcement authority charged with approval of a proposed joint venture between Siemens and Honeywell-Bull to extract the concession of setting a definite date. See H Ungerer, 'EU

telecommunications services disconnected the telecommunications regulatory strategy from the momentum of the 1992 single market programme and thus undermined the strategy of rapid liberalization.[35] However, even with the later date, the telecommunications sector was effectively liberalized between 1990 and 1998. It was a considerable achievement to have transformed the legal framework of an entire European industry from monopoly to managed competition and market entry within eight years.

A move towards positive harmonization measures and greater deference to Member States' opposition to the use of competition law highlight the inter-institutional tension that characterized that early period. The following comment from the Commission in 1990 - reporting on the adoption of a second liberalization directive - revealed the extent to which the Commission was willing to exercise its forbearance, as a competition enforcement authority:

> In the telecommunication sector, the year [1989] was marked by the Commission's adoption of a new Directive, based on Article 90 of the EEC Treaty on competition in the markets for telecommunications services. The Directive will be notified to the Member States concurrently with the entry into force of the Council Directive on an open network provision which is designed to harmonize the conditions governing access to telecommunications networks.[36]

In effect, the Commission had adopted (in 1989) but not notified the Services Directive to the Member States and only did so when the ONP Directive entered into force (1 January 1991). That the Commission pragmatically avoided confrontation may reflect a political and institutional sensitivity to the exercise of its Treaty powers. However, such sensitivity sits uneasily with normative regulatory

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Competition Law in the Telecommunications, Media and Information Technology Sectors' (22nd Annual Conference on International Antitrust Law & Policy, New York, October 1995) 12 <http://ec.europa.eu/competition/speeches/text/sp1995_041_en.pdf> accessed 11 September 2012. If true, this would raise problematic aspects of a lack of transparency in setting a significant part of the regulatory agenda, and would underscore the hybrid nature of the Commission's role in the early phase of the sector.

[35] New technologies and services, such as satellite and mobile communications, were emerging with no legacy issues. Positive regulation could be adopted to facilitate cross-border transactions and communications more easily.

[36] Commission, *Nineteenth Report on Competition Policy* (Brussels1990) 13 (Published in conjunction with the XXIIIrd General Report on the Activities of the European Communities 1989) <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB5890546> accessed 11 March 2013.

governance if a regulator is meant to be authoritative and independent, as the Commission is. This did not unduly undermine its regulatory legitimacy in the initial regulatory phase, however, where market creation was the over-riding policy goal. I return to this below.

4.3. Governance Aspects of the Early Period: a Retrospective Appreciation

This section analyzes the regulatory practices of the Commission during the initial policy development phase. Analysis of the normativity of European governance within the enforcement of competition law, as such, is outside the scope of the present research.[37] But, given the entwined nature of the Commission's initial regulatory strategy and governance practices, the analysis in this chapter focuses on the combined regulatory governance features observed in the initial regulatory phase.

Prior to 1988, Member States had made little progress in adapting their national arrangements to cater for the Treaty principles on competition and free movement in telecommunications despite repeated calls for such adaptation. All major actors in the telecommunications environment, including Member States, agreed that greater competition at the European level was needed. Thus consensus existed on what constituted the public interest. What differed between the major institutional actors were views on the powers, measures and timing to bring about the changes that were needed. Member States had virtually ignored the Commission's urgings to collaborate on their national industrial policy approaches and, until 1987, the Commission acted solely as a facilitator.

[37] Some scholars have suggested that the European competition policy enforcement practices, particularly in light of entry into force of the Lisbon Treaty and the incorporation of the Charter of Fundamental Rights into EU law, but also in light of the European Convention of Human Rights, art 6, do not meet some of the normative standards applicable to administrative and judicial protection of human rights. See eg I Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) EL Rev 817; WPJ Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) 33*World Competition* 5; D Waelbroeck and D Fosselard, 'Should the Decision-Making Power in EC Antitrust Procedures be Left to an Independent Judge?: The Impact of the European Convention on Human Rights on EC Antitrust procedures' (1994) YEL 111, 124-25.

Then, the Commission opportunistically translated a judicial precedent in a competition policy case[38] into a new policy agenda announced in the 1987 Green Paper on telecommunications. The combination of the Court's decision, the commercial pressures from technology itself, and the political will to complete the single market created a basis for the Commission to claim regulatory authority to take action, which it did in 1987 (in the Green Paper), and followed through with the Terminal Equipment Directive in 1988.

4.4. Regulatory Context and Initial Policy Assumptions

Regulation was only one part of the overall strategy to achieve a European market for the freer movement of equipment and added-value services where both harmonization and liberalization would be in play. A key policy assumption then was the continued monopoly for network infrastructure operation, which meant that national incumbents would be obliged to make their network available to new market entrants who wished to offer added-value services, almost as a variation of an 'essential facility'. The public telephony network of the period was a copper-based infrastructure and offered only analogue (voice, fax and data) services. It was assumed at the time that only one network infrastructure would be viable, until a more advanced hybrid (capacity for analogue and digital communications) was available and that this would gradually overtake and replace the earlier infrastructure as new data-based services developed. Support for research into and standardization of such a new network infrastructure, called the Integrated Services Digital Network or ISDN), was part of the Commission's classic industrial policy of the initial period and continued thereafter.[39] The key regulatory objective was to create the potential for competition which, once established, would result in new markets for equipment and services. A competitive momentum to achieve an internal market system in which competition in telecommunications services was not distorted would be generated.[41]

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[38] A Court judgment found that State-owned monopolies *could* be subject to the principles of the Treaty and, notably, the competition rules, when engaging in commercial activities. Case 41/83 *Italy v Commission* [1985] ECR 873.

[39] See C Turner, *Trans-European Telecommunications Networks: the Challenge for European Industrial Policy* (Routledge 1997) 65-80.

[41] The theory of contestable markets posits that markets in which even a small number of firms operate can nonetheless exhibit competitive equilibriums, along with desirable welfare outcomes,

In the Commission's initial framing, detailed *ex ante* economic regulation would be needed only on a temporary basis for access conditions to network infrastructure, and complemented with a basic set of users' rights.[42] This premise proved to be wrong.[43] At this stage of regulatory policy development, the Commission services generally had little experience with the use of regulatory governance as a tool with which to enhance their legitimacy. Prior to the 1992 Programme, the Commission had proposed a significantly smaller number of harmonization measures than previously.

During the initial policy development period, some of the most notable governance practices were: (1) the decision to initiate a broad public consultation through the publication of the 1987 Green Paper; (2) the explicit call for comments and feedback from as wide a spectrum of public opinion as possible; (3) the subsequent publication of the conclusions drawn from comments received; and (4) the publication of the regulatory implications of the conclusions including a detailed description of specific measures to be adopted.

The Commission services were experienced in different ways and contexts with engaging in public consultations when taking decisions in specific cases under the competition rules. When adopting interpretative instruments such as block exemptions, the Commission services followed the governance procedures prescribed by the Council.[44] These practices likely shaped the Commission's approach to regulatory governance initially.

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because of the potential for competitive entry by new market entrants. Contestable markets are those with low barriers to entry and exit; no sunk costs (ie irrecoverable once made); and equal access by all market operators to relevant technology. See WJ Baumol, JC Panzar and RD Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt Brace Jovanovich 1982) and WA Brock, 'Contestable Markets and the Theory of Industrial Structure: A Review Article' (1983) 9 *Journal of Political Economy* 1055-66. Some commentators have suggested that perfectly competitive markets would indeed behave in the way Baumol and others outlined, but that they do not exist in practice. In empirical terms, the performance of imperfectly contestable markets (ie real world markets) depends on actual rather than potential competition. See S Martin, 'The Theory of Contestable Markets' (Purdue University, Department of Economics, July 2000) 36ff (footnotes omitted) <http://www.krannert.purdue.edu/faculty/smartin/aie2/contestbk.pdf>.

[42] This was exactly the framework agreed in Council Directive 90/388/EEC (n 24).

[43] Regulatory assumptions could be re-considered. The legislation provided for a periodic legislative review. See ONP Directive, art 8.

[44] See Council Regulation (EC) 19/65/EEC of 2 March 1965 on application of Art 85 (3) of the Treaty to certain categories of agreements and concerted practices [1965] OJ L36/533, art 5 [not all language versions].

4.5. Regulatory Governance Discerned

When the manner in which the Commission established the draft legislative framework for harmonized access conditions is examined, several distinctive regulatory governance practices are apparent. In the establishment of an ad hoc group of expert advisors that was itself convening hearings with various actors in the private sector, both the Commission and the ad hoc advisory group were setting regulatory standards. The Commission's decision to use the group implicitly endorsed the need for a regulator itself to have or to have access to sufficient expertise to define relevant standards competently and appropriately. Neither the 1987 Green Paper nor the 1988 follow-up Communication explained why the creation of an advisory group was necessary, or why the group conducted hearings. The discourse of its public statements implicitly endorsed the value inherent in expertise to enhance the exercise of its regulatory authority but never stated so explicitly.

As a first exercise of its regulatory authority in an area governed by both technicity and exclusivity, the Commission discourse reflected recognition of the need to establish its *competition* authority and expertise for dismantling exclusive rights, but not the equivalent for establishing the norms by which the liberalized markets would be governed. Similarities between the governance practices used in competition enforcement powers and the practices used in exercising powers for harmonization measures can be seen. One similarity related to the Commission's conception of its regulatory authority relative to the authority of national regulators. In its initial proposal to the Council for a telecommunications directive in 1988, the Commission followed the precedent found in the measures adopted for Commission enforcement of the competition provisions of the Treaty for consultation of national experts in an advisory capacity.[45]

The Commission proposed a purely advisory comitology committee, composed of the informal advisory group (SOG-T) used earlier, for elaborating detailed implementation rules and measures, with the Commission's proposal stipulating that the advisory committee would be composed of the same ad hoc

[45] Council Regulation (EC) 17, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204.

group.[46] This was an attempt to replicate within the telecommunications legislative framework the same authority enjoyed by the Commission in competition policy enforcement, as well as to involve the same officials who had previously contributed to policy development on an ad hoc basis.[47] The Commission succeeded in retaining an advisory committee procedure for some, but not all, implementing measures but entirely failed to ensure a provision stipulating the composition of the comitology committee.[48]

4.6. The Initial Regulatory Procedures

An important aspect of regulatory governance with parallels to competition enforcement practice relates to the due process or procedural character of administrative action. Before the Commission may take a decision finding an infringement of the competition rules, it must give the undertakings concerned an opportunity to be heard and, in its discretion, the Commission may choose to hear the views of third parties that have a 'sufficient interest'.[49] When the Commission proposes to take a decision condemning one or more undertakings, or take a decision finding no infringement, it must give 'all interested parties' an opportunity to give their views.[50] Similar procedures can be observed in the Commission's regulatory governance for telecommunications. In addition, the Commission had successfully used a 'White Paper' approach to policy development for market integration in 1985. In 1987 the Commission combined its success with the use of a White Paper for the internal market programme with its pre-existing experience in managing competition

[46] Detailed elaboration was required of the legislative principles (ie objectivity of access criteria, transparency of conditions of access, and non-discriminatory conditions guaranteeing access) that created a right of access in principle to network infrastructure. Art 9(1) of the Commission's proposal for a Council Directive read: 'The Commission shall be assisted by a committee of an advisory nature composed of representatives of the Member States and chaired by the representative of the Commission. This committee shall be the Senior Officials Group on Telecommunications (SOG-T)'.
[47] Art 9 of Council Regulation 17/62 read: 'The Commission shall be assisted by a committee of an advisory nature composed of representatives of the Member States and chaired by a representative of the Commission'. In the Regulation prescribing the rules for competition policy enforcement, the Commission is assisted by a committee of an explicitly advisory nature in almost identical terms to those proposed by the Commission.
[48] See ONP Directive, art 9.
[49] Regulation 17/62, art 19(2). The 1962 Regulation was replaced by Regulation 1/2003. See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now arts 101 and 102 TFEU] [2003] OJ L1/1.
[50] ibid art 19(3) [now Regulation 1/2003, art 27(3)].

cases to develop regulatory governance practices that incorporated several of the procedural aspects used elsewhere.

The regulatory governance features that characterized the subsequent legal framework emerged in some of the final provisions of the adopted legislative texts (1990). The creation of a comitology procedure diluted some of the Commission's control over certain aspects of legislative implementation.[51] The Commission's initial proposal to guarantee harmonization of the entire value chain of telecommunications, perhaps as an indirect guarantee of liberalization, was similarly diluted.[52] Much unilateral competition power on the part of the Commission became rather an empty weapon once the ONP Directive was adopted. This indirectly appropriated the liberalization power of the Commission by tying it to future harmonization measures to be adopted by the Council. While ceding authority to the Commission to engage in post-legislative regulatory rule-setting activities, the Member States ensured that they would be closely involved in or in ultimate control of the rule-setting activities via the comitology procedures.

4.7. First criterion: Regulatory Authority and Mandate

This section analyzes the Commission's authority for liberalization and the methods for establishing its regulatory mandate. In the liberalization of the telecommunications sector, the Commission's authority for legislative competence under the competition rules was resolved in its favor by the Court rulings on its two liberalization Directives.[53] The reaction of the Member States, who were the addressees of these instruments, constituted a 'worst-case scenario' for a regulator

[51] Areas that required a majority of Member States' representatives to agree prior to application were: (1) adoption of rules to ensure interoperability; (2) a decision to mandate a technical standard for achieving interoperability and cross-border service provision; and (3) adoption of rules for the protection of data. This meant that the Commission would be required to submit a proposal to the Council where the measures proposed to the comitology committee had not meet with a majority approval. See ONP Directive, arts 3(5) and 5(3).

[52] The Commission's proposal read 'Areas for which open network conditions *are* to be drawn up' was redrafted to read 'Areas for which open network conditions *may* be drawn up'. See Proposal for a Council Directive on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP)' COM(88) 825 final, annex I and ONP Directive, annex I.

[53] Case C-202/88, *France v Commission* [1991] ECR I-1223; Joined Cases C-271/90, C-281/90 and C-289/90, *Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission of the European Communities* [1992] ECR I-5833.

since if addressees do not accept a regulator's authority, its legitimacy is significantly compromised.

The entire process was called into question when Member States initially rejected the Commission's authority to adopt such directly applicable legislative measures. The Commission was controversially willing to exercise both its autonomous competition enforcement authority and to cooperate with the Council to agree harmonized measures. The Commission insisted at this time on using its competition powers, possibly as a political signal that it was prepared to cooperate, even coordinate, its actions with the Council, but not entirely to relinquish its powers.[54] Relations between the EU institutions of the Council and the Commission changed in 1988. The Council endorsed the overall aims of the programme laid down in the 1987 Green Paper, immediately after the adoption of the Terminal Equipment Directive.[55] With this act, the Council validated the Commission's policy mandate. Once the principle of liberalization was accepted politically, harmonized regulation became inevitable, since each Member State had its own national standards and policies.

This validation can be evaluated in governance terms. Was there a legitimate authority for the policy pursued by the Commission? In the context of the period, this was contentious. Exercising its regulatory powers in the field of competition policy on a unilateral basis to conclude that the monopoly regimes of all Member States were uniformly unenforceable was precedent-setting. In developing its views, the Commission benefitted from its reflections for the Internal Market overall, and for the sector specifically, as reiterated in a series of communications on the telecommunications industry.[56] The Commission identified the public interest as an

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[54] An insistence by the Commission on the use of its competition powers can be seen from the Press Release issued by the Commission coincident with the adoption of the Framework Directive (by Council) and the Services Directive (by Commission) on the same day. See Dawn of a New Era in Telecommunications, IP/90/59 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/90/589&format=HTML&aged=1&language=EN&guiLanguage=en>. See also Ungerer (n 34) 12.

[55] Council Resolution of 30 June 1988 on the Development of the Common Market for Telecommunications Services and Equipment Up to 1992 [1988] OJ C257/1.

[56] These were: that European industry needed to develop advanced technology skills and research capacities urgently, that national markets needed to evolve into a pan-European market and that existing monopoly provision of telecommunications equipment and services was detrimental to the achievement of a common market in which competition was not distorted. The most salient communications were Commission, 'Recommendations on Telecommunications' COM(80) 422 final;

independent institution and pursued a controversial and contested liberalization and re-regulatory agenda. The Commission's unilateral action precipitated a political dynamic, which had been missing from the 'digital revolution'.[57] The Member States adapted to the new regulatory space created by the Commission to offer a more cooperative approach but they also introduced governance measures that constrained the Commission's discretion in the implementation of harmonized measures.

Obtaining a valid mandate for the Commission requires the Commission to seek political endorsement from the legislature. The Commission is obliged to put forward policy proposals, with little or no guidance on interpreting crucial aspects of its regulatory mandate, particularly to such questions as 'what is the minimum degree of "undistorted competition" required for the internal market?'. Nor does it answer the question of 'how to balance the desire for a "social market" with the requirement of a system of undistorted competition? The absence of guidance in the Treaties on the balance needed or desirable for achieving the wider public interest constitutes one of the basic normative challenges facing the Commission as a regulator.

In 1988, the analyses concerned fundamental Treaty objectives of market creation. But, even in an environment where no real internal market as yet existed, there were many aspects of harmonized regulation where a balance needed to be struck. It is hardly surprising that both the Commission and the Member States sought to influence both the pace and outcomes of harmonization and liberalization. What will become problematic in later phases of regulation will be the Commission's tendency as a regulator to centralize, to micro-manage and to neglect the value of efficiency in achieving regulatory aims while interpreting its regulatory authority. These features will emerge in the analysis in Chapter 5.

Successfully establishing its regulatory authority with Member States represented a significant challenge to the Commission.[58] The process of establishing

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Commission, 'Telecommunications' COM(83) 289 final; Commission, 'Telecommunications - Lines of Action' COM(83) 573 final; Commission, 'Progress Report and Work Done in the field and initial Proposals for an Action Programme' COM(84) 277 final.

[57] See eg D Tapscott and A Carston, *Paradigm Shift: The New Promise of Information Technology* (McGraw-Hill 1992).

[58] That the Commission has refrained from exercising its competition enforcement authority

a regulatory mandate at the EU level recurs periodically. The process is somewhat inverted within the EU: the Commission proposes the terms of harmonized regulation and then negotiates with its legislature. This continues to be an area of contention. It was seen in Chapter 2 above that establishing a valid regulatory mandate is only the first step in creating a defensible claim to normative regulatory legitimacy. The next criterion of governance analyzed against the early governance practices is expertise which, in telecommunications, plays a significant role in constructing legitimacy.

4.8. Second criterion: Expertise

Telecommunications technology and its use evolved rapidly and continue to do so.[59] The Commission possessed few resources internally to evaluate technological advances and specific technologies.[60] Input from experts was indispensable. The Commission acquired expertise by creating advisory bodies, drawn from national telecommunications ministerial experts, rather than representatives of national

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unilaterally to liberalise other utility sectors perhaps reflects its institutional confidence that it enjoys a broad regulatory authority for such sectors and need only maintain the potential to use such powers within the inter-institutional dynamic as a mechanism of negotiating leverage.

[59] See Ivan Huang, Roc Guo, Harry Xie, and Zhengxiang Wu, 'The Convergence of Information and Communication Technologies Gains Momentum' in S Dutta and B Bilbao-Osorio (eds), *The Global Information Technology Report 2012: Living in a Hyperconnected World, INSEAD, World Economic Forum, Geneva* [p 35] <http://www3.weforum.org/doc/Global_IT_Report_2012.pdf.> accessed 9 January 2013.

[60] This was shown when the Commission sought to generate a single European technical standard for future integrated pan-European networks, an initiative that failed spectacularly, due to the Commission's misreading of the potential for network innovation beyond the copper-based infrastructure. The technical standard concerned related to the Integrated Services Digital Network (ISDN). The working assumption of the Commission services dealing, not with competition but with research in IT, was to merge the transmission of voice, video, data and other network services all the while retaining copper-based networks designed for analogue transmission ('circuit-switched' in engineering terminology). The standard was defined by a technical committee of the ITU (the International Telecommunications Union, an agency of the United Nations) in 1988. See *CCITT Red Book*, vol 4 (1986) 320-25. The Commission took steps to have this standard agreed for the next generation of European public networks. The promotion of this technology formed part of the traditional approach to telecommunications in which the Commission's efforts focused on bringing all relevant European actors in the standardisation process together. Until relatively late in the regulatory cycle, the Commission continued to pursue this approach. See eg Council Resolution 89/C 196/04 of 18 July 1989 on the strengthening of the coordination for the introduction of the Integrated Services Digital Network (ISDN) in the European Community up to 1992 [1989] OJ C196/4; European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on the overall evaluation of a set of guidelines for the development of the Euro-ISDN (Integrated Services Digital Network) as a Trans-European Network (TEN-ISDN), COM(2000) 267 final; and G Fuchs, 'Policy-making in a System of Multi-Level Governance: The Commission of the European Community and the Restructuring of the Telecommunications Sector' (1997) 1 JEPP 177, 179-90.

telecommunications administrations (who still combined regulatory and operational competences).[61] While experts in these groups presumably represented considerable expertise, they generally operated in closed networks, organizing hearings at their discretion, thus significantly reducing the transparency of setting the relevant standards and principles of access. The Commission also established two advisory bodies from the private sector to comment on developments emerging in technology and market changes that could be effected by liberalization.[62] The regulatory governance practices reflect the criterion of expertise, an important value in governance generally, more so in telecommunications.

Working with the internal and unpublished reports of the advisory groups, the Commission prepared the 1987 Green Paper and its 1988 follow-up communication, the latter concluding that the Commission's structural analysis and proposals for reform had been broadly endorsed. That the views of the advisory groups were never subject to public review or comment raises issues of openness which are addressed in relation to due process below. During this period the Commission used expertise opaquely. According to some reports, the Commission worked with the private sector groups to ensure that it received the technology-based pro-competitive market messages it wanted to hear.[63] This manipulation of expertise in the context of a lack of transparency – for information that could be considered neither confidential nor sensitive – undermined the authoritative value of the expertise.[64]

It was seen in Chapter 2 that expertise constituted a major legitimating factor in Majone's model of regulatory legitimacy, together with regulatory independence, in order to achieve robust and defensible regulatory decisions. What Majone's argument does not address – in the telecommunications context – is the aspect of

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[61] Fuchs, ibid 182.

[62] The Information Technology Users Group (INTUG) and the European Communications Technology Users Group (ECTUA).

[63] See Fuchs (n 60) 188.

[64] An example of a particularly problematic aspect of the use of expertise related to the user group created by the Commission for the creation of the Integrated Services Digital Network. This group enjoyed privileged access to the Commission services which in turn used their views to formulate European technical standards for European-wide deployment of network technology that failed to happen. The Commission's unsuccessful use of expertise for a pre-determined outcome is the antithesis of regulatory legitimacy for a regulator. Both the process and its outcomes are contestable and undermined the legitimacy of its policy decisions. See C Turner, *Trans-European Telecommunications Networks: The Challenge for European Industrial Policy* (Routledge 1997) 65-80.

competing values when market conditions are subject to rapid change. When a regulator claims regulatory expertise, it may seek to rely on that criterion rather than justify its decisions and explain how it balanced competing interests to a wider public. Since the wider public had access only to the views as prepared and published by the Commission, it is not possible to determine what spectrum of views was expressed nor how the Commission balanced these.

Expertise can be contested if opinions and technical assessments can be debated. Where there is little public access to the views expressed by experts, selectivity of reporting and emphasis can convey a stronger message than might otherwise be objectively merited. For example, it would have been helpful to an appreciation of the expertise relied upon by the Commission to know whether there were any conflicts of opinion between experts and, if so, of what nature and how these were taken into account; or whether the experts representing national ministries were also reflecting national views. If the its tactics or proposals were controversial, the Commission resorted to having a broad consensus on the substantive content of its policy, while minimizing the controversy with Member States of its unilateral initiative.[65] While the Commission reported broad consensus on its policy programme for telecommunications, access to the comments received by the Commission during the public consultation on the Green Paper (1987) was only available on request.[66]

Different experts may represent different levels of experience, objectivity and credibility. This should affect an appreciation of their analytical independence and thus the normative reliability to be placed on their views. It is also difficult to evaluate expertise in such a context from the point of view of what alternative decisions were available or debated. Impact assessment procedures adopted by the

[65] An example of this appears in the latter part of the follow-up Communication to the 1987 Green Paper in which the Commission explicitly stated its intention to adopt a Commission Directive under Art 90(3) EEC [now art 106(3) TFEU] to de-monopolise the terminal equipment sector. The Communication (dated 9 February 1988) stated 'the Commission will, before end-March of 1988, issue a Directive under art 90 (3) regarding the liberalisation of the terminal equipment market'. The Communication announced a further directive: 'The progressive opening of telecommunications services from 1989 onwards and the ...separation of operational and regulatory functions will be dealt with by a Commission Directive to be presented before mid-1988 and to be adopted before end-1988. [emphasis in original]'. See COM(1988) 48 final, 22.
[66] ibid 11.

Commission in 2002 were intended in part to address this deficiency.[67] I return to this issue in Chapter 6 below. The Commission used expertise that it had identified, controlled and interpreted to assert its authority under the Treaty to determine what constituted the public interest within the meaning of the principles and aims of the EEC Treaty. This allowed it to signal implicitly to those inclined to resist, such as telecommunications administrations, national equipment manufacturers and national ministries that its own expertise and appreciation in this regard were authoritative and valid.

The ONP Directive created a harmonized but skeletal system that required further work and elaboration. That the Commission would have preferred, when adopting implementing measures, to make discretionary use of the expertise of experts with whom it had already established a working relationship evokes the practice of officials engaged in competition policy enforcement. There, considerable confidentiality attaches to the internal deliberations of the Commission and to the consultations with national competition authorities on matters under review. However, from a regulatory governance perspective, confidentiality in the use of regulatory expertise is highly undesirable.

The use of comitology committees in a regulatory space where markets were absent and needed to be created offered the Member States an opportunity to participate in, shape and sometimes control, the process of elaborating the specific measures to which their telecommunications administrations would be subject. In regulatory governance terms, this not only correlates with the criterion of due process, discussed further below, it also offered the addressees of regulatory measures an opportunity to contribute to the formulation of regulatory norms. Comitology committees create their own problems of regulatory governance.[68]

It will be recalled from Chapter 2 that Scharpf contested the normative value of expertise within a system of positive economic regulation that went beyond a minimalist standard. His view was based on the premise, exactly contrary to that of Majone's, that economic regulation, even by experts, carries distributional

[67] Commission, 'Impact Assessment' COM(2002) 276 final.
[68] The present research is addressed to regulatory processes of policy development. For analysis of the legitimacy of comitology procedures, see M Rhinard, 'The Democratic Legitimacy of the European Committee System' (2002) 15 Governance 210.

consequences that are political in nature. Thus, such regulation should be embedded within a political process that has some form of *democratic* legitimacy.[69] Without a definition or criteria to determine unacceptably distributional regulation, the Scharpfian analysis remains largely a political critique rather than a framing for empirical regulatory governance analysis. Much regulation at the EU level goes beyond Scharpf's limitative standard.[70] Both Majone and Scharpf's theories concur with the narrow premise of a necessity for expertise in market creation and re-regulation in the European context. Such re-regulation was required in order to create a more unified market space than previously. Although the Commission lacked technical skills, it possessed sufficient expertise in other dimensions, related to the institutional, legal and economic dimensions of needed regulation. For example, communications from the early 1980s, even with corporatist industrial policy approach to the sector, nonetheless clearly reflected an understanding of the potential of the technology for market disruption.[71] The Commission understood at an institutional level that mere discourse was insufficient to induce the Member States to adopt the type of measures that were needed to effect the regulatory changes needed to create conditions for competitive market access and entry.

4.9. The Importance of Legal Expertise

The Commission's legal expertise was reflected in its ability to combine an economic appreciation of the technology with a willingness ambitiously to use the provisions of the Treaty to overturn a pre-existing interpretative consensus. The quality of legal expertise within the Commission represents a particularly important value of regulatory governance at this time. The strategy of unilateral liberalization was highly risky in political terms, as was borne out by subsequent challenges. The single precedent of the Court, finding European competition provisions applicable to

[69] Scharpf based this analysis on 'output legitimacy' which he argued is sufficient to justify the use of EU-type processes and institutions in order to resolve common problems. But output legitimacy is more limited in its 'substantive reach' and 'more demanding' institutionally. F Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) 11-12.

[70] For a sceptical, if not cynical, view of the absence of meaningful limits on EU competences, see S Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal* 827.

[71] See eg Commission, 'Faced with the Challenge of New Information Technologies: A Community Response' COM(79) 650 final; Commission, 'Telecommunications: Communication from the Commission to the Council' COM(83) 329 final.

telecommunications in some instances, could not be directly relied upon.[72] But an important principle was established and subsequently applied: a statutory monopoly engaging in activities of an economic nature constitutes an undertaking within the meaning of the competition rules.

What the Court had not established was the proposition that the existence of monopoly rights could themselves constitute an infringement of the principles of Article 106(1) and (2) TFEU.[73] Yet this proposition was the basis for the adoption of the Terminal Equipment Directive. In what now seems utterly defensible, the Commission newly reasoned that exclusive rights prevented the development of Community trade and impacted negatively upon cross-border trade, violating the Treaty. The Commission's extrapolations from the narrower holding were subsequently vindicated by the Court of Justice, but were legally uncertain and politically controversial at the time. It was also legally uncertain that the Commission's Treaty powers under what is now Article 106(3) TFEU extended to the adoption of a *legislative* measure in which national statutory rights were nullified. Such powers were politically sensitive.[74] If upheld, the Commission would have the authority to repeal national, democratically adopted, laws, touching upon the constitutional relationship between the Commission, Member States, governments and national legal entities. The Commission's single previous use of the

[72] The Court established in 1985 that three propositions were pertinent to the exercise of the Commission's competition authority: (1) that a national telecommunications monopoly is subject to the obligations imposed by Community competition rules when it engages in a business activity in which the undertaking itself determines its contractual terms; (2) that the application of Community competition rules to a State-owned monopoly did not infringe the principle that the Treaty shall in no way prejudice the rules in Member States governing property ownership [art 345 TFEU]; and (3) that the application of Community competition rules to a statutory monopoly is not incompatible with its status as a monopoly. Case 41/83, *Italian Republic v Commission of the European Communities* [1985] ECR 873, paras 18, 20, 22, 48.

[73] The current provisions read as follows: '1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in art 18 and arts 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.'

[74] The Commission's initial use of the power to adopt a directive requiring disclosure of financial information between Member States and public undertakings was challenged by France, Italy and the UK with supporting interventions by the Netherlands and Germany. See Joined Cases 188 to 190/80, *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* [1982] ECR 2545.

relevant provision had not touched upon or affected the validity of national legal rights.[75]

The Commission's reliance upon narrow legal precedents to liberalize a sector with strong and historic national statutory rights, associated with a high degree of national interest, highlighted the Commission's ability to extract the implications of narrow holdings and apply its legal analysis to a broader legal context using legal inferences based on Treaty principles and textual exegesis. This reflected considerable institutional and legal expertise within the Commission. Such legally innovative and interpretive expertise underpinned the policy unilaterally to abolish exclusive rights but this was only part of its regulatory strategy. Positive integration measures would also be needed which required sound economic expertise.

4.10. The Importance of Economic Expertise

Economic regulatory expertise enables an appreciation of the level at which regulation needs to intervene and what types of measure are needed to correct a problem or to remove a barrier to trade. A harmonized norm that maximizes the potential for market access must be developed. With sub-optimal norms, over-regulation or under-regulation takes place, the effect of which is to skew regulatory outcomes and processes by reference to what is desirable or what is aspired to.

The Commission's initial approach to the rules for economic regulation was minimalist, covering two categories that related to (1) conditions for access, and their exceptions;[76] and (2) harmonized commercial terms and conditions of access by market entrants to networks and services, reflecting four general principles applicable to all trading activities.[77] The approach to market access regulation attempted to frame the legislative rules so as to avoid complexity, legalism and lack

[75] The Directive required Member States to keep available for five years information concerning public funds made available by public authorities to public undertakings. The intention was to facilitate application of State aid rules.

[76] These were based on requirements that could be imposed as a condition for access, meaning technical rules to ensure network integrity, data security and protection, and inter-operability features that allowed exceptions to the principle of market access. Council Directive 90/387/EEC (n 24) art 3(2).

[77] The legislative text defining the economic market access principles provided that open network provision conditions must comply with a number of basic principles, namely that: they must be based on objective criteria; they must be transparent and published in an appropriate manner; they must guarantee equality of access; and they must be non-discriminatory, in accordance with Community law. See ONP Directive, art 3(1).

of flexibility.[78] Inevitably, most of the detailed work of applying the principles and exceptions fell to the implementation phase. The economic and technical aspects of expertise in policy development were difficult to separate, especially where access to the views of external expertise relied upon was not available. Once market creation is no longer the primary focus of policy analysis, expertise required for market regulation is clearly discernible and is analyzed in Chapters 5 and 6.

4.11. Efficiency

If the least possible levels of inputs and costs are expended in regulatory execution, a regulator satisfies the criterion of efficiency.[79] When the early period of European telecommunications regulation is considered, some features of the governance process reflect a high level of efficiency, relative to the purely economic regulatory aims defined in the Treaty of Rome. Two Treaty powers were available to the Commission as a positive economic regulator to intervene in national markets: competition enforcement and the adoption of draft legislative measures. No consensus existed that the Commission could intervene in national utility markets. Once this consensus was eroded within Commission circles, the Internal Market completion programme was able to offer a larger framing within a Commission strategy for telecommunications to achieve the aims of the Treaty. The value of efficiency would be highly represented in using Commission de-monopolization directives as a form of negative integration with support from positive integration measures, as the inputs and the costs for carrying out the regulatory agenda.

To have the appropriate level of outcomes at the European level, the actions that needed to be taken were at the national level. Yet the actions at the national level necessarily had to be simultaneous, congruent, and mutually agreed, *to be efficient*. Persuasion in the 1970s and 1980s had failed to achieve the aims of market integration. Using coercive regulatory measures generated a different political environment, which in turn created political momentum for the liberalization and re-regulation strategy that the Commission pursued. From the perspective of efficiency, the Commission's use of its competition policy enforcement powers represented an

[78] See eg R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 37.
[79] ibid 81 n 15.

efficient use of the regulatory opportunities that were available to it and formed the major part of its regulatory strategy of the period.

The second aspect of efficiency during the early phase of telecommunications policy development was interaction between the regulatory strategy for telecommunications and the timetable of the programme to complete the Internal Market. This meant that the regulatory strategy for telecommunications was tied to the creation of a common market by 1992, and drove efficiency to a high value within the regulatory strategy. A strategy for achieving competitive conditions in telecommunications by relying solely on enforcement of competition law would have produced an unpredictable, and insufficiently credible, strategy. Far from suggesting a long-term or credible policy commitment, the use of competition powers *alone* would have produced an incomplete strategy with significant design flaws (and called regulatory expertise into question), or it might have suggested that the strategy was devised more for political purposes than for purposes of regulatory credibility and policy commitment. For example, New Zealand's initial reliance on competition law alone produced an unwieldy explosion of judicial cases and chaotic market outcomes. [80] Similarly, the outcome in the EU of using competition law alone would have required high profile and politically controversial enforcement actions against national undertakings, requiring considerable resources on the part of the Commission to conduct and presumably would have taken years to resolve. Thus, completion of the single market by 1992 introduced a time criterion into telecommunications that facilitated a rapid adoption of positive regulation creating a realistic prospect of achieving a common market in telecommunications by 1992.

A final aspect of efficiency relates to the redistributive effects of economic regulation. Market regulation causes redistribution effects and creates winners and losers. Analysis of regulatory governance in policy design cannot entirely avoid non-economic factors. Any assessment of the fairness of distributional outcomes will in part be determined by the pre-existing distribution of wealth in the market and

[80] Among the industrialised countries in the world, very few attempts were made to achieve competitive liberalization in telecommunications using the regulatory strategy of competition law alone. When tried, regulatory failure occurred which was followed by resort to the kind of mixed strategy approach used by the Commission. See eg RJ Ahdar, 'Battles in New Zealand's Deregulated Telecommunications Industry' (1995) 23/2 *Australian Business Law Review* 77; P Spiller and C Cardilli, 'The Frontier of Telecommunications Regulation: Small Countries Leading the Pack' (1997) 11/7 *Journal of Economic Perspectives* 127.

society generally.[81] This linkage affects the normative value of efficiency since the concept of efficient regulation is linked to market outcomes by reference to what distribution of wealth and income existed prior to regulation. The primary 'losers' in the process of liberalization and deregulation were the national incumbents and the equipment manufacturers that supplied them, yet even the latter might have regarded a larger market as a price worth paying for liberalization.

State-owned incumbents were 'losers' in the sense that they were confronted with competition in newly emerging 'added-value' markets. Nonetheless, the monopoly on voice telephony, and thus the source of approximately 90% of the incumbents' revenue, continued until 1998. At the same time, the incumbents could compete in markets other than their own national markets to offer cross-border services. Even as 'losers', they enjoyed potentially compensatory gains. The State treasuries may have been 'losers' by reference to the downward pressure that competition could exert on market prices for 'added-value' services and for terminal and infrastructure equipment. However, allowing IT technology to be deployed widely and competitively would normally be expected to produce significant macro-economic effects thus growing the national economies of the States. Economic growth would correlate with a higher level of tax revenue in consequence, in addition to the additional beneficial effect on the standard of living. In theory, even national governments and incumbents could benefit in terms of allocated efficiency from liberalization.

In terms of competition policy, the inputs and costs of the early policy seem commensurate with the aims. The efficiency value for the initial positive integration measures to be adopted was high. It was part of a coherent regulatory strategy in which *ex ante* regulation was ancillary but necessary to ensure the effectiveness of the competition policy component of the strategy, so that a more powerful economic driver, that of market forces, could be deployed throughout telecommunications markets to achieve a single market by 1992. Positive regulation was needed to establish proxy conditions of competition allowing market entrants to acquire market share of their own and become competitive. Once the liberalized markets were

[81] C Veljanovski, 'Economic Approaches to Regulation' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010) 23.

sufficiently competitive, in theory the need for positive regulation would diminish and ultimately disappear.

The Commission used positive regulation primarily to complement the role of competition policy and not as an alternative to achieving competitive markets. The Green Paper and other communications of the period systematically reiterated the competitive potential of the telecommunications markets once liberalized. Efficiency at this stage therefore strongly underpinned a conclusion of legitimate use of Treaty powers to remove national barriers to cross-border commerce. Efficiency can also be ascribed to the Commission as a positive regulator, as the legislation and associated rules were conceptualized as being temporary, flexible and minimalist.

4.12. Procedural Due Process

No meaningful difference in regulatory governance emerges between competition policy enforcement and positive regulatory development. The treatment of meetings and discussions is one example. Rule-setting activities were conducted in one of two ways, either by the Commission meeting with national telecommunications experts in private, or meetings were convened directly by the ad hoc advisory groups. The Commission's reports referred to these meetings as 'hearings' with stakeholders, but did not mention 'public hearings', a fact that would likely have been mentioned.[82]

The narrative reporting on the work with the advisory group and the hearings with stakeholders implied that, while expertise was necessary to the exercise of regulatory authority, the transparency of the procedures used in rule-setting activities need only meet a minimal standard effectively analogous to that provided in competition policy. This strongly contrasts with a highly interactive, fact-based, procedure-oriented rule-setting practice that characterizes US federal agencies' regulatory practices.[83]

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[82] For example, reporting on its own public consultation in 1988, the Commission noted that the Green Paper consultation was the 'very first time in the Community that an in-depth broadly based discussion between all actors involved in the future of the sector has taken place'. COM(88) 48 final, 11.

[83] All information used by the regulator in a rule-setting procedure must be publicly available in the US. If a federal agency's decision relies on considerations or factual elements that are not in the public record that provides significant grounds for judicial reversal. See Administrative Procedure Act, 5 USC s 556, s 556(d), s 557 and s706(a)(2). See generally D Hall, *Administrative Law Bureaucracy in a Democracy* (4th edn, Pearson 2009).

The development of provisions for positive harmonization was also flawed. Initial rule-defining activities were carried out behind closed doors between the Commission and an ad hoc group of experts, who were never identified. That is not to suggest that the norms agreed were flawed. But normative regulatory governance requires that the means through which such norms are laid down must be seen to be open and transparent. The initial practices of the Commission as a positive regulator failed to satisfy that standard. The definition of principles of access might arguably be said to relate to technical areas where expertise and even efficiency are more important than participation. However, the important element of procedural due process in which certain values can be seen to be validated was missing. Discourse is not a substitute for transparent participation in rule-making; the Commission used consultation procedures to establish the proposition that a broad social consensus existed on controversial policies and thereby blurred the boundaries between competition policy enforcement and regulatory practices.

Nowhere does the narrative explain why the governance practices of the negative and positive integration measures were so blurred. The Commission's intention may have been to forestall Member States' resistance. Some language in the Green Paper suggested that different policy options were under consideration based on some important assumptions. The Commission acknowledged, for example, that the use of enforcement procedures under individual Treaty articles to achieve a liberalized *and harmonized* market would be problematic as the reason for engaging in harmonization since:

> If a series of contentious cases and lengthy conflict (which would have to be resolved by the Commission under Articles 52, 59, 85, 86 and 90 of the Treaty [now, respectively arts 49, 56, 101, 102 and 106 TFEU] is to be avoided, the Community will have to develop common principles regarding the general conditions for the provision of the network infrastructure by the Telecommunications Administrations to users and competitive services providers, in particular for trans-frontier provision [emphasis in original].... [84]

Thus, unilateral liberalization of services without agreement on harmonized access terms and conditions would have created a considerably uncertain market

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[84] COM(87) 290 final, 69.

environment, where national regulatory authorities, while still providing telecommunications services, would have set the commercial and technical terms for access by new market entrants, with no binding European norms and standards. The Commission would have been enmeshed in a burdensome series of infringement and enforcement cases. The creation of an Internal Market in telecommunications by 1992, or even 1998, would hardly have been realistic in such circumstances.

The Commission explicitly mentioned both negative and positive *legislative* integration measures but neglected to specify what its intentions were:

> The transition towards a Community-wide competitive services market could therefore be substantially accelerated by Community Directives on Open Network Provision (ONP), based on Articles 100A [art 114 TFEU] and 90(3) [art 106(3) TFEU] respectively.[85]

Both Council and Commission measures would be needed but it was unclear what the content, scope and role of these would be.[86]

Regulatory procedures during this period suggested that the consultative procedures were meant to convey the impression that a self-contained and complete regulatory policy had been developed which simply required endorsement and little political input, or 'rubber stamping'. This comes across notably in the Green Paper's description of the access conditions that would need to be laid down in European harmonization directives. A typical green paper will discuss alternatives along with the advantages and disadvantages of a possible solution, inviting comments to refine the policy thinking. This 'Green Paper' extensively prescribed the access conditions to be defined, harmonized and elaborated.[87]

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[85] ibid.

[86] The 'hidden bombshell' in this narrative was the reference to art 90(3) EEC [art 106(3) TFEU] with no clarity as to its specific nature (ie decision, directive or recommendation), scope, addressees, or provisions.

[87] Appearing in the narrative of the Green Paper, and implicitly resulting from the internal reflections between the Commission and the advisory groups, was an identification of the scope of measures that harmonized access provisions would need to cover. These related to harmonized conditions for three network 'layers' involved in the use of the telephony network by new entrants. These were: (1) technical interfaces, ie specifications of facilities and mandatory standards, including the conditions under which radio frequencies needed to be made available; (2) tariff principles, in particular separate tariffing ('unbundling') of 'bearer' [meaning mere carriage or transmission services] and 'value-added' capabilities; and (3) restrictions of use which could be imposed because a particular service had not yet been liberalised. But any such restrictions for the third 'layer' would have to be 'reviewed' according to the Green Paper, 'within given time intervals'. Since the only service excluded from the scope of future harmonisation in the Framework Directive was voice telephony, in practice this constituted only one class of service. See COM(87) 290 final, 69-70.

The true purpose of the Green Paper was revealed in the report on the consultation:

> [T]he fundamental purpose of the measures [the regulatory proposals appearing in the Green Paper] is therefore to set off a dynamic process that will give the political, economic and social actors involved *a better understanding of their own interests* and will optimize their activities in the construction of the Community. [emphasis added][88]

At this early stage of telecommunications policy development, the Commission used consultative procedures to facilitate a wider understanding, and expected acceptance of its policies and proposals. The intention in creating a debate and appealing for comments was to ensure that the dialectic process would conclude with recognition on the part of *political, economic and social actors* of the rightness of the Commission's proposals *in relation to their own interests.* The Commission seemed to consider this as the main purpose of public consultation, foreshadowing the view in the Governance White Paper of 2001 - where public consultations were characterized as a medium of education and persuasion for those who have not yet appreciated that the European policies are actually in their own interest when properly understood - and not a means for determining the public's views on possible policies.[89]

That the Commission expected to retain a close working arrangement with the advisory group used to develop the initial proposal for harmonization, that the Commission would determine the proposals resulting from their work that would be submitted to further public consultation, and that the results of the Commission's appreciation of the comments received would be used to prepare and submit a legislative proposal to the Council for endorsement by the Member States reflect a regulator free to disregard opinion with which it disagreed.[90] The Commission perhaps only inadvertently revealed its thinking here. By spelling out that it and the

[88] COM(88) 48 final, 10.
[89] An interesting Freudian slip appeared in the follow-up communication to the Green Paper that implied the Commission's perception of a binary breakdown of liberalisation views. Reporting on the divergence of opinion received in the consultation on some of the positions defended in the Green Paper, the Commission noted that the views received, with respect to its suggestion that network infrastructure should continue to be subject to a national monopoly: 'the acceptance of the continuation of exclusive provision for network infrastructure...has met acceptance in most comments while receiving some criticism *from both sides*'. [emphasis added]. COM (88) 48 final, 13.
[90] COM(88) 48 final, 18-19.

advisory group would develop the conditions for open access and for technical requirements such as network security, submit these to public consultation and thereafter complete all of the necessary work by the end of 1989, it implied that the legislative process could be expedited.

It should be recalled that the Commission had firmly anchored the telecommunications agenda into the overall programme to complete the single market by 1992. This is revealed by reading together a number of different comments in the Communication. On the conditions for access, the Communication stated 'In the meantime [ie 1988, post-consultation and pre-legislative proposal], the [advisory group] has started to define the general approach to the concept [of the general requirements for use of the network]. In order to allow timely input to the Community-wide definition of fair access and usage conditions, it is suggested to concentrate on those issues most critical to provide competitive services and a competitive market environment and to work according to a stringent time schedule...'[91] The stringent timetable proposed that all of the work that needed to be done to analyze and define the conditions for access would be completed by mid-1989.[92] The Commission clearly expected, in 1988, that all services other than voice telephony would be rapidly liberalized but that even the 'cash cow' of voice was not immune from future liberalization: 'By 1st January 1992, any remaining exclusive provision of services will have to be reviewed...'[93] As noted above, the legislative process did not complete until 1990 and the ONP Directive once adopted changed the dynamic by precluding any automaticity of liberalization and also introduced time lags into the process of liberalization, as it was by then legislatively tied to harmonization. While the discourse of the need to achieve a general consensus via public consultation procedures among all concerned ('including users, industry and potential service providers'[94]) seemed to be grounded in notions of transparency and access by the wider public to rule-setting, it more likely was intended, but failed, to operate as a 'shield' with which to deflect the resistance of the Member States to the momentum of forthcoming liberalization measures.

[91] ibid.
[92] COM(88) 48 final, 17.
[93] ibid 17.
[94] ibid 19.

The Communications issued by the Commission during the initial policy phase repeatedly referred to a 'broad consensus' in civic society that endorsed the policy that the Commission pursued in telecommunications.[95] There is no record of the discussions with Member States, national Telecommunications Administrations and ministry experts, other than those filtered through the Commission's pronouncements, which were used instrumentally to support its regulatory strategy. Whatever the views expressed in private meetings, the Commission constructed a narrative of consensus.

The Green Paper of 1987 effected a compression of several stages of regulatory policy when compared to national regulators. The Commission defined and defended its own policy mandate and identified the scope of liberalization and regulation.[96] What it did not do was to ensure transparency in respect of the next regulatory steps that would follow, relative to the Commission Directive, while lauding itself for the innovative use of public consultation procedures.[97] Yet the Green Paper revealed that the Commission had spoken with some Member States about the measures under consideration.[98] Member States would not necessarily have understood the equivocal language relating to the use of Treaty powers as announcing an intention unilaterally to act.[99]

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[95] For example, in the 1988 report of the Green Paper consultation, the Commission noted 'the [consultation] process has proved that, while respecting different national situations and perceptions, a broad consensus in this field can be developed in the Community'. ibid 11; also that there was 'a broad consensus regarding the full liberalisation of the terminal equipment market' and that there was 'a broad consensus on the liberalisation of value-added services'; and 'full endorsement of the separation of regulatory and operational responsibilities' and 'strong support...to maintain or create Community-wide standards' and 'general acceptance of the need to apply the general rules of competition law to the operational activities of both [incumbents] and other private providers' and 'general support for existing Community programmes...aimed at strengthening the long-term convergence and integrity of the network infrastructure of the Community'. ibid 12-13.

[96] For example, the Green Paper stated '"reserved services" are defined as services reserved for exclusive provision by the Telecommunications Administrations. Reserved services must be narrowly defined, in order to avoid restrictions or distortions of competition. They must be provided on a universal basis. "Competitive services" would include all other services, in particular "value-added services"'. See COM(87) 290 final, 67.

[97] Reporting on its own public consultation in 1988, the Commission noted that the consultation on the Green Paper was the 'very first time in the Community that an in-depth broadly based discussion between all actors involved in the future of the sector has taken place'. COM(88) 48 final, 11.

[98] Mention is made of the UK, the Netherlands and Germany and their respective policy preferences for avoiding 'cream-skimming' activities on liberalized infrastructure, as methodologies to safeguard the financial viability of the Telecommunications Administrations. COM(87) 290 final, 75.

[99] In the 1987 Green Paper, the Commission noted, conditionally, that is, using 'could' in the following statement: 'The transition towards a Community-wide competitive services market *could* therefore be substantially accelerated by Community Directives on Open Network Provision (ONP),

Chapter 2 above showed that due process can significantly enhance or reduce the normative legitimacy of a positive regulator. Because of the adjunct nature of the role of positive integration in the initial phase of telecommunications policy, the administrative procedures used by the Commission were largely those of an antitrust authority, and less the administrative procedures of a purely regulatory authority. Differences between these two types of authority are reflected in the different values that need to be served by the administrative procedures used in the adoption of definitive enforcement decisions for competition powers and the adoption of draft legislative regulatory measures.

The values of openness, transparency and procedural due process require that formal administrative procedures contribute to legal, social, economic, and any other values intended to be served by the regulation. The procedures should ensure that these values can be validated. The Commission's initial approach to due process reflected an imperfect awareness of the desirability of transparency, particularly in relation to the intended recipients of its most potent de-regulatory measure. The intention to adopt liberalization Directives under Article 106(3) TFEU should have been addressed more specifically to the Member States and national incumbents and not downplayed in the narrative.

The normativity of procedural due process in regulatory governance lies in its value as a substitute for the mechanisms of accountability associated with democratic political processes.[100] The association of due process with accountability is strong. The importance of procedural due process to a regulator's legitimacy is linked to an ability to control the regulatory process in terms that are meaningful to democratic values. When procedural due process creates a positive association with accountability, regulatory legitimacy is enhanced. Thus, its legitimacy is enhanced when a regulator conducts regulatory practices according to normative standards of transparency and accessibility meaning that public participation in transparent and decision-making and rule-making procedures are accessible.

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based on Articles 100(A) [now art 114 TFEU] *and 90(3)* [now art 106 TFEU] for technical specifications and network access respectively.' The Green Paper laid down three conditions for harmonised access, of which two were technical aspects. Having stated these three conditions, the Green Paper *made no further statement as to the use of Community legal instruments*. ibid 69.

[100] The next section addresses accountability.

The discourse and procedures of the Commission reflected a broad participation to validate its policy agenda but only privileged access to specific regulatory norms. The latter were considered in closed procedures, accessible only to those who were invited by the Commission or to representatives of the Member States. As a benchmark for constituting a legitimating factor in the regulatory process, such procedures lack considerable force. This analysis highlights the dynamic nature of regulatory legitimacy, the way in which specific circumstances and context can affect a legitimacy analysis, which is a phenomenon of both national and supranational regulators. Legitimacy is never definitive and is always a matter of degree.

4.13. Accountability

It will be recalled from national models examined in Chapter 2 that accountability involves regulatory oversight but that mechanisms of accountability could in practice undermine the level of independence needed to carry out a regulatory mandate effectively. At the market-creation stage of European integration, the value of regulatory independence was highly salient to the success of the regulatory strategy.

Accountability can be controversial. In exercising its direct Treaty enforcement powers, the Commission is held to account by the institution to which it is answerable in Treaty terms, the Court of Justice. In terms of regulatory authority, however, the Commission's rendering of account is primarily self-defined, such as its annual competition reports, the general reports of the activities of the European Communities and numerous communications, all of which are drawn up and published by the Commission itself.[101] Such practices are laudable but no procedure exists for any institution or body to review and evaluate such reports.[102] An

[101] As an example of the annual reports on telecommunications policy see <http://ec.europa.eu/information_society/policy/ecomm/library/communications_reports/index_en.htm> accessed 15 January 2013.

[102] Under the Treaties, the Commission is formally accountable to the Parliament. The EP formally elects the president of the Commission. It also approves the appointment of the Commission as a whole. By adopting a motion of censure, the Parliament can force the Commission as a college to resign. These are significant powers but they do not constitute an accountability relationship with the Commission for the exercise of regulatory powers, nor have the Treaties created another body to perform the role of counterparty to which the Commission must render an account of its regulatory activities, and who has the authority to evaluate the Commission's performance as a regulator. In the UK, for example, the annual reports of national regulators provide regular opportunities for parliamentary scrutiny if desired. See Baldwin and Cave (n 78) 287.

important element of normative regulatory discourse is thus absent.[103] Various mechanisms to enhance accountability of national regulators have been identified and put into practice with variable success.[104]

It is premature to argue at this stage that rigorous mechanisms to control the Commission's exercise of its regulatory powers in the area of telecommunications should have been in place. In the initial phase of liberalization, the value of credibility and therefore of independence outweighed the need for oversight or control of the Commission-as-regulator, where pan-European market creation was the primary policy aim. This conclusion however highlights the tension within the criterion. For what is a regulator accountable, separately from the question to whom is it accountable? Furthermore, in the EU, the Commission's Treaty mandate is not merely to identify measures to 'establish' an internal market but to propose harmonizing measures needed for its 'functioning', a goal which forms only one part of myriad Treaty objectives that have no inbuilt hierarchy.[105]

It is difficult to detect if Member States were at all concerned with accountability in the harmonization process. Nor is straightforward to determine in what capacity, if at all, the Member States could be said to be part of an accountability relationship with the Commission. The Commission is institutionally independent in the EU architectural constellation and therefore it is contentious to attribute a duty on the part of the Commission formally to *account to* the Member States in any sense other than a general civic or political duty, no more than to other actors in wider society.

An examination and analysis of the ways in which the Member States, or even the European Council, and the Commission might be deemed to have a principal-agent relationship is beyond the scope of the present research.[106] The

[103] A national regulator will often be accountable to its national parliament or another elected institution to enhance the democratic value inherent in the criterion of control. ibid 79.
[104] Baldwin and Cave identified several categories of national mechanisms as follows: accountability to parliament; accountability to government; accountability to super-agencies; accountability to judges; and accountability to consumers. ibid 288-305.
[105] Art 114(1) TFEU.
[106] For a discussion of the nature of the relationship between the Commission and Member States as one of agent and principal, see eg H Kassim and A Menon, 'The Principal-Agent Approach and the Study of the European Union: Promise Unfulfilled?' (2003) 10 JEPP 121-39; and T Doleys, 'Member States and the European Commission: Theoretical Insights from the New Economics of Organization' (2003) 7 JEPP 532-53.

legislative adoption procedures of the late 1980s offered little opportunity for understanding, and certainly none for intervention, in legislative negotiations which are not, in any event, the focal point of accountability relationships in regulatory governance. The value of accountability mechanisms in the context of regulatory governance is the creation of opportunities to verify how the public interest represented by the regulatory measures has been satisfied, as well as the extent to which the regulator has successfully balanced the different interests affected. Significantly, it creates a constructive feedback loop that allows regulatory priorities to be re-calibrated or clarified when conflicting regulatory aims cannot easily be reconciled. That no feedback mechanisms were present in the initial policy phase was not fatal, but it will progressively undermine regulatory legitimacy. Furthermore, analysis in Chapters 5 and 6 shows that this criterion continues to be weakly represented where the regulation increasingly consists of positive harmonization measures.

4.14. Conclusion

This chapter has examined the creation of a European telecommunications regulatory policy beginning with competition policy enforcement powers as a primary tool, and moving rapidly into harmonization measures. The picture of the Commission that emerges from the early policy period is that of an intellectually pro-active and politically astute policy actor, building on other Community initiatives, willing to use its Treaty powers contentiously and precedent courageously.

The outcome of the legislative process in 1990 confirmed that the Commission's initial regulatory strategy gave way to the political interests engaged in the legislative negotiation process. The Commission accepted the loss of discretionary control over the elaboration of post-liberalization access conditions. Member States accepted a policy agenda and a timetable shaped but not unilaterally defined by the Commission. That the Commission was prepared to align its discretionary use of competition enforcement powers to the timetable laid down in the Council's harmonization Directive also highlighted the political nature of the regulatory dynamic of the period. This fundamentally political role played by the

Commission nonetheless undercuts Majone's argument that economic regulation should be independent of political influence.

That the Commission's regulatory discourse camouflaged this political policy game in no way disguises how differently from national contexts regulatory strategies were developed and pursued at the European level. The regulatory outcome of the legislative process had the effect of separating two aspects of regulatory strategy. The hybrid policy agenda had been identified by the Commission while the detailed implementation and timetable for implementation became part of the oversight apparatus constructed by the Member States to influence or control the regulatory process post-adoption. This uniquely European approach to regulatory strategy and regulatory governance has been repeated elsewhere.[107]

The normativity of the regulatory governance practices was reasonably robust, given the circumstances that confronted the creation of an internal market in telecommunications. The Commission was willing to use negative and positive integration measures to achieve its policy objectives. Its regulatory governance measures were largely borrowed from those used in competition policy enforcement measures but nonetheless displayed an adequate level of normativity in overall terms, with significant weaknesses in relation to procedural due process, and significant strength in relation to achieving a robust regulatory mandate using high levels of expertise.

Even if the normativity of regulatory governance was acceptable, this in no way suggests that there were no significant problems with the way that the Commission exercised its regulatory powers under the Treaty. A regulator's normative legitimacy depends on a number of considerations related to the satisfaction of important qualitative criteria. That the regulator satisfied some of the criteria acceptably thus allows an argument to be made that, on balance, regulatory legitimacy should be attributed to the regulator's performance during the policy period. However, this does not mean that the regulatory governance of the period

[107] Eg for tobacco products. See Council Directive 2001/37/EC of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L19426. In 2001, the Commission established a comitology register to facilitate access to documents used with comitology committees, as part of the measures prescribed in Council Regulation (EC) 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43. For the register itself, see <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=List.list>.

was without flaws. Legitimacy in regulatory terms is a matter of degree. The next chapter examines the second policy period in which the role of the Commission as regulator-in-chief comes to the fore and the role of regulation to achieve market creation commingles with re-regulation.

Chapter 5

Emerging Governance in Telecommunications, 1990-1999

Introduction

This chapter analyzes telecommunications regulatory governance between 1990 and 1999 before the 'digital revolution' and convergence influenced policy development.[1] It covers the period that achieved full liberalization and re-regulation.[2] During this time, further legislative measures were adopted as foreseen in the ONP Directive.[3] Meanwhile, a trend emerged of relegating competition law largely to support for harmonized measures. The Commission abandoned its emphasis upon autonomous competition policy enforcement, broadly conforming to the role of executory regulator, to discharge the legislative mandate, which was appropriate and legitimate. However, its treatment of the most controversial measure (voice liberalization) suggested a problematic lack of transparency for sensitive measures.

At the same time, the Commission sought and obtained new regulatory authority for further liberalization and harmonization not foreseen in its original strategy of 1987 or in the political consensus of 1990. In pursuing this new mandate, the Commission combined a range of regulatory governance skills with a dimension of political deference. This was problematic in principle because political influence over a regulator's regulatory appreciation is considered to undermine the independence of the regulator. A fuller analysis in context suggests that this concern is more theoretical than real. But a risk for future cycles of review and re-regulation is clear.

The first section of this chapter identifies the principal legislative measures adopted post-1990. I then describe post-1990 administrative procedures, focusing on

[1] Convergence in this instance means connecting computing and other information technologies, media content, and communication networks as the result of the development of digital technologies and popularization of the Internet. It created an economy of activities, products and services that have emerged in the digital media space.

[2] The term re-regulation referred to here is meant to highlight the fact that EU regulation replaces pre-existing national rules. For an in-depth analysis of the various impacts on national legal systems of European internal market regulation, see G Menz, *Varieties of Capitalism and Europeanization: National Response Strategies to the Single European Market* (OUP 2005).

[3] 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 [1990] OJ L192 (ONP Directive).

regulatory governance aspects that I evaluate against the normative standards modeled in Chapter 3 above.

5.1. Regulatory Developments

The picture of the telecommunications sector in the post-1990 period is complex.[4] The regulatory environment became one where the Commission, the EP and the Member States interacted as principal players and a complex new regulatory architecture developed. This regulatory architecture comprised both hard and soft law which was elaborated at EU level, overseen by the Commission, and executed at a national level.[5] As it developed, so also did the broader notion of governance of the sector in relation to the EU institutions, their relationships, and the applicable rules. Important strands of regulatory discourse emerged, one of which de-emphasized competition law and adopted overtly political tones.

The ONP Directive had established a principle of open access to public telecommunications networks and services.[6] It was a 'framework' directive. The Council and EP adopted implementing measures throughout the 1990s, including the Leased Lines Directive,[7] the Voice Telephony Directive,[8] the Interconnection Directive,[9] and the Licensing Directive[10] that made up the '1998 package', so-called

[4] For further analysis and discussion of telecommunications regulation during this period, see eg NT Nicolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors* (Kluwer Law 2006) ch 1. See also W Sauter, *Competition Law and Industrial Policy in the EU* (OUP 1997). Nicolinakos approaches the subject from a competition policy analysis while Sauter uses a primarily industrial policy approach. The present research differs from both by examining policy developments and practices from a regulatory governance perspective.

[5] By the end of twentieth century the Commission proposed to simplify and consolidate rationally. See Commission, 'EU Financial Reporting Strategy: The Way Forward' (Communication) COM (1999) 359 final. I address this in ch 5 below.

[6] But not access to all services. Excluded from the scope were: voice telephony, telex, radiotelephony, paging and satellite services. See Directive 90/388/EC, 'the Services Directive' arts 1(2) and 2. The definition of voice services was very narrowly drawn (art 1). The Directive noted that opening voice services to competition would threaten the financial viability of the national incumbents. See Recital 18.

[7] Council Directive 92/44/EC of 5 June 1992 on the application of open network provision to leased lines [1992] OJ L165/27 (Leased Lines Directive).

[8] Directive 95/62/EC of 13 December 1995 of the European Parliament and of the Council on the application of open network provision (ONP) to voice telephony [1995] OJ L321/6.

[9] Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection and interoperability through operation of the open network provision (ONP) [1997] OJ L199/32.

[10] Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services [1997] OJ L117/15.

for the reason that full liberalization of the sector was agreed for 1998. The package was intended to manage the transition from monopoly to competitive markets. National regulatory authorities were created at national level. The implementing measures charged both Member States and NRAs with enforcement and implementation responsibilities in general terms without benchmarks for assessment of performance or outcomes. It would take another decade before the Commission recognized the value of such assessments as examined in Chapter 6. Although problems arose with inadequate enforcement by national regulators,[11] significant problems with inadequate transposition of EU legislation also existed, as noted in a 1997 report:

> [T]he Commission considers that a number of provisions, contained in various directives which should already be transposed, are still not fully or adequately transposed in a significant number of Member States....
>
> The Commission considers this situation is unacceptable both from a legal and from an economic and competition point of view.....[T]he Commission intends to take action under the infringement procedure.[12]

Most Member States had put appropriate measures into place by 1999 by which time the Commission had undertaken a review as required by the legislation.[13]

Chapter 2 explained that regulatory activities comprise three dimensions or phases, ie standard-setting activities; (behavioral modification via) enforcement activities; and review activities, including information gathering, assessment and revision.[14] In the 1990s, the Commission engaged primarily in setting standards and enforcing them using soft 'reporting' measures and its Treaty powers against Member States. Important strands of regulatory discourse emerged, one of which saw the Commission de-emphasizing competition law as a primary regulatory tool

[11] The Commission summarized the situation in 1997 as follows: 'a number of reports concerning national measures which, although accurately transposing Community law, are not being applied correctly in practice, such as the incomplete liberalization of alternative infrastructure, long delays in granting authorisations, discouraging licensing fees, and interconnection fees leading to anti-competitive price squeezes'. Commission, 'The implementation of the telecommunications regulatory package: first update [Second report]' (Communication) COM (97) 504 final, s 1.5.
[12] ibid s 1.4.
[13] 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 [1997] OJ L295/23, art 2(12).
[14] M Lodge and L Stirton, 'Accountability in the Regulatory State' in R Baldwin, M Cave and M Lodge, *The Oxford Handbook of Regulation* (OUP 2010) 358.

while adopting overtly political tones. In the standard-setting context, the Commission played two roles, to execute an existing mandate and to create a new one, and executed these unevenly. It broadly discharged its regulatory executive mandate that involved adopting draft legislation in accordance with good governance practices, albeit with singular exceptions, notably in relation to voice telephony. As to the second, ie broadening the scope of the original liberalization and harmonization mandate, it adopted a distinctly deferential discourse.

5.2. The Regulatory Executor

The Commission duly prepared proposals for adoption or endorsement by the Council to implement the ONP Directive.[15] [16] For the most part, it did so expertly, efficiently and transparently but the exception was notable. An example of good regulatory practice appeared in the Explanatory Memorandum that accompanied the Commission's 1991 proposal for a Council Recommendation on packet-switched data services, in which the Commission recapitulated the *entirety* of the regulatory procedures leading up to the proposal, including references to ad hoc advisory groups on which it had relied and the roles they played in norm-setting:

> Since the Commission deemed it necessary that the analytical work on public data networks was taken up as soon as possible... [p]reparatory work on the application of ONP principles to public data networks was therefore undertaken by the SOG-T (Senior Officials Group-Telecommunications) and its sub-group GAP (Groupe d'Analyse et de Prévision) as early as 1989 [ie even before adoption of the ONP Directive].
>
> SOG-T arranged for the participation of representatives of European industrial organizations, trade associations, service providers, telecommunications users, and telecommunications in general.... [P]ublic comments on the proposals of GAP were invited by notice in the Official

[15] See eg, Commission, 'Proposal for a Council Recommendation on the harmonlsed provision of a minimum set of Packet-Switched Data Services In accordance with Open Network Provision (ONP) principles' COM (91) 208 final; Commission, 'Proposal for a Council Directive on the application of open network provision to leased lines' COM(91) 30 final [1991] OJ C58/10; Commission, 'Proposal for a Council Directive on the application of open network provision (ONP) to voice telephony' COM(92) 247 final.

[16] The ONP Directive additionally created some technical standard-setting prerogatives as part of the Commission's regulatory role. For example, the Commission alone was authorized to create standardization mandates for European harmonization bodies such as the European Committee for Telecommunications Regulatory Affairs. ONP Directive, art 4(4).

> Journal dated 6 April 1990[17] and two fora were organized in March and October 1989 for public discussion of the proposals.
>
> Subsequently, a draft of the proposal for a recommendation was discussed with the ONP [comitology] Committee.
>
> The present proposal...takes into account the results of a) the analysis of the GAP report; b) the comments received from interested parties in the course of the public comment process, and c) the comments received from the ONP committee.[18]

The Commission explained its recourse to expertise, to public consultations, to the views of Member States and even indirectly made reference to the notion of efficiency by recalling its own self-defined need for rapid regulatory action in the area. Why the speed of action was not a problem here related to the efficiency value of engendering a liberalized telecommunications marketplace as quickly as possible. Delay in de-regulating sectors with high levels of dynamism translates into a slower transformation of monopolized markets into competitive ones. Here the Commission acting with speed was a positive factor of efficiency, but the Council's legislative process delayed adoption of harmonization measures and introduced a slower timeframe than envisaged by the Commission.

The proposal for the liberalization of voice telephony, which was the last to be agreed and the most contentious, lacked transparency, openness, and accessibility. The Commission followed the procedures laid down in the ONP Directive and submitted a detailed analysis to the advisory committee. The Commission duly noted in its proposal that the advisory committee's opinion was reflected in an amended version of its analysis and that this had been published for comment.[19] However, in a distinct departure from recapitulating the views received and how they impacted upon the outcome, the comments received were described and dismissed in the space of one paragraph:

> A number of comments called for additional features to be included in the proposed directive; others were concerned about over-regulation, and in particular that the obligations proposed should be in proportion to the desired effects. Balancing these submissions, the Commission took the

[17] Commission, 'Announcement on the availability of the report on ONP for public data networks — Invitation for public comments' [1990] OJ C88/3.
[18] COM (91) 208 final, 4-5.
[19] COM (92) 247 final, 8.

> view that any over-regulation which placed an excessive burden on the sector and which could result in an imbalance in competitive conditions had to be avoided. While appreciating the calls for further provisions, it was decided not to extend the proposed directive beyond the minimum provisions originally contained in the Analysis Report.[20]

What is noteworthy in the context of executing a regulatory mandate is how thoroughly the Commission described the basis for one early proposal, while minimizing the opinions that it had received on its most controversial proposal (voice liberalization), which should have received a higher standard of defensibility. I analyze this differentiation below.

5.3. New Authority to Liberalize

The Commission sought a new mandate in addition to the regulatory executor role. Its strategy was to orchestrate an inter-institutional dynamic and a public-private discourse, so as to reach consensus on infrastructure liberalization. The Commission adroitly threaded a number of policy strands together, beginning with the Presidency Conclusions of the Corfu summit of June 1994, as the basis for a Commission Action Plan on Europe's Way to the Information Society.[21] This was followed by the publication of two Green Papers.[22]

In these communications, the Commission's new stance as a politically dependent regulator is clear. The question of infrastructure liberalization under Article 106(3) TFEU fell within the interpretative authority of the Commission,[23] yet the Green Paper conceded:

> Opening up telecommunications infrastructure to competition is the key issue which now requires a *political* decision. The High Level Group [composed of national regulatory officials and created by a Council Resolution of 1992 on telecommunications[24]] acknowledged this in its

[20] ibid 9.
[21] Commission, 'Action Plan on Europe's Way to the Information Society' COM (94) 347 final.
[22] The Green Papers were divided into two parts. The first part addressed principles and timetables; the second, the issues to be addressed in future regulatory measures. See Commission, 'Green Paper on the Liberalization of Telecommunications Infrastructure and Cable Television Networks: Part One, Principle and Timetable' COM (94) 440 final (Green Paper pt 1); Commission, 'Green Paper on the Liberalization of Telecommunications Infrastructure and Cable Television Networks, Part II: A Common Approach to the Provision of Infrastructure for Telecommunications in the European Union' COM (94) 682 final (Green Paper pt 2).
[23] The Court had by now endorsed the Commission's power autonomously to adopt directives specifying that Member States have an obligation to abolish monopoly rights. See Case C-202/88 *France v Commission* [1991] ECR I-1233.
[24] Council Resolution of 17 December 1992 on the assessment of the situation in the telecommunications sector [1993] OJ C2/5.

> first recommendation to the Member States to 'accelerate the on-going process of liberalization of the telecoms sector by: opening up to competition infrastructures and services still in the monopoly areas'[emphasis in original].[25]

The Commission willingly submitted the exercise of its Treaty powers to a political consensus. In contrast to 1987, the Commission now presented itself as a regulator responding to invitations from and encouragement by other institutions.[26] The Commission duly obtained the endorsement of the Member States and the EP.[27] The Commission had, as requested,[28] 'worked closely' with the High Level Committee of National Regulatory Authorities.[29] Having obtained its new mandate, the Commission linked it with the '1998 package'. For this exercise, the Commission used recognizable governance tools, political and popular endorsements for regulatory proposals. Public consultation *followed* political endorsement. Section 4 below examines this within a regulatory governance framing.

5.3.1 Enforcement: A Light Touch

The Commission's enforcement powers were broadly limited to a general duty of supervision over Member States who were charged with ensuring transposition.[30] In

[25] Green Paper pt 1, 8.
[26] In Part One of the Green Paper on infrastructure the Commission referred to the call by the EP for the Commission to take action: 'Parliament called on the Commission to adopt as soon as possible the necessary measures to take full advantage of the potential of existing infrastructure of cable networks for telecommunications services and to abolish without delay the existing restrictions in the Member States on the use of cable networks for non-reserved services, and to adopt measures to obtain optimum utilisation of the cross-border telecommunications networks of railway operators and electricity producers'. Green Paper pt 1, 13, quoting a Resolution of the Parliament of 20 April 1993. The Green Paper also referred to comments in the report of the High Level Group on the Information Society (the Bangemann Group).
[27] Council Resolution 93/C213 of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market [1993] OJ C213. European Parliament Resolution of 7 April 1995[1995] OJ C109/310. The 1995 Communication on the Green Paper Consultation reported not just on the very broad set of interests represented in the contributions received, but also on the endorsements of the Economic and Social Committee and the Joint Committee on Telecommunications, as well as on the consultations at national level that were complementary to those at European.COM(95) 158 final, 4.
[28] Council Resolution 94/C 379/03 of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures [1994] OJ C379/03.
[29] COM (95) 158 final, 5.
[30] An example of the legislative approach was: 'Member States shall ensure that the national regulatory authority lays down the procedures whereby it decides, on a case-by-case basis and in the shortest time period, to allow or not telecommunications organizations to take measures such as the refusal to provide a leased line'. Leased Lines Directive, art 8.

the Voice Telephony Directive, NRAs were directly assigned regulatory duties with no additional enforcement powers accorded to the Commission.[31] The Commission's formal enforcement capacity was limited to one primary mode, that of initiating infringement procedures against a Member State for failure to transpose and correctly apply EU legislation.[32] During this period, the Commission interacted more directly with the national representatives in comitology procedures and with Member States in proceedings before the Court. The Commission's institutional engagement with NRAs, its centralization of interpretative application of the rules, and recent creation of a European telecommunications agency, began in the post-2000 period and is examined in Chapter 6.

5.3.2. Assessment and Review

The Commission initially struggled to match its vigorous policy-setting role with a robust assessment role. In an early assessment of the legislation, it identified three regulatory priorities: to seek the full practical application of existing regulatory measures; to clarify the precise scope of some measures; and to pursue the rapid adoption of the implementing proposals then being submitted.[33] While NRAs were singled out in some Member States for not being truly independent, no regulatory follow-up was identified. The effective application of regulatory measures remained the focus until 1999.[34]

One of the most problematic areas of implementation related to tariffs where implementation was clearly failing[35] While the principles of objectivity, transparency and non-discrimination applied to regulated tariffs, the ONP Directive provided only that such tariffs 'must in principle be cost-oriented', meaning that the setting of actual tariffs was outside of the scope of the Directive and squarely within the realm of national prerogatives.[36] Deficiencies in implementation were barely commented

[31] See eg the ONP Directive, arts 4 and 5.
[32] Art 258 TFEU.
[33] COM(93) 159 final, 6.
[34] ibid.
[35] The consultation process confirmed the Commission's perception that the level of charges within the EU exceeded by a considerable degree those elsewhere: 'Almost without exception, users and service providers commented on the high level of charges in the Community, as compared with the price of similar services in North America'. ibid 10.
[36] '...tariffs must be based on objective criteria and especially in the case of services and areas subject to special and exclusive rights must be in principle cost-oriented, on the understanding that the fixing

upon, and remedial action proposed was rather mild.[37] Notwithstanding the problems with implementation, the Communication argued that NRAs should continue to have the main responsibility for implementation at national level.[38] Further examination of progress would follow.[39] The Commission's supervisory role over Member States was mild-mannered. It opted to use the infringement procedure principally for egregious cases. Moreover, infringement procedures could be drawn out, giving Member States a likely year or more before a Court decision on the merits which would only have endorsed the Commission's finding, if successful. Realizing the weaknesses of infringement procedures, the Commission will begin to 'name and shame' Member States in other contexts.[40]

When reporting on the functioning of the regulation in 1999, the Commission understandably wanted to present a picture of regulatory. Regrettably, in the absence of verifiable data, the Commission succumbed to the temptation of presenting estimates as empirical findings and drew conclusions that may or may not have been warranted and which were impossible to contest. For reasons of economy and focus, the foregoing descriptions represent just a sample of the regulatory measures and practices dating from the 1990s. I have selected representative measures and practices that highlight differences and inconsistencies. These will be further analyzed below within the governance framing set out in chapter 3 above.

The chapter has sketched an important period of regulatory transition. The Commission abandoned its earlier strategy of policy autonomy to adopt a more cooperative and deferential attitude towards the Member States and their preferences. The Commission discharged two regulatory roles during this period. It met the executory requirements of the ONP Directive by tabling the legislative measures for

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of the actual tariff level will continue to be the province of national legislation and is not the subject of open network provision conditions'. ONP Directive, annex 2.

[37] 'In summary, there was general support that the Community's efforts to encourage cost-orientation, and therefore tariff rebalancing, were necessary and should continue.' COM(93) 159 final, 11.

[38] ibid 13.

[39] ibid 35.

[40] See the Commission's annual Internal Market Scoreboard documenting the state of Member State transposition of single market Directives, and Commission infringement procedures launched in consequence, beginning in 1997 <http://ec.europa.eu/internal_market/score/index_en.htm> accessed 16 January 2013. Treaty provisions now foresee financial penalties on Member States for failure to fulfil an obligation under the Treaties, such as timely implementation. See art 258 TFEU and art 260 TFEU.

liberalized markets. At the same time, it initiated a new regulatory cycle as a policy designer to enlarge the scope of its mandate.

5.4. Analysis of Regulatory Governance in the 1990s

This section evaluates the telecommunications regulatory governance of the 1990s using the standards identified in chapter 3. These were regulatory mandate, expertise, efficiency, procedural due process, and accountability. The Commission will be seen to be an actor that significantly shaped its mandate, acted as an executor and controlled *ex post* assessments of the legislation. The regulatory governance picture that emerges is one of considerable strengths and weaknesses but which benefits from a robust normative legitimacy largely underpinned by the foundational normativity linked to market creation measures whether negative or positive. The analysis will be less forgiving when evaluating two cycles of policy development and when re-regulation predominates in the next decade, as examined in Chapter 6.

5.4.1. Regulatory Executor

The post-1990 Directives and their implementing measures were intended to manage the transition from monopoly to competitive markets and to create Europe-wide markets where they previously did not exist. The normativity of the regulatory mandate for implementation measures relied on the considerable authority which was conceived within the provisions of the Treaty for achieving a single market.[41] The post-1990 measures can be regarded as a legislative extension of the Treaty mandate for economic integration and a legally necessary application of the legislative mandate.[42] How does it affect the normativity of its regulatory authority that the Commission accepted a compromise date of 1998 rather than 1992 for completing the telecoms single market?[43] And how does it affect regulatory authority for the

[41] The 1957 Treaty of Rome was amended by the Single European Act (SEA) in 1987 which added the legislative procedure for adoption of measures 'for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'(art 100a). The SEA defined the internal market as '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.'

[42] See particularly arts 2 and 3(h) EEC. What these articles meant in terms of economic rights was elaborated in other provisions. For a fuller discussion, see chapter 1 above.

[43] In the 1987 Green Paper, the Commission identified 1992 as the date for completion of the internal market in telecommunications. See COM (87) 290 final, 27, 57, 130, 149. This aim was re-formulated

legislation to have done no more than identify a list of telecommunications services susceptible to harmonization,[44] thus softening the legal effect of legislatively identifying the services to be harmonized? Was the legislative re-formulation problematic in legitimacy terms? An examination of the characteristics of the market, the legal premises for creating the mandate, applying a Scharpfian analysis, would suggest not. Articulating the case within a framing of modern regulatory governance, considerable normative regulatory authority for the approach can be found.

Once the Maastricht Treaty introduced a broader set of regulatory and other aims into the legal system, the choice and form of positive integration measures became more contestable, for reasons seen above. That is not the case here. The use of positive integration measures at supranational level, throughout the 1990s, continued to be premised on the objective of securing basic economic rights that could not otherwise be assured except by harmonization measures. This is underpinned by reference to the nature of the problem, that is, the pre-existing legal, technical and commercial mismatches that gave rise to the need for an explicit regulatory mandate. The regulatory measures adopted directly targeted foundational Treaty objectives.

The justifications for the adoption of positive regulation in a welfare economics framing of regulatory theory offer additional normative support.[45] The geographic separation and the absence of contestability in monopolized markets made liberalization merely a prerequisite to creating a single market. The significant disparity of national regulatory regimes in the Community required a comprehensive regulatory mandate to reconfigure the national markets. It was seen earlier that an expected increase in economic welfare justified the introduction of competition into markets which required the ancillary measures of harmonization for effectiveness. The creation of positive integration measures was essentially a logical extension and

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in the ONP Directive. In annex I, the Directive described the telecommunications services susceptible to harmonised access conditions as 'Areas for which open network provision conditions *may be drawn up*', which considerably softened the legal effect of identifying the services concerned.

[44] For a fuller discussion of the Commission's initial conception of post-legislative harmonization, see chapter 4 above.

[45] See eg, C Veljanovski, 'Economic Approaches to Regulation' in R Baldwin, M Cave and M Lodge, *The Oxford Handbook of Regulation* (OUP 2010) 17-27 and R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 9-11.

legislative expression of a political consensus as to achieving change through legislative action within the remit of the Treaty of Rome as amended.

A Scharpfian analysis of the post-1990 positive integration measures would evaluate the validity of claims for regulatory authority by reference to the existence of a Treaty mandate and by reference to its constitutive effects.[46] A positive integration measure does not innately suffer from impaired legitimacy when compared to a liberalization measure. Some positive integration is a necessary corollary of the process of achieving a desirable level of economic integration.[47] Scharpf acknowledged that some positive integration measures adopted alongside unilateral negative integration could be categorized as '"market-making" [measures to] liberalize hitherto protected, cartelized or *monopolized* national markets....to support the extension of negative integration' [emphasis added].[48] Thus there is an explicit endorsement of positive integration measures even within a narrow reading of the scope of legitimate positive integration provided they constitute market making measures.

For the Commission as a regulator, the conditions surrounding the liberalization and harmonization of telecommunications regulations offered a regulatory 'sweet spot' where major theories of regulation converged. Regulatory authority for the measures required by the ONP Directive can be strongly associated with the Commission's Services Directive. Similarly the authority of the mandate for adoption of positive integration measures was grounded in the rationale found in the Treaty in relation to the establishment of the common market and the resulting public welfare benefits.

The high normativity of creating a market privileges the legitimacy of regulatory actions to achieve it. Yet it will be seen in the next chapter that regulatory measures which are intended to achieve another Treaty aim, that of harmonization for the *functioning* of the internal market, are associated with far less normativity and much greater contestability. Even with a legal mandate underpinned with sanctions,

[46] Recall that Majone's economic theory identified market failure or excessive market power in a market as a justification for a regulatory mandate.
[47] 'While all measures of negative integration should probably be classified as being market-making, measures of positive integration may be either market-making...or market-correcting...' F Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) 45.
[48] ibid 70.

which some have suggested conveys legitimacy automatically to a transnational regulator,[49] it can nonetheless be difficult for the Commission to achieve normative legitimacy for its mandate. The appropriate formulation should be that a legally underpinned mandate creates some, but not a definitive, regulatory legitimacy. That result requires an evaluation of the regulatory governance practices using several normative criteria.

The next section analyzes the extension of the liberalization and regulatory agenda using a different regulatory strategy.

5.4.2. New Mandate for Infrastructure Liberalization

It was noted earlier that public telephony *infrastructure* was excluded from the initial scope of liberalization. In the mid-1990s, the Commission re-considered whether the exclusion was justified. It launched a new regulatory discourse in 1994 explicitly seeking a political mandate for liberalization of the public telephony network.[50] Differently from its approach in the 1987 Green Paper, the Commission did not behave as a 'crusading' initiator of policy. Several Commission communications prepared the ground.[51] Rather than announce a definitive policy stance as previously, with argumentation based on Treaty interpretation and economic and technical considerations, the Commission acknowledged beforehand that a political consensus was needed *before* it pursued any regulatory activities, whether liberalization or harmonization.[52]

The Commission now presented itself *as a regulator/liberalizer seeking political endorsement*. The Commission in 1988 was institutionally willing to exercise its autonomous authority *without explicit political endorsement*. Although it

[49] ibid.
[50] The regulatory strategy included liberalizing and harmonizing integration measures, ie competition policy enforcement and legislative harmonization.
[51] See eg, Commission, 'Towards Europe-wide systems and services: Green Paper on a common approach in the field of satellite communications in the European Community' COM(90) 490 final; Commission, 'Towards the personal communications environment: Green Paper on a common approach in the field of mobile and personal communications in the European Union' COM(94) 145 final (Mobile Green Paper); Commission, 'Communication from the Commission to the Council and the European Parliament on satellite communications: the provision of - and access to - space segment capacity' COM(94) 210 final; COM(94) 347 final.
[52] By 1994, the Commission's discourse reflected political reality: 'Opening up telecommunications infrastructure to competition is the key issue which now requires a *political* decision'. COM(94) 440 final, 8.

remained theoretically possible for it to use Treaty powers autonomously in the mid-1990s to adopt liberalization directives without political agreement, the Commission elected not to do so. Before acting, the Commission achieved consensus both for the exercise of Treaty liberalization powers and for the exercise of regulatory harmonization powers. It conceded that, as a regulator, it was dependent upon political judgment for its mandate, even where independence of Commission action was the mode envisaged by the Treaties. The Commission therefore effectively changed how it undertook its regulatory roles.[53]

The discourse revealed an institutional shift in terms of the Commission's relationship with the Member States. Rather than presenting itself as an institution with independent authority to exercise its own prerogatives, the Commission's practice reflected an evolution in its governance approach. The shift was subtle but nonetheless reflected a regulatory governance architecture in which institutional relationships, practices and norms were in flux and evolving, as was the institutional view of its authority. The Commission's practices reflected a need not only for inter-institutional consensus, but also consensus within the private sector on the scope and timing of a wider liberalization, even when founded on basic Treaty objectives.[54] The Commission waited for an unambiguous consensus to develop before concluding that it had the authority for liberalization and legislative harmonization.

Taking these still-evolving norm-setting activities into consideration, from where did the Commission obtain its regulatory authority for the new remit and what was the normativity of that agenda? The strength of a regulator's authority for regulation has a direct bearing on its legitimacy, that is, on the reasons for which its regulatory activities should be considered appropriate, rather than by subjective standards.[55] In extending its regulatory mandate, the Commission's strategy made no distinction between achieving further liberalization and harmonization, merging them into the same set of regulatory governance practices, effectively minimizing the

[53] The fact that liberalization of other utility sectors in the EU involved *no* Commission liberalization directives is a strong indication of the level of opposition by Member States to such measures.
[54] The Communication linked the Bangemann Report, the Action Plan and the conclusions of the G7 summit, in Brussels in February 1995. It summarised the outcome of the consultation and the G7 summit as: 'Now on the basis of the consensus established through the consultation, it is possible to move forward at a national, Union and global level'. COM(95) 158 final, 1.
[55] See eg, D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 AJIL 596, 612; Baldwin and Cave (n 44) 601-03.

role played by its Treaty powers of enforcement. In a normative framing of regulatory legitimacy, this practice strengthened the regulatory authority of the mandate but weakened its independence as an economic regulator. Thus, Majone's argument that legitimacy in economic regulation must be linked to the regulator's independence (and expertise) is relevant to a conclusion that the Commission undermined its legitimacy by compromising its independence.

However, Scharpf's argument that a regulator's legitimacy is enhanced by the strength of the connection with democratic processes is relevant to a conclusion that the Commission also enhanced its legitimacy by ensuring a broad spectrum of political consensus prior to executing its autonomous powers of enforcement. There is nonetheless a problem that lies in disconnecting the consensual nature of obtaining a regulatory mandate from political actors from the normal democratic processes of electoral corrective feedback but it inheres within the system. There is no democratic step for European citizens to censure or give corrective feedback to political actors as part of the EU policy development process. This consideration highlights a point of dislocation in supranational governance with the controls available within classic regulatory governance theory. It is a weakness of a supranational regulatory system, when framed within a normative governance model that needs to be addressed at some point in the regulatory cycle in other ways than by recourse to democratic mechanisms that are not available.[56] I will return to this in my chapter conclusions and in the concluding chapter.

5.4.3. Expertise

Chapters 2 and 3 showed that expertise can vary in meaning depending on the type of regulation engaged and its purpose.[57] When ex ante market-intervention regulation is based on an economic welfare rationale, as in telecommunications, analytical economic expertise has a particularly strong association with normative regulatory governance and is a major premise of an economic theory of regulation and legitimacy. But when and where is it relevant and who should have it? An evaluation

[56] One such mechanism that has been suggested, but because of limits to the length of the thesis is not explored in this research, is the recently developed theory of global administrative law. This is an area where further research is needed. See in this regard, N Krisch and B Kingsbury, 'Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 EJIL 1; D Esty, 'Good Governance at the Supranational Scale: Globalising Administrative Law' (2006) 115 Yale LJ 1490.
[57] See ch 2 above.

of the use of expertise takes into account the specific regulatory activity concerned set out below.

5.4.4. Measures Required by the ONP Directive

The 1990s legislation required norm-setting to be carried out at the EU level (by Commission with comitology committees), with enforcement at the national level by national authorities, that is, a 'multi-level' system.[58] Under the ONP Directive, the Commission was charged with preparing the implementing legislative measures that were adopted by the Council initially and jointly by the Council and the EP from 1993.[59] The preparation of these measures of detailed application required technical expertise perhaps more than that required for the ONP Directive.[60]

The Commission marshaled the resources needed to prepare the relevant proposals. In some instances, preparatory work began before the adoption of the 1990 Directives.[61] The provisions of the proposals submitted reflected technical and economic expertise. For example, the proposal for packet-switched data services summarized the technical difficulties that prevented intra-Community network interoperability from arising, observed the developments in pan-European services and explained why that was relevant.[62] The proposal for a Council Directive on leased lines provided extensive explanation of the meaning and interpretation of the

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[58] 'Multi-level governance...can be understood as the exercise of authority and the various dimensions of relations across levels of government...' OECD, Directorate for Public Governance and Territorial Development, Regional Development, Multi-Level Governance <http://www.oecd.org/document/11/0,3746,en_2649_34413_36877643_1_1_1_1,00.html> accessed 11 June 2012. See also eg, L Hooghe and G Marks, 'Types of Multi-Level Governance' (2001) 5 European Integration Online Papers <http://eiop.or.at/eiop/pdf/2001-011.pdf> accessed 12 June 2012. For an overview of the development and main issues in the study of multi-level governance, see I Bache and M Flinders, *Multi-level Governance* (OUP 2004).

[59] The Maastricht Treaty entered into force in 1993 and created co-legislative power for the EP.

[60] Annex II of the Directive prescribed a common framework for defining technical interfaces and service features, for defining harmonised supply and usage conditions, and for defining harmonised tariff principles. See ONP Directive, annex II.

[61] See Commission, 'Proposal for a Council Recommendation on the harmonised provision of a minimum set of packet-switched data services in accordance with Open Network Provision (ONP) principles' COM (91) 208 final, 4 and Commission, 'Proposal for a Council Directive on the application of open network provision to leased lines' COM (91) 30 final, 3.

[62] 'The development and availability of international value added services to support the applications required by users is largely dependent on [packet-switched data services] because without such an adequate transeuropean transport service, higher value added services will be difficult to offer to users on a Community wide scale. Such services will flourish if, and only if, a high quality, reasonable priced, ubiquitous transport service is available.' COM (91) 208 final, 3.

principles to be applied.[63] Objectivity as to certain aspects such as technical interfaces as well as flexibility were reflected, an example being the principle of applying transparency in cost accounting:

> ...the Commission proposal foresees the application of sufficiently transparent cost accounting system which allow the enforcement of the basic principles of transparency and cost orientation. The application of appropriate cost accounting systems is aimed at by the introduction of the principle of fully distributed costing which is qualified as a prominent example as a suitable cost accounting principle. In conformity with the principle of subsidiarity, the provisions leave sufficient room for application along the lines of national perspectives.[64]

In terms of the use and application of technical knowledge, the Commission was building upon, if not relying primarily on, the expertise of the same *ad hoc* advisory groups, SOG-T and its sub-group GAP, as used prior to 1987.[65]

But the Commission went beyond the advisory groups. Under the terms of the ONP Directive, the Commission was obliged to conduct a 'detailed analysis' in order to draw up a work programme, and then to consult the advisory committee.[66] The views of the standing committee on non-tariff barriers to trade were also required.[67] This input consisted of technical and commercial information during the formulation of individual measures in application of the ONP Directive. All of these administrative steps were followed by a requirement to consult publicly prior to submitting proposals. This provided the Commission with considerable technical and

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[63] On the principle of cost orientation the proposal stated: 'Member States shall ensure that tariffs for leased lines follow the basic principles of cost orientation and transparency and comply with the provisions of this paragraph: a) Tariffs for leased lines shall be independent of the type of service applications which the users of the leased lines implement; b) Tariffs for leased lines shall normally contain the following elements: - an initial connection charge, based on the average cost in making the leased line connection; [and] - a periodic rental charge, ie a flat rate element; When other tariff elements are applied, these must be transparent and based on objective criteria. c) Tariffs for leased lines apply to the facilities provided between network termination points at which the user has access to the leased lines. For leased lines provided by more than one telecommunications organization, half-circuit tariffs, ie from one network termination point to a hypothetical mid-circuit point, can be applied.....' COM (91) 30 final, 20-21.

[64] COM (91) 30 final, 4.

[65] In two of its proposals, the Commission acknowledged that it had expedited the process of elaborating the implementation measures of the ONP Directive by pro-actively using the expertise of the formerly expert ad hoc advisory groups. See ibid 3 and COM (91) 208 final, 4.

[66] See ONP Directive, art 4(4)(a).

[67] This was the standing committee set up by Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [1983] OJ L109/8.

economic input for drafting the implementation measures, and offered a broad perspective once drafted.

5.4.4.1. Articulation and Balancing as Part of Expertise

Elaborating technical implementation measures clearly required an ability to evaluate the views and recommendations of a range of interests, including those of technical experts. Nonetheless, the Commission failed to articulate and demonstrate where expertise was relevant, and how it was used to develop the standards proposed. This is regrettable but not devastating so long as the use of expertise is demonstrable. Some, but not all, communications adopted by the Commission throughout the 1990s in relation to an extensive range of issues in telecommunications, amply testified to a high level of expertise, both economic and technical. However, the Commission missed opportunities to disentangle any conflicting claims and to show how it had balanced any conflicting interests. Even if there were no such conflicts, it would be better to say so and dispel any doubts.

Showing how different views on economic and social issues had been balanced was sometimes lacking. For example, in the proposal for the Leased Lines Directive, the Commission referred to ad hoc meetings convened by SOG-T with a variety of representatives of industry, trade unions and service providers while public comments on a proposal from an internal advisory group were solicited.[68] The Commission explained how sharply diverging viewpoints on key policy issues had been accommodated in the following terms:

> The comments received supported the need for harmonization of open and efficient access and usage conditions....There were *substantial concerns* with respect to unjustified constraints on the use of leased lines e.g. for interoperability reasons, the potential for discriminatory treatment between the TOs [telecommunications organisations, ie, incumbents] and their competitors, insufficient emphasis on cost orientation in tariff principles and the future availability of state-of-the-art leased lines...[A] draft of the proposal for a directive was discussed with the ONP Committee [a comitology committee]. The present proposal for a Council Directive takes into account the results of a) the GAP analysis report, b) the comments received from interested parties in the course of the public comment process, and c) the comments received

[68] Invitation for Public comments on the GAP proposal ['Proposal by the Analysis and Forecasting Group of SOG-T (GAP) on Open Network Provision (ONP) for Leased Lines in the Community of 11 January 1989]' Notice No 89/C58/04 [1989] OJ C58/5.

> from the ONP Committee. At the same time, it takes account of the general principles which have been laid down in the Directives on competition in the market of telecommunications services and implements the ONP Framework Directive [emphasis added].[69]

This constituted the entirety of the Commission's articulation of how its proposal took account of those *substantial concerns*. The explanation barely reached one page, conveyed no thoroughness of analysis, and lacked any explicit reference to balancing. This is reflected in the comments on cost orientation:

> The Commission proposal foresees the application of sufficiently transparent cost accounting systems which allow the enforcement of the basic principles of transparency and cost orientation. The application of appropriate cost accounting systems is aimed at by the introduction of the principle of fully distributed costing which is qualified as a prominent example of a suitable cost accounting principle. In conformity with the principle of subsidiarity, the provisions leave sufficient room for application along the lines of national perspectives.

The response to concerns about the risk of discrimination, a real and highly anti-competitive risk for new entrants, was to refer to the recitals in the Directive:

> The proposed Directive refers in its recitals to some of the principles resulting from Community law. The operative part then specifies in detail how the Open Network Provision conditions are to be harmonized for the provision of leased lines in accordance with these principles.[70]

As a matter of substantive norms, this offered little legal security. As a matter of expertise, it showed a substantial shortfall of normativity. Not only is it possible to doubt the substantive validity of such a norm, the underlying expertise used in defining the standard is also open to question.

5.4.4.2. A Normative Alternative

None of this establishes that the proposals were necessarily flawed. Viewed impartially, they may have represented a very high level of professional competence and neutrality. An examination of the specific provisions of a proposal by persons who are themselves experts should not be necessary to determine whether and how the expertise contributed or not to a regulator's determination of the relevant norms.

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[69] COM (91) 30 final, 3-4.
[70] ibid 4.

What the narrative did not explain adequately, however, was the manner in which the proposals correlated with the views, comments and advice that it had received and reviewed and how these had been taken into account.

The texts concerned were those that would manage the transition from monopoly to competition in telecommunications. The Commission's narratives largely failed to explain the role that expertise played in the detailed working out of the measures and missed the opportunity to demonstrate the input of an independent expert-led point of view. The relevance and application of expertise in the actual proposals were present by inference, rather than by explicit reference.

When the use of expertise is not made transparent, proposals may be criticized as failing to represent a fair balancing of the interests at stake, or as being tainted with politically or ideologically bias. Majone's major premise that, when economic regulation is carried out by apolitical expert technocrats, no bias is introduced into regulatory determinations and it is not universally shared, as discussed in Chapter 3. Chapter 6 pursues this normative weakness more thoroughly in relation to impact assessment procedures where expertise is a crucial factor. The Commission's shortfall will become even more evident in that context, but the seeds were already present.

The critique from this period does not claim that expertise had *no* role, or even an inadequate one, in the norm-setting processes. Rather, the important value of professional and institutional independence, within a system of delegated authority, should be reflected in the use of expertise. Delegated authority should be exercised appropriately relative to the aims defined in the mandate. In the case of a US federal agency, for example, a decision would be criticized, or even overturned on appeal, if the record did not contain an explicit rationale in which the regulator explained how and why different views had been considered, balanced and taken account of in a final agency determination.

In a technologically dynamic sector such as telecommunications, the complexity of the issues related to technology and economics means that expertise has particular importance for the quality of the norms proposed with a consequent impact on regulatory legitimacy. The Commission often missed the chance to use the normative technocratic value of independent expertise to re-enforce the legitimacy of

the positive integration measures of the ONP Directive. This was less problematic in the 1990s because the measures adopted genuinely began the process of establishing an internal market, and thus enjoyed the higher level of normativity that attaches to an explicit Treaty mandate of market creation. The lack of lessons learned during this period will be reflected in the analysis of regulatory performance of the twenty-first century, and will contrast with the attempt to use modern management techniques of *ex ante* policy analysis. Thus, having broadly done things well, in regulatory governance terms, *before* the watershed of the White Paper on Governance, policy development for the *functioning* of the telecommunications single market will take a normative nose-dive in the next century. This is described in Chapter 6 below.

5.5. Expertise and Liberalized Infrastructure

Rather than focus on Treaty interpretation as done earlier, the opening discourse to launch further liberalization in telecommunications emphasized the macro-economic, pro-growth arguments for further liberalization in a dynamic environment.[71] Having started with claims for pro-growth effects of infrastructure liberalization, Parts One and Two of the Infrastructure Green Paper provided a structured, thorough and authoritative presentation of the context, the political background, and the economic, regulatory and legal issues to be considered, as well as proposals for how to approach them with suggested timetables and implementation measures.[72] An example of analytical conciseness and thoroughness that characterized the Green Paper was:

> ...[H]igh tariffs for and lack of availability of the basic infrastructure over which such liberalised services are operated or provided to third parties have delayed the widespread development of high speed corporate networks in Europe, remote accessing of databases by both business and residential users and the deployment of innovative services (such as telebanking, distance learning, etc.). Additionally the regulatory

[71] 'To compete effectively today, one must have the means to access, to process, manipulate, stock and produce information quickly and effectively...Telecommunications infrastructures will form the fundamental platform upon which Europe's society and economy will depend in the decades to come. ...In a world economy that is increasingly globalised, European firms must be able to compete with their counterparts in other regional economic groupings. By reinforcing their competitiveness European companies will not only be able to retain their position in existing markets, but help ensure that they are well-placed to take advantage of new opportunities and win new markets...Information and communication technologies can make a significant contribution to helping improve productivity, which is essential to the creation of wealth and to competitiveness. By stimulating economic growth, competitiveness contributes to job creation.' COM (94) 440 final, 3.

[72] Pt 1 of the Green Paper had 39 pages; pt 2 extended to 166 pages including three annexes.

> restrictions in many Member Sates prevent the use of alternative infrastructure operated by third parties (such as the cable TV networks and networks owned by energy companies, railways, or motorways to meet their internal communications needs). Many large companies, employers groups and user associations stressed that European business is less competitive, that innovative services are more slowly deployed, and that the creation and development of pan-European networks and services is [sic] being delayed as a result.[73]

Having carried out three studies, the Commission reported that the 'basic findings' of the studies emphasized the potential for responding to concerns expressed about delays in service offerings for liberalized services and the slower than expected pace of innovation.[74] Furthermore, the studies detailed the structural anti-competitive barriers resulting from exclusive infrastructure provision and 'indicated' that the growth of liberalized services would be promoted by allowing additional infrastructure to enter the market for carriage.[75] This reasoning was clear.

Ten studies were carried out and cited by the Commission in relation to the Infrastructure Green Paper.[76] The Commission also referred to OCED work.[77] Throughout the Green Paper, there were numerous references to the supporting arguments found in external studies:

> The basic findings of the studies undertaken emphasise the potential role for cable TV networks and alternative infrastructure networks in meeting the concerns raised about the slower pace of innovation and delayed role-out of liberalised services.....The studies indicate that the growth of liberalised services would be promoted by widening the supply of infrastructures.[78]

> Studies carried out for the Commission indicate that the removal of current restrictions on infrastructure within satellite networks could stimulate use of satellite communications in the EU within corporate networks and closed user groups, without having a serious impact on the financial position of the TOs [Telecommunications Organisations].[79]

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[73] COM(94) 440 final, 12.
[74] ibid 14-15.
[75] The Communication also cited the studies and research done within the Member States on the issue which lent support to the arguments for rapid and selective liberalization of infrastructure such as electricity, railway, and cable TV networks. ibid 13-15.
[76] COM(94) 682 final, annex 2.
[77] ibid 50.
[78] COM(94) 440 final, 15.
[79] ibid 20.

> The studies suggest that liberalization could be achieved without having a major financial impact on the provision of universal service....[80]

The evidence base that the Commission was able to construct for further liberalization drew from broad and independent sources of data and analysis, on which the Commission explicitly relied in its own evaluation. Even if the Commission did not itself enjoy the expertise to gather and assess the data for the pro-competitive potential of infrastructure liberalization, it showed a capacity to seek relevant external expertise on which to rely transparently.

5.5.1. Expertise: Summary of Key Findings

Certain regulatory activities positively require the exercise of expert evaluation and judgment to be legitimate. As seen in chapter 3, expertise plays significant roles when regulators consider a number of options, the goals to be achieved, the interests or values at stake, and come to a balanced appreciation, before coming to a conclusion. This is especially true when the regulator must make its assessments in a context of change or where the available information is incomplete.[81] When a regulator comes to a conclusion that is contentious, expertise can play the role of assurance whereby a regulator creates an inference that there are objective reasons that can withstand critical scrutiny for the conclusions drawn.

This consideration affects, not only the expertise criterion as a measure of regulatory legitimacy, but an appreciation of the correctness and likely effectiveness of the measure. This interaction is a key reason why regulatory legitimacy is a construct of several values, which can overlap, but which can also subtract from each other. If it relies entirely on expertise for its claims of legitimacy, the regulator undermines the later stages of establishing a measure of regulatory assessment or accountability. As seen in Chapter 2, EU Treaties at present contain only weak institutional mechanisms for determining effectiveness. When it fails to explain how

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[80] ibid 35.

[81] Baldwin and Cave noted the importance expertise where information is 'shifting' or 'incomplete'. In such situations, they argued, a regulator may legitimately claim support on the basis of its expertise and the nature of the task at hand. Baldwin and Cave (n 44) 80. Expertise plays a central role in the US administrative process. See eg, JO Freedman, 'Expertise and the Administrative Process' (1976) 28 Admin L Rev (1976) 363.

its judgment, decision, or conclusion has been shaped by considerations of expertise, a regulator undermines transparency and reduces legitimacy. The liberalization of infrastructure has benefitted from a robust use and demonstration of regulatory expertise and thus contributed to the normativity of the regulatory outcome.

When comparing the use of expertise in the process of elaborating implementation measures and creating a discourse for a broader mandate, the difference in the Commission's use of expertise is striking, all the more so since the two regulatory activities were proceeding in parallel. What would explain this difference of approach in different regulatory discourses at the same time in the same area? A possible inference would be an effort to maximize the scope for political harmony when suggesting potentially contentious liberalization. Or perhaps a legislative mandate allowed a lower standard of evidence-based reasoning and balancing, in that expertise was less relevant.

The reasons for the relative differences in the two processes are not directly relevant here. What is more important is the differential blindness on the part of the Commission. All economic regulatory choices and decisions involve consideration of interests, goals and options, as shown in Chapter 3. An inability to recognize the importance of articulating interests, aims, options and differences of view, and explicitly to balance these, before drawing conclusions, is problematic for the legitimacy of a positive regulator. In this regard, the Commission's practice post-1990 would not meet a modern standard of administrative practice or even the Commission's own future standard, as will be seen in the next chapter.

5.6. Efficiency

In the realm of what is only theoretically possible and what is realistically and politically feasible, the value of efficiency engages with the empirical rather than with considerations of what could have been.[82] Genuinely political choices are not questioned. Rather, the value of efficiency takes political choices as a constant and seeks to evaluate the regulatory system as a given construct using information related to the operation of the system in practice. A meaningful evaluation of efficiency requires reliable information. This concerns the input costs directly associated with

[82] An evaluation of the theoretical possibilities for a regulatory regime falls within regulatory standard-setting activities.

the regulatory process and implementation of the regulatory mandate without which productive efficiency cannot be evaluated. Any cost-benefit analysis of the regulatory regime without empirical evidence would be analytically weak. When a regulation has not yet been implemented, an analysis of efficiency is difficult, if at all meaningful, and contributes little to an appreciation of regulatory governance. Some efficiency-framed questions about inputs and costs nonetheless can be posed.

5.6.1 Efficiency of Directives as Inputs

Was the use of directives to convert Treaty aims into the achievement of a pan-European telecommunications market a regulatory choice that responded to the value of productive efficiency in the regulatory process? Arguably yes, for the following reasons. Pre-1990 national telecommunications markets and national regulatory systems for telecommunications varied widely and were embedded within national legal systems and institutions. The starting conditions for transforming disparate national markets and rules into a single pan-European market required marshaling regulatory resources on an order of magnitude beyond the capabilities of the Commission alone to oversee and enforce.

The changes that had to be introduced into national market structures and regulatory systems by public actors and incumbents were such that national authorities were better positioned to assure the application of the rules. The alternatives, of creating an EU regulatory authority with enforcement powers, or of using Commission liberalization measures alone, were not even under consideration. It is therefore possible to conclude that the efficiency value of the cost aspects, of using directives and related soft law measures to achieve regulatory objectives, contributed significant normative weight to regulatory legitimacy. The second aspect of efficiency is more problematic due to the inadequacies of implementation throughout the period. This is discussed immediately below.

5.6.2. Efficiency in Reaching Public Welfare Goals

Another value that is associated with regulatory efficiency relates to the allocative and dynamic efficiencies of regulation.[83] Economic regulation is based on the

[83] Baldwin and Cave define allocative efficiency as a characteristic of regulation wherein it would be

expectation that economic development and consumer welfare will be enhanced with market interventions that encourage both market entry and innovation, which in turn promote competitiveness.[84] Thus this aspect of efficiency deals with empirical market and consumer welfare outcomes.

Efficiency is a factual determination relative to specific regulatory measures. Market outcomes are evaluated and distributional effects are detected to see how efficient economic regulation has been. The Commission issued a first report on the state of implementation of telecommunications regulatory measures in 1997.[85] This report detailed the state of transposition and the considerable shortfalls of Member States. The Commission's second report stated that most Member States had managed to set up a national regulator but serious shortfalls remained.[86]

The Commission issued a report using estimated figures and statistics in 1999.[87] Full liberalization had taken place a year previously. It did not provide data comparing pre-liberalized and post-liberalized markets. A lack of empirical data on markets and consumer welfare might have been expected, given the widespread transposition difficulties catalogued in the Commission's several reports.

Also in 1999, the Commission published its 'Sixth Report on the Implementation of the Telecommunications Regulatory Package'.[88] This provided a great deal more factual information about the impact of liberalization on previous market structures. The Communication claimed that the sector was a 'significant driver' for macro-economic growth in the EU generally, stating:

> The national markets for telecommunications services will be worth an estimated € 191 billion in 2000; the value of national markets is growing by an average of 9%, an increase in the growth rate of two percentage

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impossible to redistribute goods to make at least one consumer better off without making another consumer worse off. They define dynamic efficiency as a characteristic of regulation that encourages desirable processes and product innovation within a system that responds flexibly to demand. Baldwin and Cave (n 44) 81.

[84] See eg, OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (OECD Publications 2002) 28.

[85] Commission, 'The implementation of the telecommunications regulatory package' (Communication) COM (97) 236 final.

[86] Commission, 'The implementation of the regulatory package: first update' (Communication) COM (97) 504 final, 4-5.

[87] Commission, 'Fifth Report on the Implementation of the Telecommunications Regulatory Package' (Communication) COM (99) 537 final. This report consisted of a Communication plus four annexes.

[88] Commission, 'Sixth Report on the Implementation of the Telecommunications Regulatory Package' (Communication) COM (2000) 814 final. This Communication had six annexes.

> points over 1999. Data and leased lines services grew by 8%, while voice telephony increased by around 4%.[89]
>
> Figures for end 1999 confirm the general downward trend of incumbent operators' market shares in the voice telephony market. The rate at which new entrants are taking over market share varies from one market segment to another, and is higher for international and national long-distance calls than for local calls.[90]
>
> The aggregate of the number of operators actually offering long-distance calls is now 461, up from 244 in 1999; 468 for international calls, up from 281 in 1999; and 388 for local calls, up from 223 in 1999. An aggregate of some 1215 operators are now authorised to offer public voice telephony, an increase of 35% over 1999, following an increase of 42% in 1999 over 1998.[91]
>
> [A]s a consequence of tariff rebalancing, which has seen EU average monthly rentals increase by 12% over the period 1997 to 2000, and local calls by 7.5% for a ten-minute call and 15% for a three-minute call, the EU average price of ten-minute long-distance and international calls has declined steadily over the same period, by 40% for long-distance and international calls (near EU) and 49% for calls to the US. It should be borne in mind that these prices are for the services of incumbent operators; many new entrant operators offer services at significantly lower tariffs.[92]
>
> The average monthly bill for residential users of the incumbents' services is now below that of the incumbent in Japan and of Verizon in the USA.[93]

The empirical evidence presented a seemingly unambiguous case of industrial expansion, economic growth, greater consumer choice and falling prices. However, there was no evidence supporting the macroeconomic claims. While it may have been true that the rate of growth of the total value of the industry between 1999 and 2000 was 2%, *implying* that regulation was responsible, there was no evidence to correlate this growth to the effects of regulation.

Nor did the report explain what would have been a valid basis of comparison with that figure. Rather than traditional telecommunications services, which were the

[89] ibid 6.
[90] ibid 8.
[91] ibid 2.
[92] ibid 9.
[93] ibid 10.

implicit message, what might have caused the growth of the sector were mobile communications, which were rapidly and widely adopted in the EU:

> Mobile services remains the fastest growing sector, with average growth in terms of value of around 20% and penetration rates up from 36% in August 1999 to 55% in August 2000.[94]

This is not to call into question the premises of economic regulation. Mainstream economic theory supports the premise that the introduction of competition into a formerly monopolized sector such as telecommunications promoted allocative efficiency.[95] As an empirical determination, regulatory efficiency effects may have been positive as early as 1999. The point here is not to conduct an evaluation of the allocative efficiency of the regulatory measures in question, but to note the manner in which the Commission as a regulator made use of the second value of efficiency, related to a fact-based assessment of public welfare outcomes, as a basis for claiming regulatory success, efficiently achieved.

Putting aside the empirical weakness of the data and the factual claims made by the Commission for macroeconomic effects, it is nonetheless the case that the Commission engaged explicitly, even if unknowingly, with an important criterion for the legitimacy of economic regulation. The Commission claimed that overall economic welfare, the raison d'être for economic regulation, had been enhanced as a result of the measures introduced. While the Commission could claim that telecommunications was a 'significant' driver of growth in the EU, the further inference that this was necessarily due to regulation was not warranted.

The Commission implicitly claimed regulatory legitimacy based on an empirical argument of allocative efficiency. When the Commission's implied claim for enhanced macroeconomic growth as a result of telecommunications regulation is assessed by reference to a normative standard of efficiency, it is clear that the Commission is claiming indirectly that the regulation satisfied the second, allocative, value of efficiency which is widely recognized in economic theories of regulation.

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[94] ibid 24.

[95] O Boylaud and G Nicoletti, 'Regulation, Market Structure and Performance in Telecommunications' (2000) OECD Economics Department Working Paper No 237 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=238203> accessed on 18 June 2012; TH Oum and Y Zhang, 'Competition and Allocative Efficiency: The Case of the US Telecommunications Industry' (1995) 77 *Review of Economics and Statistics* 82.

But the Commission as a regulator had not yet recognized the usefulness of a formal and rigorous approach to the use of efficiency as a criterion in regulatory governance. This normative weakness would be exacerbated when it comes to conduct regulatory impact assessments in the next decade.

The implicit claim by the Commission also raised issues of output-oriented legitimacy, which Scharpf endorsed for measures of economic integration, with the caveat that economic integration could be justified by output legitimacy but only up to the point that it does not become excessively invasive of national prerogatives. At this stage of establishing the common market in telecommunications, the weight of output legitimacy was considerable, given the starting point. As shown in chapter 1, output legitimacy was a major theoretical underpinning for the creation of a European single market. It is therefore unsurprising that the Commission used an apparent regulatory success story to enhance its legitimacy as a regulator.

Even so, the measures of positive integration adopted to date can reasonably be associated with considerable efficiency. In future, the Commission would need to grapple with more analytically nuanced issues related to *adaptation* of existing regulatory measures, where a broadly positive presumption in favor of positive regulatory measures to establish an internal market will cease to apply. This question is addressed directly in Chapter 6, which examines the period during which two re-regulatory cycles occur and where policy is not directed to creating a single market but to re-regulating the market.

5.7. Procedural Due Process

In this section, I examine the regulatory procedures related to two regulatory contexts: implementing the ONP Directive and creating a new regulatory mandate. Regulatory legitimacy in traditional governance theory results from a combination of input and output legitimacy.[96] The former consists of an electoral mechanism of

[96] It is now fashionable to create a variety of legitimacies for analytical purposes, mixing different contexts of evaluation, depending on the school of thought. Putting things differently, the questions that a political scientist pursues are different from those of an economist or a jurist. For legitimacy analyzed as a regulator's attribute, resource or endowment, in terms of functional, systemic, democratic and normative *challenges* see J Black, 'Legitimacy and the Competition for Regulatory Share' (2009) LSE Working Papers 14/2009 <http://ssrn.com/abstract=1424654>. Beetham and Lord identify political legitimacy as a multi-dimensional concept, comprising legality, normative justifiability and legitimation. D Beetham and C Lord, 'Legitimacy and the European Union' in M Nentwich and A Weale (eds), *Political Theory and the European Union: Legitimacy, Constitutional*

control while the latter forms part of an evaluation of effectiveness, ie whether the regulation achieved the aims sought.[97] Chapter 2 found that regulatory due process in EU policy development offered the wider public no more than a consultative role in regulatory policy development.[98] This effectively left output legitimacy as the sole basis for supranational regulatory legitimacy for the Commission. Despite the difficulties with ratification of the Maastricht Treaty, broader participation by civil society in regulatory governance was not considered as a means of addressing concerns about legitimacy.[99] Regulatory due process has several important operational facets that the Commission will only begin to address in the period beginning after 2001.

5.7.1. Due Process in Implementing the ONP Directive

The ONP Directive prescribed procedures and timelines for producing draft instruments before their adoption.[100] The Commission had anticipated some of the major implementation requirements. Thus, it had prepared draft measures in the perspective of achieving harmonization rapidly. However, carrying out the regulatory mandate according to the terms of the legislation slowed the adoption process.[101] Here, some tension between efficiency and due process may be observed.

Choice and Citizenship (Routledge 1998) 15. Even de Burca falls into the trap of lumping together the democratic deficit linked to a transnational scope of powers accorded to regulators (like the EU) with the different problem of the non-consensual approach to evaluating the *use* of the Commission's foundational economic integrationist powers. For so long as this is the case, it will be difficult to find a broadly agreed approach to the use of regulatory governance in pursuit of the internal market. See G de Burca, 'Developing Democracy beyond the State' (2008) *Columbia Journal of Transnational Law*, 101.

[97] Scharpf neatly summarised the two dimensions of what he termed democratic self-determination: input-oriented authenticity (government by the people) and output-oriented effectiveness (government for the people), but warned that such determination existed in a 'precarious symbosis with the capitalist economy' and 'dynamics that transcend the given boundaries of any political system. Scharpf (n 64) 2.

[98] Prior to 2001, EU telecommunications regulation was one of the few policy areas for which public consultations related to policy development were systematically conducted and reported on; this was equally true for the extension of the initial regulatory mandate.

[99] B Finke, 'Civil Society Participation in EU Governance' (2007) 2 *Living Reviews in European Governance* 4 < http://europeangovernance.livingreviews.org/Articles/lreg-2007-2/> accessed 12 June 2012.

[100] ONP Directive, arts 3-4, 9-10.

[101] The ONP Directive was adopted in June 1990. The draft directive on leased lines was submitted to Council in February 1991 and the draft directive on packet-switched data services on June 1991. See Commission, 'Proposal for a Council Directive on the application of open network provision to leased lines' COM(91) 30 final and Commission, 'Proposal for a Council Recommendation on the harmonised provision of a minimum set of Packet-Switched Data Services In accordance with Open Network Provision (ONP) principles' COM(91) 208 final.

As mentioned in Chapter 3, US administrative processes are lengthy. Judicial review, hearings and appeals potentially extend the period for concluding any federal norm-setting activity into a matter of years. Some similarity can be seen with the implementing rules of the ONP Directive. Not only did the ONP Directive impose procedures that lengthened the time for adopting implementing measures, the measures adopted themselves introduced further delay.[102] How legitimate were such processes and such delays? How legitimate was the change from the Commission's initial completion date of 1992 for liberalization of the sector to 1998? These questions are ones of degree. There is no normative standard for constructing ideal regulatory processes. What the value of due process should reflect is regulatory transparency, fairness, and accessibility.

The Commission's performance in relation to the implementing measures foreseen in the ONP Directive was mixed in relation to these values. Legislative proposals for leased lines, licensing and interconnection showed considerable transparency and procedural fairness in putting forward all of the views on record and addressing them even-handedly, with explanations for the balancing of the interests at stake and reasons for the conclusions drawn. The Commission created the impression that in some cases all views were given due weight and evaluated before reaching a decision, which was itself rationally motivated.

For the sensitive area of voice telephony, the views of the external experts were neither reviewed nor remarked upon, nor did explanations draw upon expert external studies. The Commission presented an overall appreciation of the comments received and its regulatory conclusion, but anyone outside of the process would not have been aware of the balancing that the Commission claimed. This shortfall in observing important aspects of due process diminished the values of accessibility and openness and undermined. The Commission was not able to show that it had reached a conclusion taking all views into consideration as objectively as possible before reaching a definitive view, and did not demonstrate an objective rationale for the outcome reached.

[102] As an example, the Leased Lines Directive was adopted in June 1992, or almost one and a half years after the Commission's draft proposal was submitted. The transposition date for Member States was June 1993. This was the case for an implementing measure that the Commission had anticipated, and had therefore previously prepared a draft legislative instrument.

When a regulator's reasoning, explanations, and arguments are minimalist to the point of intransparency, as was the case in some instances, it impairs the legitimating value of public participation in the rule-making process. When a regulator truncates the reasoning for its decisions without explaining the views received from experts, the wider public and national representatives and how these were taken into account, the process lacks transparency and the regulator undermines its legitimacy. That the procedures followed were entirely in accordance with legislative requirements does little to mitigate the lack of normative due process for the most contentious proposal. When developing its proposal for politically sensitive measures, the Commission misjudged the needs of procedural legitimacy.[103] The Commission's failure to provide greater detail and reasoning did not appreciate the level of explanation and justification appropriate to an exercise of its discretion. The Commission as a transnational regulator plays a role in the creation of its legitimacy.[104] Conformity with procedural due process would now be framed as a requirement and command a broad consensus, in what can be called a 'compensatory' (ie compensating for a lack of democratic credentials) approach to transnational regulatory legitimacy.[105]

In regulatory governance terms, it is therefore regrettable that the Commission failed to appreciate the potential for strengthening its regulatory legitimacy that a fuller articulation of how comments were evaluated, on what basis, and the grounds for its final conclusion, all the more so since the proposal was the most contentious of all. Where regulatory decisions are contestable, transparent due process that enhances the normative quality of the decisional process contributes significantly to regulatory legitimacy. I will return in the conclusions chapter to the issue of due process within a supranational regulatory system. A distinction in due process standards between supranational and national regulators relates to the levels of participation of the public in the decisions of regulators, in what capacities, and with what instruments of ex ante and ex post control. For some authors, control is

[103] Thatcher and Stone Sweet find that procedural or decision-making legitimacy of transnational regulators, which they associate with transparency, legality and stakeholders'access, is normatively better than opaque deliberations of governmental ministries and go so far as to suggest it as a substitute for electoral accountability. M Thatcher and A Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1, 19.
[104] Black (n 95) 23.
[105] De Burca (n 95) 121.

more important that procedural legitimacy.[106] This is characteristic of structural analyses from a political science perspective. Attempts to address regulatory legitimacy through purely technocratic or procedural models (procedural legitimacy) is typically rejected for the reason that the range of issues linked to EU governance cannot *all* be addressed with such analytical tools.[107] Even if true, that does not mean that *some* regulatory governance issues cannot be so addressed.

Legitimacy is not simply a matter of control. For the exercise of foundational regulatory powers, particularly regulation necessary for the single market, a combination of analytical tools and models can meaningfully contribute to constructing a normative form of regulatory legitimacy. I will return to the analytical 'toolbox' for constructing a defensible form of normative regulatory governance in chapter 6.

5.8. Infrastructure Liberalization and Due Process

In its regulatory role of seeking a broader harmonization mandate, the Commission reflected extensive procedural engagement. It separated different aspects of the new mandate for consultation; it analyzed these and variously considered several factors before drawing up a specific regulatory strategy and mandate. Once the consultation processes were concluded, the Commission presented its conclusions with arguments for regulation and liberalization but made no attempt to precipitate a mandate by presenting Member States and EP with a *fait accompli* of a Commission Directive. A transnational regulator's legitimacy is enhanced but not established by consultative procedures that offer a broad participation in setting norms.[108]

Within an evaluative framing, the Commission decision on the strategy to follow was defensible, having showed that it identified the interests at stake, that it understood the Treaty and regulatory goals, that it considered reasonable alternatives, and that it engaged in a balancing of interests before reaching a conclusion. Perhaps the elaborate procedures were no more than window dressing for a previously

[106] C Scott, 'The Governance of the European Union: The Potential for Multi-Level Control' (2002) 8 ELJ 59.
[107] ibid 76.
[108] The Commission's own Governance White Paper in 2001 paid particular attention to the related notions of participation and openness. A broad consensus exists as to the general proposition that legitimacy and participation are correlated, and fall within an evaluation of the quality of the decisional processes of transnational governance. See de Burca (n 95) 122.

determined regulatory outcome. If so, the Commission showed remarkable skill in concealing it. From the evaluative perspective of regulatory governance, the creation of the new mandate satisfied a normative standard of due process.

The Commission used uneven or inconsistent standards of transparency in proposing norms for drawing up legislation and for establishing a new regulatory mandate. This was seen in the politically sensitive subject of voice liberalization. By contrast, the creation of a new liberalization mandate was normatively balanced, although the introduction of a political dimension into the use of Treaty powers undermined two other normative values of expertise and independence. Again, this highlights the value of a cumulative use of criteria which avoids over-reliance on only one dimension of regulatory governance. Variation within a broadly normative spectrum of due process does not significantly diminish the legitimacy of the process. However, a distinctive shortfall in due process norms that related only to politically sensitive proposals is problematic.

The next section addresses accountability which attracts as much academic interest as a subject of analysis as European regulatory governance.[109]

5.9. Accountability

At what point in the regulatory cycle should accountability, as a criterion of evaluation and a legitimating normative value for a supranational regulator, be required? Scharpf's premise - that the foundational task of establishing a common market laid down in the Treaty of Rome carried an innately high normativity - would imply that those positive regulatory measures adopted and implemented pursuant to the ONP Directive required *relatively* little in terms of subsequent democratic accountability mechanisms. What should be demonstrable was a meaningful movement towards greater intra-Community trade in the sector.

The establishment of an initial common framework in telecommunications was indeed effected by the implementing measures of the 1990s but these were far

[109] Different approaches can be discerned in various academic communities. See eg Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale UP 1984); G Majone,'Temporal Consistency and Policy Credibility: Why Democracies Need Non-majoritarian Institutions' (1996) European University Institute /Robert Schuman Centre Working Paper 96/57; Scott (n 105); Thatcher and Stone Sweet (n 102); GA Hodge and K Coghill, 'Accountability in the Privatized State' (2007) 20 Governance 675; RB Stewart, 'Administrative Law in the Twenty-First Century' (2003) 78 New York Univ LR 437; AM Slaughter, 'The Accountability of Government Networks' (2001) 8 *Indiana Journal of Global Legal Studies* 347.

from universally transposed and applied. The short period in which the rules were in force attenuated, but did not eliminate, the need for rigorous *ex post* control and feedback mechanisms: this was reflected in the Commission's reporting practices. The Commission first reported on implementation of telecommunications regulation in 1997,[110] and published an overall assessment of remaining barriers in 1999.[111] The Commission's use of discourse appealed indirectly to notions of accountability by reference to the achievement of the single telecommunications market:

> ...it is clear that the liberalised regimes in place in the Member States are driving growth in all sectors of the market, large increases in market entry...[and] large decreases in the cost of national and international leased lines...[L]ess than two years after full liberalization, overall implementation of the telecoms regulatory package has been and continues to be a success.[112]

This discourse drew upon a functional rationale which Scharpf would have recognized as an implicit claim of 'output legitimacy'.

Even unilaterally, the exercise of rendering an account carried a positive normative value, in terms of due process, and contributed to transparency. Nonetheless, merely providing information, while important, constituted an incomplete level of accountability.[113] The reports created a legitimacy claim in which the Commission formulated or implied successful regulatory outcomes by reference to macro-economic effects and micro-economic statistics.[114] Output legitimacy is based on empirical determinations. A short re-examination of the Commission's basis for this claim is needed.

A significant weakness in the empirical data was that many of the statistics relied upon were estimated.[115] Information on which claims for successful outcomes

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[110] COM (97) 236 final.
[111] A 1999 report assessed the state of transposition of the harmonization measures into national law; analyzed the application of the national rules; provided an overview of the status of the telecommunications services markets in the Member States; and identified the major remaining barriers to the achievement of a single telecommunications market. COM(1999) 537 final, 1. All implementation reports can be found at <http://ec.europa.eu/information_society/policy/ecomm/library/communications_reports/index_en.htm> accessed 11 June 2011.
[112] COM(1999) 537 final, 27, 31.
[113] D Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13 ELJ 523, 532.
[114] COM(1999) 537 final, annex 4, s 4.1.
[115] ibid annex 4.

are based should be empirically verifiable. Otherwise, a regulator's claim for regulatory effectiveness cannot be validated and this undermines its credibility.[116] An inability to check the empirical basis for success independently weakened the normativity of the claim. This is not to say that the claim was unwarranted. Since no consensual standards for evaluating regulatory outcomes existed, the Commission was not held to any standard of verifiability. The reports in question were prepared by those responsible for policy development who had good reasons for presenting their measures as successful.

As will be seen in chapter 6 this lacuna became acute in the 2000s. I will argue in the thesis conclusions chapter that there is now a pressing need to introduce a normative form of regulatory governance for the EU regulatory regime for internal market regulation and an accountability mechanism. This is particularly urgent given the broad perception that the Treaty and jurisprudential limits to the exercise of regulatory discretion for positive harmonization measures are illusory.[117] Relatedly, what will become problematic in the 2000s is the Commission's monopoly constructing the official legitimacy discourse and in responding to the claims of different legitimacy communities. Majone and Scharpf provide two major examples of this. I will argue that regulatory governance as currently practiced is a tool that should be improved to construct a more robust form of supranational regulatory legitimacy.

5.10. Concluding Remarks

Two dimensions of the Commission as a regulator emerged throughout the 1990s, as an executor of policy and as a policy designer for a broader mandate. The Commission discharged the legislative requirements of the ONP Directive, following the administrative processes prescribed. Superficially, those activities seemed appropriate and proportionate. Analysis shows that important values of regulatory legitimacy were under-served, that important proposals were under-explained, and that professional expertise was inadequately reflected in sensitive proposals. But when designing a wider mandate, the Commission used expertise, transparency and

[116] R Baldwin, M Cave and M Lodge, *Understanding Regulation, Theory, Strategy, and Practice* (2nd edn, OUP 2012) 71.
[117] S Wetherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising:* How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal* 827.

due process more effectively. Expertise became increasingly important in policy development but was used even less effectively for even more contentious proposals in future, including the creation of a European telecommunications agency.

For norm setting or mandate creating activities, the Commission's practices reflected the extent to which its inter-institutional discourse deferred to political consensus which can impair the exercise of professional judgment of an independent regulator. At a minimum, it conveys a lack of independent institutional determination whereby compromises result in sub-optimal measures. Without empirical methods of accounting for regulatory outcomes, there is little scope for corrective regulatory feedback.

A much more difficult governance challenge arose when questions relate to removal or adaptation of existing measures.[118] By 2000, commercial conditions, market structures and the regulatory landscape in telecommunications had changed with indications of even greater changes to come. By 2007, further changes in market structures were found. At the same time, at the beginning of the 2000s, the Commission was about transform its regulatory governance procedures and policies. The next decade of telecommunications policy development thus coincided with the adoption of a White Paper on Governance and implementation of a formal regulatory governance policy. The regulatory landscape at the EU level and as practiced by EU institutions was about to be transformed. The changes begun in 2001 will have major repercussions which will be analyzed in the next chapter.

[118] As seen in Ch 1, the effect of negative integration is to remove a national barrier to trade. Once removed, no further measures may be needed to be effective. The same is not true for positive integration and indeed is an important facet of regulatory governance analysis.

Chapter 6

Telecommunications Governance in the Twenty-First Century

Introduction

This Chapter examines the period from 2000 to 2009, which was marked by re-regulation in the context of the Lisbon Agenda.[1] Technological and market developments, of which convergence[2] and the spreading use of the Internet were the two most significant, carried clear implications for telecommunications regulation even by the end of 1999.[3] While convergence did not come as a surprise to regulators, policy analyses had missed the development of the Internet. The iterative approach to liberalization and harmonization of networks and services had resulted in more than twenty legislative instruments. Simplification was necessary. Consumer protection more generally entered the frame and ensuring more effective competition became a priority.[4]

The intended market-making effects of earlier liberalization and harmonization had not yet produced either a pan-European or a competitive market. Investment was discouraged by a low level of harmonization of national licensing regimes,[5] but also in relation to interconnection pricing norms which were weakened by the incumbents' cost accounting methodologies.[6] Serious problems existed with diverging application of harmonized rules while some national regulatory

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[1] Also known as the Lisbon Strategy, adopted in 2000, it was an action plan for the development of the information-based economy in the EU between 2000 and 2010. A 2010 initiative was subsequently adopted, which has now become the Digital Agenda for Europe. See <http://ec.europa.eu/digitial-agenda/> accessed 14 December 2012.

[2] 'The convergence of the telecommunications, broadcasting and IT sectors is reshaping the communications market; in particular the convergence of fixed, mobile, terrestrial and satellite communications, and communication and positioning/location systems. From the point of view of communications infrastructure and related services, convergence makes the traditional separation of regulatory functions between these sectors increasingly inappropriate and calls for a coherent regulatory regime.' Commission, 'Towards a new framework for electronic communications infrastructure and associated services: The 1999 communications review' (Communication) COM (1999) 539 final (not published in OJ). <http://europa.eu/legislation_summaries/internal_market/single_market_services/l24216_en.htm>.

[3] Commission, 'The result of the public consultation on the 1999 Communications Review and orientations for the new Regulatory Framework' (Communication) COM (2000) 239 final.

[4] ibid.

[5] 'In respect of licensing regimes, wide differences exist in procedures, periods of validity, fees, classifications of operators with which they are faced, not to mention the difficulty of submitting applications in the eleven official Community languages.' COM(1999) 539 final, 5.

[6] 'There appear to be major weaknesses in the regulation of this issue by some NRAs which have led to price squeezes in a number of Member States.' ibid.

environments were highly non-transparent.[7] The regulatory measures intended to facilitate market entry were not producing satisfactory outcomes.

Prior to 1999, the Commission had painted regulatory failure with a national shortfall brush: regulatory outcomes and national disparities in implementation had patently been unsatisfactory.[8] Yet, much more discretion for national regulators was said to be needed going into the twenty-first century.[9] The regulatory principle that enforcement of regulation should, as much as possible, occur as closely as possible to the activities being regulated led the Commission to conclude that for the future:

> Primary responsibility for achieving objectives set out in sector-specific [telecommunications] Community legislation should rest with the independent national regulators...The natural counterpart of such delegation is greater *co-ordination*....[emphasis added][10]

Either the Commission believed in the capabilities of national regulators to learn to apply regulatory norms or it suggested considerable belief in its institutional capacity to oversee national regulators and avoid disparities between national approaches. Having rejected the creation of a formal European regulatory authority,[11] the Commission found that the discretionary powers of the NRAs needed to be compensated by direct *ex ante* Commission control of national decisions.[12] With appropriate legislative revision, competition in telecommunications markets would become more fully established, and the 'focus of concern' would turn to the commercial behaviors of market players, giving traditional competition rules applied to undertakings an increasing importance, with increased surveillance of the sector

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[7] ibid.

[8] See Commission, 'Fifth Report on the implementation of the telecommunications regulatory package' (Communication) COM (1999) 537 final.

[9] 'The Commission considers that an effective way of introducing much-needed flexibility into the new regulatory framework can be **via the increased use of Recommendations and Guidelines**. It recognises the legitimate concerns of stakeholders about transparency, effectiveness, legal certainty and democratic control in respect of such measures [emphasis in original].' COM (2000) 239 final, 20.

[10] COM (1999) 539 final, 14.

[11] A new European regulatory authority would not add sufficient value to justify the additional layer of bureaucracy that would be created: '...issues concerning disparity of interpretation and application of Community legislation...are best dealt with by improving co-ordination and co-operation between NRAs...'ibid 8-10.

[12] 'Since the rules at EU level will be more general than at present, there will be a need for mechanisms to ensure that NRAs apply the objectives and principles set out in the directives in a way which safeguards the integrity of the internal market.' ibid 53.

by competition authorities.[13] Legislation was adopted with entry into force in 2003 ('the 2003 Framework').[14]

In 2006, a Commission review of the 2003 Framework found insufficient consistency in the application of *ex ante* remedies.[15] It concluded that '[a]lthough progress has been made, an internal European market for electronic communications and for radio equipment is not yet a reality' and therefore further measures were needed.[16] This review included an impact assessment. The major proposals foreseen were to reform radio spectrum policy and to streamline the procedures for conducting market analyses.[17] In 2007, legislative proposals were tabled that included a draft regulation for a European telecommunications authority; the addition of the *ex ante* remedy of 'functional separation' of network assets and services (as BT was required to do by Ofcom under its competition authority) as an obligation available for NRAs to impose on undertakings with market power; and additional veto powers for the Commission over *ex ante* obligations.[18] Legislation was adopted in 2009 and entered into force in 2011.[19]

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[13] ibid 18.

[14] The legislation consisted of one consolidating art 106 TFEU directive, five art 114 TFEU harmonization directives and one art 114 TFEU decision. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) [2002] OJ L108; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) [2002] OJ L108; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201; Decision 676/2002/ EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) [2002] OJ L108.

[15] Commission, 'On the Review of the EU Regulatory Framework' (Communication) COM (2006) 334 final, 8.

[16] ibid.

[17] ibid 11.

[18] Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/12/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services' COM (2007) 697 final.

[19] Council Directive 2009/136/EC of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) 2006/2004 on cooperation between national

The chapter examines two full cycles of policy development between 2000 and 2011 and concludes overall that, despite the *formal* adoption of normative regulatory governance practices, the Commission's actual practices failed to satisfy the criteria defined in Chapter 3. The chapter is organized as follows. First, I recap regulatory governance developments since 2001.[20] The next section describes the main elements of two cycles of re-regulation in telecommunications. In the final section, I analyze the regulatory governance practices for the two policy cycles. Impact assessment procedures were used in 2006-2007. The analysis shows that there is still considerable work to be done in achieving a normative level of European regulatory governance, even as the Commission defines it, despite the regulatory governance 'learning curve' displayed by the Commission throughout the 2000s.

6.1. The Governance White Paper's Progeny

As drafted, the Governance White Paper was meant to address misperceptions and lack of popularity of the EU and to complement the forthcoming enlargement of the EU with a distinctly political message.[21] In its follow-up to the Governance White

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authorities responsible for the enforcement of consumer protection laws [2009] OJ L337/11; Council Directive 2009/140/EC of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37; Council Regulation (EC) 1211/2009 of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1.

[20] See the discussion in ch 3 for details.

[21] Speaking to the EP in 2000, the President of the Commission explained that the Commission services were preparing a governance paper as a reflection of a new political reality: the process of European integration would no longer consist primarily of an economic project to complete the single market but would be an 'increasingly political process'. With respect to furthering a political process of integration, the President stated: 'This is not a matter of choice, it is a necessity: Europe's political integration must advance hand in hand with its geographical enlargement....' R Prodi, '2000-2005: Shaping the New Europe' (European Parliament, Strasbourg, February 2000) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/41&format=HTML&aged=1&language=EN&guiLanguage=en>accessed 28 July 2012. For an example of commentators who duly evaluated the White Paper as a political intervention, see eg, D Wincott, 'Looking Forward or Harking Back: The Commission and the Reform of Governance in the European Union' (2001) 39 JCMS 897: 'Whatever model of the EU lies behind it, the White Paper's emphasis on institutions focusing on their core tasks gave the Commission the opportunity to take a much more radical step. The Commission could have identified activities and tasks in which it is currently engaged, which fall well outside its core role. Had the Commission identified a number of such tasks *and announced its intention to give them up,* it would have placed itself in a strong political position to invite other institutions to reflect on how they might change their own practices. Its failure to engage with powerful actors and interests inside the Commission raises questions about the authority of the governance initiative and team within that institution...[T]he White Paper gives the impression of

Paper, the Commission acknowledged the challenges of the democratic deficit critique, but expected this to be addressed by the forthcoming constitutional convention and inter-governmental conference, distinguishing challenges that it and other institutions faced in relation to achieving good governance in the discharge of regulatory authority.[22]

The Commission published a summary of the negative views expressed in the governance consultation. The candor suggested transparency: the Commission revealed that its suggestions were contentious and that the views expressed reflected considerable disagreement. Comments had endorsed the ambition of better policies and regulation *in principle*. However:

> ...the response also shows the need to reconcile two concerns. On the one hand, there is the view that alternative regulatory models and non-legislative instruments have often proved to be more efficient and effective than traditional legislation. On the other hand, there is the opinion that improved efficiency cannot justify a transfer of decision-making competence to interested parties [ie the Commission] who would not be democratically accountable.[23]

Thus, the Commission articulated a difficult and sensitive issue related to regulatory delegation, that is, the contestability of delegated powers to third parties, such as itself. It would be another decade before the Commission began actively to explore an accountability mechanism for EU regulation.[24] The Commission's emerging recognition that mechanisms of accountability serve important governance interests

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having been written with the existing power structure of the Commission itself very much in mind...' [emphasis in original] 909-10.

[22] For another report of the acute criticisms submitted during the period of public consultation on the GWP, and an idea of the inspiration for a plethora of governance measures subsequently adopted by the Commission, see European Governance: A White Paper, Working Summary of the Public Response (nd) <http://ec.europa.eu/governance/docs/comm_results_en.pdf> accessed 1 August 2012.

[23] *Report from the Commission on European Governance* (Governance Report) (2003) 36 <http://ec.europa.eu/governance/docs/comm_rapport_en.pdf> accessed 1 August 2012.

[24] Until 2010, the Commission's governance approach, while ambitious in some respects, reflected little recognition or acknowledgement that a mechanism for accountability was essential to its own regulatory legitimacy. In 2010, the Commission proposed to conduct *ex post* evaluations of regulatory policies, but to do so itself, thus self-reverentially, and contestably. I examine this briefly below and in Chapter 7. For the initial Commission proposal to conduct *ex post* evaluations of EU legislation, see COM(2010) 543 final; more recently, the Commission launched a public consultation on, inter alia, improving stakeholder involvement in *ex post* evaluation of EU legislation. See 'Stakeholder Consultation on Smart Regulation in the EU, Follow Up to the 2010 Communication on Smart Regulation' (2012) <http://ec.europa.eu/governance/better_regulation/smart_regulation/consultation_2012/docs/consultation_en.pdf> accessed 19 August 2012. To date there has been no follow-up.

is welcome and merits further analysis, both for economic and general public interest regulation, *once operationalized*.[25]

6.1.2. Regulatory Impact Assessments

In 2002, the Commission undertook to conduct impact assessments[26] for the purpose of 'guarantee[ing] and justify[ing] the validity of its legislative proposals'.[27] This is not the place to review all of the Commission's better lawmaking and better regulation measures initiatives in detail.[28] Regulatory impact assessment procedures have attracted widespread use, analysis and comment.[29] Not all are relevant to the present research. However, such a regulatory design tool, if applied properly, and its results interpreted correctly, could constitute a qualitative governance measure,[30]

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[25] The Commission explained that 'Smart regulation'**...**requires constant attention to the achievement of objectives as well as to the associated costs...giving as much importance to the evaluation and improvement of existing legislation as to the design of new legislation...[and] involves efficient mechanisms to monitor results, collecting evidence and using it to inform political decisions. It demands a comprehensive approach to all the costs and benefits of legislation...that systematically identifies all opportunities to improve the efficiency and effectiveness of legislation throughout the policy cycle.' Stakeholder Consultation (n 24) 3.

[26] It is said to be the practice of performing economic analyses of possible regulation to show whether the benefits are likely to exceed its costs and whether alternatives to that regulation are more effective or less costly. Impact assessments originated in the US beginning in the 1970s, with requirements, variously, for a 'quality of life' assessment, an 'inflation impact' assessment and, finally, an 'economic assessment', which remains the standard in force at present. See JB Wiener, 'Better Regulation in Europe' in J Holder and D McGillivray (eds), *Taking Stock of Environmental Assessment: Law, Policy and Custom* (Routledge-Cavendish 2007) 78; and RD Morgenstern, 'The Legal and Institutional Setting for Economic Analyses at EPA' in RD Morgenstern (ed), *Economic Analyses at EPA: Assessing Regulatory Impact* (RFF Press 1997) 10-12.

[27] COM (2002) 278 final, 7.

[28] The Commission website on better law making, better regulation and smart regulation can be accessed at <http://ec.europa.eu/governance/better_regulation/index_en.htm>. Even scholars who specialize in regulatory governance studies are selective in the measures that are analyzed within a single work. '[T]his study addresses in more detail the main components of Better Regulation - impact assessments and administrative simplification - and advocates the adoption of several institutional improvements. Other aspects of regulatory reform in Europe.....are mentioned here but are not the focus.' Wiener (n 26) 67.

[29] See eg, A Alemanno, 'The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward?' (2009) 15 ELJ 382; CM Radaelli and ACM Meuwese, 'Better Regulation in Europe: Between Public Management and Regulatory Reform' (2009) 87 *Public Administration* 639; CM Radaelli 'Regulating Rule-making via Impact Assessment' (2010) 23 Governance 89; R Baldwin, 'Better Regulation: Tensions Aboard the Enterprise' in S Weatherill (ed), *Better Regulation* (Hart 2007); J Torriti, 'Impact Assessment in the EU: A Tool for Better Regulation, Less Regulation or Less Bad Regulation?' (2007) 10 *Journal of Risk Research* 239; J Wiener, 'Better Regulation in Europe' (2006) 59 *Current Legal Problems* 447; and CM Radaelli and ACM Meuwese, 'Better Regulation in the European Union: The Political Economy of Impact Assessment' <http://centres.exeter.ac.uk/ceg/research/riacp/documents/The Political Economy of Impact Assessment.pdf>.

[30] One commentator summed up the Better Regulation programme as 'a set of centrally imposed rules designed to structure the key stages of regulatory process (from rule formulation, via [regulatory impact assessments], to the simplification of existing rules and the removal of administrative burdens)

particularly the evidence-based cost-benefit analysis within the IA process.[31] I describe the use of this policy tool in section 6.3 below and evaluate its use in the analysis of section 6.4.

The Commission now systematically conducts stakeholder consultations and IAs.[32] It publishes internal and external cost-benefit analyses. How it develops regulatory policy generally has changed. It is nonetheless far from self-evident to assert, as the Commission has, that these practices have increased accountability.[33] They do not by themselves generate accountability or even credibility. As argued in Chapter 3, it requires an evaluative framework to assess regulation *ex post* and independently of the regulator.

The 2002 commitment[34] included an intention to use IAs:

> as a tool to improve the quality and coherence of the policy development process. It will contribute to an *effective* and *efficient* regulatory environment....[The process of conducting an] Impact Assessment identifies the likely positive and negative impacts of proposed policy actions, enabling informed political judgments to be made about the proposal and identif[ies] trade-offs in achieving competing objectives. It also permits to complete the application of the subsidiarity and proportionality protocol annexed to the Amsterdam Treaty.[35]

Further:

> Within the general objective of 'better regulation', the aim of the impact assessment process is that the Commission bases its decision on sound

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with the aim of achieving certain improvements in regulatory performance (eg targets of burden reductions, cost-effective regulation, increased reliance on market-friendly alternatives, etc)'. Radaelli and Meuwese (n 29) 196.

[31] See, eg Radaelli (n 29); N Lee and C Kirkpatrick, 'Evidence-Based Policy-Making in Europe: An Evaluation of the European Commission Integrated Impact Assessments' (2006) 24 *Impact Assessment and Project Appraisal* 22; Wiener (n 26); Alemanno (n 29); C Radaelli, 'Desperately Seeking Regulatory Impact Assessments: Diary of a Reflective Researcher' (2009) 15 *Evaluation* 31; RW Hahn and RE Litan, 'Counting Regulatory Benefits and Costs: Lessons for the US and the EU' (2005) 8 *Journal of International Economic Law* 473; CM Radaelli, 'Diffusion Without Convergence: How Political Context Shapes the Adoption of Regulatory Impact Assessment' (2005) 12 JEPP 924.

[32] IAs started from 2003. These can be found at <http://ec.europa.eu/governance/impact/ia_carried_out/cia_2012_en.htm> accessed 31 July 2012.

[33] 'Stakeholder consultations and impact assessments...have increased transparency and accountability.' COM(2010) 543 final, 2.

[34] 'In this communication the Commission establishes a new integrated method for impact assessment, as was agreed at the Göteborg and Laeken European Councils...Most recently, the Commission made commitments at the Laeken Council to implement better regulation principles including a regulatory impact assessment mechanism.' COM(2002) 276 final, 2.

[35] ibid 2.

> analysis of the potential impact on society and on a balanced appraisal of the various policy instruments available.[36]

In broader terms, IAs were part of the pursuit of the Lisbon Agenda.[37] Other countries such as the UK and the US, had adopted IAs.[38] If done correctly, IA reveals the economic, social and environmental impacts of a proposed policy initiative and these objectives in adopting IAs were explicitly endorsed by the Commission.[39] Costs and benefits should be *quantified* and monetized, if possible.[40]

A recurrent issue in the scholarship focuses on the quality of IAs, both national[41] and supranational.[42] The comparative merits of regulatory IAs in different jurisdictions and the experience of cross-border policy learning are also examined.[43] This is not the place to offer an evaluation of the IAs conducted by or for the EU, which others have begun to examine.[44] They constitute a tool for developing technical and complex regulation that is suitable for purpose, but they must be

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[36] ibid 5

[37] The Lisbon Agenda - now re-labelled the Lisbon strategy - focused on growth and jobs across Europe with the intention of pursuing a sustainable development strategy. See Commission, 'Working together for growth and jobs: A new start for the Lisbon Strategy' (Communication) COM (2005) 24 final.

[38] 'It should be noted that the BCA [benefit-cost analysis] in the US addresses all types of costs and benefits-including economic, social and environmental-and thus is comparable to the "Integrated Impact Assessment" conducted in the EU.' Wiener (n 26) 463; the OECD, US and EU approaches to impact assessments set out broadly the same standards for conducting such assessments. See eg, Wiener (n 26). In the 1980s, an Enterprise and Deregulation Unit was created; impact assessments were introduced on proposed Westminster regulations that could impinge upon businesses. According to Margaret Thatcher, deregulation was one of the basic Conservative principles of the 1980s. See A Dodds, 'The Core Executive's Approach to Regulation: From "Better Regulation" to "Risk-Tolerant Deregulation"' (2006) 40 *Social Policy & Administration* 526, 529.

[39] Impact Assessment Guidelines, SEC(2009) 92, 31-32.

[40] See R Hahn and others, 'Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12866' (2000) 23 *Harvard Journal of Law and Public Policy* 859, 864.

[41] See eg, TO McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (CUP 1991); GR Baldwin and C Veljanovski, 'Regulation by Cost-Benefit Analysis' (1984) 62 *Public Administration* 51; OECD, *Evaluation of Regulatory Impact Assessments, 2006-2007* (Stationery Office and National Audit Office 2007). See OECD, *Regulatory Impact Analysis: Best Practices in OECD Countries* (OECD Publications 1997) <http://www.oecd.org/governance/regulatorypolicy/35258828.pdf>.

[42] CM Radaelli and ACM Meuwese, 'Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU' (2010) 33 *West European Politics* 136; Radaelli (n 29).

[43] See eg, Wiener (n 26) 65-130; and C Cecot, RW Hahn and A Renda, 'A Statistical Analysis of the Quality of Impact Assessment in the European Union' (AEI-Brookings Joint Centre for Regulatory Studies, Working Paper 07/09)<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984473>.

[44] Lee and Kirkpatrick (n 30); Radaelli (n 29); Radaelli and de Fransceso examine measures of better regulation as a public policy itself. Such measures 'define, identify and operationalize quality...[but they find that] this process of definition and operationalization has not started yet'. See CM Radaelli and F de Francesco, *Regulatory Quality in Europe* (Manchester UP 2007) 184.

conducted properly.[45] For that to happen, economic and technical expertise is required. IAs thus form part of the expertise criterion of the regulatory governance model. What has emerged thus far in the literature is a broadly negative view of the quality of Commission IAs. Since initial adoption, the Commission has tried to improve its use of IAs.[46]

In the next section, I examine the legislative trajectory of positive harmonization from 2000 to 2010.

6.2. Twenty-first Century Legislation

Because of the trend towards and expectation of technological convergence of historically separate services such as telephony, broadcast media and IT, regulation of transmission services needed to be conceptually horizontal, irrespective of the types of services carried.[47] This translated in policy terms into a regulatory framework covering all communications (transmission) infrastructure.[48]

6.2.1 Legislation and Innovation

Legislation adopted in 2002 consolidated and partially repealed the painstakingly constructed legislative mosaic of the 1990s.[49] The principle of significant market

[45] Ample scholarship testifies to the longstanding problem of trying to ensure that regulation is done properly in terms of problem definition, identification of policy options and relative assessment of norms and outcomes. See eg, BM Mitnick, *The Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms* (Columbia UP 1980); Wiener (n 26); RB Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harvard LR 1669; RB Stewart, 'US Administrative Law: A Model for Global Administrative Law?' (2005) 68 *Law and Contemporary Problems* 63.

[46] According to the Commission, the Guidelines for conducting IAs were revised in 2009 based on the experience of the Commission services in preparing impact assessments; experience of the independent Impact Assessment Board since it was created in late 2006; inputs from the High Level Group of National Experts on Better Regulation; an external evaluation in 2006/2007 of the Commission's impact assessment system, and a public consultation on the Impact Assessment Guidelines held in mid-2008. The Guidelines replaced the previous Guidelines 2005 and also a 2006 update. <http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm> accessed 14 March 2013.

[47] ibid.

[48] ibid. Information Society services are defined as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'. Art 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC [1998] OJ L217, 18–26.

[49] The legislation consisted of one consolidating art 106 TFEU directive, five Article 114 TFEU harmonization directives and one Article 114 TFEU decision. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) [2002] OJ L108;

power to impose *ex ante* obligations was introduced, while the Commission acquired direct but limited veto rights over the exercise of regulatory powers by national regulators.[50] The Commission centralized regulatory discussion on implementation by creating an informal network of national regulators, the European Regulators Group.[51] Soft law measures followed, as legislatively prescribed, such as the recommendation on relevant markets.[52] 'Telecommunications' became 'electronic communications' to reflect its broader scope.[53] Negative integration measures were retained as a framework of legally binding measures for newly acceding Member States with telecommunications monopolies.[54]

Conceptually, the only markets to be regulated were those structurally lacking in competition, defined according to competition law economic analysis, and identified in soft law as being susceptible to regulation.[55] The framework anticipated, and regulatory discourse predicted, the progressive removal of regulation, as and when competition became effective and sustainable.[56] Yet, a decade later, regulatory

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Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) [2002] OJ L108; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201; Decision 676/2002/ EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) [2002] OJ L108.

[50] Framework Directive, art 14(2) and art 7(4).

[51] Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services [2002] OJ L200/38.

[52] Council Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services [2003] OJ L114/45 <http://ec.europa.eu/information_society/policy/ecomm/doc/library/recomm_guidelines/relevant_markets/en1_2003_497.pdf> accessed 24 July 2012.

[53] Framework Directive, art 1(a) and (c).

[54] At this stage, the application of art 106 TFEU no longer played a significant role in the determination of regulatory provisions or obligations; the art 106 TFEU directive adopted in 2002 was largely legally superfluous, given that no exclusive or special rights in the telecommunications sector subsisted in any Member State at that time, although the directive would have been relevant for the countries that were candidates for accession to the EU.

[55] Recitals 5, 6 and 8. Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2003] OJ L114.

[56] See COM(1999) 539, 5. 'Regulation implemented as a proxy for competition will be reduced as markets become more competitive.'

discourse still referred to transitioning markets from monopoly to competition, when an unfolding regulatory failure scenario was arguably emerging, as will be seen below.

Macro-economic and political objectives of the regulatory framework were tied into the broader aims of the Information Society and the 'Lisbon Agenda'.[57] This can be seen as a form of 're-branding' of the 1992 Single Market regulatory narrative that connected wider economic and political objectives and the need for a more competitive and dynamic economy to the new telecommunications regulation. Some have called this a 'single market cum back-to-the-future' phenomenon.[58] Harmonized sector-specific policy objectives, ie to promote competition, consolidate the internal market for electronic communications and benefit consumers and users, were legislatively laid down, to guide NRAs in making regulatory determinations.[59]

To encourage consistency of approach, the Commission created the European Regulators Group.[60] The group was meant to 'advise and assist' the Commission, to provide an interface between NRAs and contribute to the functioning of the internal market and to consistent application of the 2003 Framework.[61] When the Commission reported in 2006 on the working of the market assessment procedure, it noted that, out of 229 national market assessments, it had used its veto powers only four times.[62]

In 2006, the Commission found that market reviews had 'led to more consistent regulation...ensured that regulation is based on a thorough economic analysis and [wa]s strictly limited to markets in which there is persistent market failure. This has resulted in better regulation....[A]ll NRAs follow a common methodological approach based on EC competition law principles'.[63] Consistency had been achieved with market definitions and market power assessments, but less so

[57] Framework Directive, Recitals 4 and 10.
[58] Professor A Scott, University of Edinburgh, School of Law, via email.
[59] Framework Directive, art 8.
[60] Commission, 'Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services' [2002] OJ L200/38. An earlier informal network of national regulators had been set up by the NRAs themselves (the so-called 'Independent Regulators Group').
[61] ibid art 3.
[62] Commission, 'On market reviews under the EU Regulatory Framework consolidating the internal market for electronic communications (SEC(2006) 86)' COM(2006) 28 final, 6.
[63] ibid 9.

with regulatory obligations.[64] The Commission insisted that it was 'working with NRAs to ensure that their discretion with regard to remedies [*ex ante* obligations] is exercised in a consistent manner'.[65] Nothing in the preparatory documents published prior to the 2006 review suggested that the oversight mechanisms of the 2003 Framework needed significant revision, and certainly not a European regulatory authority. The Commission fixated on consistency, without clarifying the dimensions of the problem, relative to overall market assessments, or to the impact on the single market. This made it difficult to appreciate the true nature of the problem.

The upbeat 2006 evaluation is replete with assertions that are fundamentally about regulatory outcomes.[66] Little evidence or analysis was produced to support them. Claims for successful results were made by referring to generic statistics, such as the comparative percentages of revenue invested by new entrants and by incumbents, but a deeper analysis of how such macroeconomic statistics related to achieving regulatory objectives was absent.[67]

6.3. Another Review/Another Revision: 2007

As required by the terms of the 2002 legislation, a review of the regulatory regime was carried out in 2006.[68] It found that radio spectrum management needed attention and the procedural burdens of conducting market analyses should be streamlined.[69] Of secondary importance, the review also found a need to 'consolidate the single market'.[70] Among the items linked to this were concerns about the appropriateness of obligations imposed by NRAs.[71] The 2006 review concluded briefly that 'To secure the benefits of the internal market, it is proposed to extend Commission veto powers to cover proposed remedies [ie *ex ante* obligations].' The problem with this conclusion was the lack of concrete evidence, other than the Commission's opinion,

[64] ibid.
[65] ibid.
[66] 'The current regulatory framework has produced considerable benefits...'; 'Market players are facing new competitors and are seeking new business models in the face of imminent changes to the electronic communications market of today'; 'All of this will lead to new and innovative services for users...' COM(2006) 334 final, 6.
[67] SEC(2007) 817, 25-26.
[68] COM(2006) 334 final.
[69] ibid 6.
[70] ibid 7.
[71] ibid 8.

cited in the review to support this proposal. The 2007 review amplified these remarks adding a few further strands of analysis:

> [A] number of inconsistencies have emerged between the remedies imposed in a given market situation by different NRAs...Given the fact that market players generate around one third of their revenues in Member States other than their own, further cross-border growth would be enhanced if greater consistency were achieved.[72]

An external study found that the internal market was fragmented,[73] suggesting the primary goal of harmonization, to *establish* an internal market, had not been achieved, on which the Commission commented as follows:

> Although progress has been made, an internal European market for electronic communications and for radio equipment is not yet a reality...[74]

Experience with national decisions under the centralized vetting procedure, using advice from the ERG, gave rise to the following assessment:

> Regarding the choice of remedies [ie *ex ante* obligations], the Commission observes less consistency across the EU than has been achieved in market definition and SMP analysis [where the Commission had veto powers]. Differences in remedies were not always justified by diverging market conditions or other notified specificities. In addition, not always the most efficient remedy was chosen.[75]

The Commission concluded that further veto powers were needed over NRA decisions:

> Many comments made by the Commission on draft measures of NRAs have related to the appropriateness of the remedies proposed. The Commission has voiced concerns in particular regarding remedies that solved only part of the competition problem identified, remedies that appeared to be inadequate and remedies that might have produced effective results too late. To secure the benefits of the internal market, it

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[72] Commission, 'European electronic communications regulation and markets 2006 (12th report) (SEC(2007) 403)' (Communication) COM(2007) 155 final, 15.
[73] Hogan & Hartson and Analysys, 'Preparing the Next Steps in Regulation of Electronic Communications: A Contribution to the Review of the Electronic Communications Framework' (2006) <http://ec.europa.eu/information_society/policy/ecomm/doc/library/ext_studies/next_steps/regul_of_ecomm_july2006_final.pdf>accessed 3 February 2013.
[74] COM(2006) 334 final, 8.
[75] COM(2007) 401 final, 6. In analytical terms, this criticism focused on sub-optimal harmonization of regulatory results rather than harmonization of methods.

> is proposed to extend Commission veto powers to cover proposed remedies.[76]

The 2007 legislative proposals included: (1) a Commission veto over national *ex ante* obligations;[77] (2) Commission powers to require NRAs to impose a prescribed obligation;[78] and (3) Commission powers to require an NRA: (a) to designate an undertaking as possessing significant market power; and (b) to impose a specific obligation, if NRAs failed to meet deadlines for market analyses.[79] Simultaneously, the Commission tabled a draft regulation to establish a European Electronic Communications Market Authority.[80] Nothing in the 2006 review suggested a need for a regulatory agency. Legislative proposals in 2007 were accompanied by an IA that largely reproduced the policy analysis of 2006, in terms of defining problems and identifying policy alternatives.[81] The 2007 impact assessment recorded the extensive consultation processes that had been conducted, beginning in 2005 with a call for input[82], two public workshops in 2006, two public consultations, along with discussions with Member States and regulatory authorities.[83]

The IA constituted a thorough exercise in extensive box-ticking.[84] The requirements of the 'Better regulation' action plan were found to be satisfied; the synergies of the proposed measures were described; a link with the i2010 initiative was made;[85] the recommendations of the Impact Assessment Board were mentioned;

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[76] COM(2006) 334 final, 8.
[77] Proposal for a Directive amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services COM(2007) 697 final, art 7(5).
[78] ibid art 7(8).
[79] ibid art 16(7).
[80] Commission, 'Draft regulation for establishing the European Electronic Communications Market Authority' COM (2007) 699 final. All of the proposals of the Commission of 13 November 2007 are available online <http://ec.europa.eu/information_society/policy/ecomm/library/proposals/index_en.htm>accessed 15 August 2012.
[81] SEC(2007) 1472.
[82] Working Document of DG Information Society & Media, Call for Input on the forthcoming review of the EU regulatory framework for electronic communications and services including the review of the Recommendation on relevant markets, 25 November 2006 <http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/review/comments/511_25_call_for_input_comp.pdf>.
[83] COM(2006) 334 final, 10.
[84] The document was 150 pages.
[85] Commission, 'i2010 – A European Information Society for growth and employment' (Communication) COM(2005) 229 final. This has been overtaken by the 'Digital Agenda for Europe, a Europe 2020 initiative'. See http://ec.europa.eu/digital-agenda/>.

the results of the public consultations were included; an annex on the administrative costs involved followed the model of the Commission Impact Assessment Guidelines; and an evaluation of the costs and benefits of the European Authority in Electronic Communications was included.[86] Although the outward appearance suggested meaningfully qualitative regulatory governance methods, some of the key policy measures of the 2007 proposals turn out to have a weak analytical basis, when the governance measures are examined carefully.

6.3.1 Soft Law: a tool of better regulation or a Trojan horse?

The 2007 review found that soft law instruments provided 'deregulatory flexibility'.[87] In practice, this allowed the Commission to adopt regulatory norms, with limited judicial oversight, and which NRAs for the most part observe. A particularly problematic aspect of soft law in telecommunications regulation inheres to the decisive roles that informal measures, and Commission positions based thereon, play in the NRAs' application of economic regulation. A failure to acknowledge the issue reflects either a willful blind spot or a lack of expertise. I return to this issue in the analysis of regulatory expertise.

[86] Commission, 'Staff Working Document, Impact Assessment accompanying document to the Proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 2002/21/EC Proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC Proposal for a Regulation of the European Parliament and the Council establishing the European Electronic Communications Markets Authority' SEC(2007) 1472.

[87] 'The system of defining markets in a Recommendation provides further scope for deregulatory flexibility.' Commission staff working document - Impact Assessment - Accompanying document to the Proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 202/21/EC - Accompanying document to the Proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC - Commission Staff Working Document Impact Assessment Accompanying Document to the Proposal for Directive amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 2002/21/EC, Proposal for a Directive amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC, Proposal for a Regulation establishing the European Electronic Communications Market Authority SEC(2007) 1472, 20.

6.4. 2009 Legislation[88]

6.4.1 Commission Veto and a European Telecommunications Authority

To recap, the last review produced proposals for several radical changes to the regulatory framework, including a new regulatory agency, a Commission veto over the entirety of economic regulation, and the introduction of 'functional separation' of networks and services, an *ex ante* obligation which had never formed any part of telecommunications regulation. The proposal for a regulatory agency was transformed in the legislative process, in terms of its composition, role and tasks, but no impact assessment was conducted.[89] Two Directives and one Regulation were adopted in 2009.[90] A Body of European Regulators for Electronic Communications ('BEREC') was created,[91] having a largely advisory role, in which the Commission participates as an observer.[92] BEREC incorporated the tasks previously undertaken by the ERG and the European Network and Information Security Agency ('ENSIA'), both advisory.

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[88] As was the case in 2002, the entirety of substantive legislative measures adopted cannot be reviewed here. Arguably, the most significant related to the adoption of a regulatory framework for radio spectrum management that introduced important regulatory principles of service neutrality, technological neutrality and transferability of rights of use. See Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) [2002] OJ L108/1.

[89] The Council, EP and Commission agreed that impact assessments - of Commission proposals and substantive amendments by European Parliament and Council - should consider potential impacts in an integrated and balanced way across the social, environmental and economic dimensions. See 'Common approach to Impact Assessment' (November 2005) <http://ec.europa.eu/governance/better_regulation/documents/ii_common_approach_to_ia_en.pdf>accessed 8 February 2013.

[90] Regulation (EC) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337, 1; Directive 2009/136/EC of the European Parliament and of the Council of 25 November 209 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L337, 11 and Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337, 37.

[91] Regulation (EC) No 1211/2009.

[92] ibid art 4(9). BEREC will disseminate best practice on the implementation of the regulatory framework; provide assistance to NRAs on request; deliver opinions on draft regulatory documents; issue reports and deliver opinions to the EP and Council; and assist the European institutions in relations and exchanges with third parties, including assistance with disseminating best practice to third parties. ibid art 2.

The proposal for the Commission to have veto powers over *ex ante* obligations was rejected. However, the compromise that was agreed significantly blurred the boundary line between hard and soft law, while the exact legal nature of the Commission's decisional powers is far from clear. If the Commission considers that a proposed measure on *ex ante* obligations could create a barrier to the single market or may be incompatible with Community law, the Commission may adopt a recommendation 'requiring' that the draft measure be withdrawn or amended.[94] On its face, the procedure appears to be merely cooperative, persuasive rather than coercive.[95] Where the NRA in question decides *not* to amend or withdraw its measure, notwithstanding the Commission's 'recommendation', it must provide a 'reasoned justification'.[96] If the NRA provides such a reasoned justification, the absence of any further procedural provision implies that the Commission has no further authority over the NRA and would be obliged to initiate an infringement procedure, if it deemed the measure incompatible with Union law.

The suggestion that this opaque procedure will achieve consistency in regulatory obligations can be doubted. The lack of clarity and legal security of such a provision sets a problematic legal precedent for the legal value of hard and soft law, and may offer little judicial control over the latter.[97] I return to this point in the analysis of regulatory expertise.

6.4.2. Additional ex ante obligations

The 2009 legislation amended the 2002 'Access Directive'[98] to introduce 'functional separation' of networks and services as an additional - but exceptional - obligation

[94] Directive 2002/21/EC as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 [2009] OJ L337/37, art 7a.
[95] This may be contrasted with the formal powers of the Commission legally to require change or withdrawal of a market definition or market power assessment. ibid art 7(4).
[96] ibid art 7a.
[97] Under the 2003 Framework, the General Court (GC) found in Case T-109/06 *Vodafone España and Vodafone Group v Commission* [2007] ECR II-5151 and Case T-295/06 *Base NV v Commission of the European Communities* [2008] ECR II-28 that undertakings could not appeal such 'decisions' of the Commission. The GC reasoned that the Commission's comments do not have a legally binding effect unless they are formal Commission veto decisions (under Directive 2002/21/EC, art 7(4)). A formal decision by an NRA to impose *ex ante* obligations will be fully susceptible to appeal. The GC observed: 'if the Commission exercises its right of veto under Article 7 (4), the procedure does not lead to a national decision, but to the adoption of a Community act having binding legal effects and an action may be brought before the Court of First Instance' *Vodafone* (n 97), para 103.
[98] Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) [2002] OJ L108/7. This

that NRAs could impose.[99] Three conditions must be fulfilled beforehand.[100] Adding this provision has been criticized from the point of view of dynamic efficiency, as well as risking over-regulation and 'perpetual' regulation.[101] According to the annual reports on the implementation of the regulatory framework, competition has developed.[102] Many markets have become sustainably competitive.[103] For some, *ex ante* regulation of markets is going in the wrong, expansionary, direction with the trend showing little signs of deregulation in practice.[104] Furthermore, there seems to be a mismatch between the rhetoric of withdrawing regulation and the increasingly heavy administrative measures and machinery for implementation.

Directive laid down the powers of NRAs, the rights and obligations of undertakings, and the list of possible *ex ante* obligations that NRAs could impose.

[99] 'Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 9 to 13 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets, it may, as an exceptional measure, in accordance with the provisions of [the consultation mechanism] impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.' Directive 2009/140/EEC, art 2, amending art 13 and inserting art 13a; Access Directive.

[100] They are: (1) other *ex ante* obligations including price caps must have failed to redress the problem; (2) NRAs must provide impact assessments of investment incentives; and (3) the Commission must approve the measure in advance The proposal must contain a significant level of detail on the nature and level of separation, the legal status of the entity, which assets which are to be subject to functional separation, as well as governance, transparency and monitoring arrangements and compliance provisions. Access Directive, art 8 (2) and (3) (ii).

[101] L Waverman and K Dasgupta, 'Mandated Functional Separation: Act in Haste, Repent at Leisure?' (unpublished paper 2007); J Whalley and A Henten, 'Functional Separation: Experiences from Telecommunications and Other Infrastructure Based Industries' (2010) 34 *Telecommunications Policy* 351; R Cadman, 'Means not Ends: Deterring Discrimination through Equivalence and Functional Separation' (2010) 34 *Telecommunications Policy* 366; A Nucciarelli and BM Sadowski, 'The Italian Way to Functional Separation: An Assessment of Background and Criticalities' (2010) 34 *Telecommunications Policy* 384.

[102] '…the state of competition is improving and new technologies are being taken up…' Progress Report on the Single European Electronic Communications Market 2008 (14th Report) COM (2009) 140 final, 18. 'The fact that there are now 23.5 million unbundled lines, compared to 11.6 million resold and 6.0 million bitstream lines, suggests that new entrants are climbing the investment ladder.' COM(2008) 153 final, 10.

[103] Compare the annex of Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (2003/311/EC) [2003] OJ L114, 45; with that of Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC) [2007] OJ L344, 65.

[104] 'The increase of regulation does not match the de-regulatory rhetoric...' See A de Streel, 'Current and Future European Regulation of Electronic Communications: A Critical Assessment' (2008) 32 *Telecommunications Policy* 722, 726.

Creating a new European regulatory authority that largely replicates the ERG also raises concerns. The tasks of BEREC are advisory, ie to 'to deliver opinions on draft measures or draft recommendations',[105] 'to be consulted on draft decisions and measures',[106] 'to provide assistance to NRAs'[107] and 'to monitor and report'[108] on the sector. The opinions of BEREC bind neither the Commission nor NRAs, which 'shall take the utmost account' of BEREC's opinions or recommendations.[109] Converting the informal ERG into a formally constituted body with legal personality but no meaningfully different role seems contradictory, if the real intention is ultimately to withdraw regulation.

In other words, BEREC was the answer to the wrong question. Public comments on the principle of creating European agencies reflected a high degree of skepticism which the Commission chose to disregard in adopting its Communication on agencies.[110] Moreover, it is questionable whether BEREC will even be able to fulfill the objectives assigned to it, particularly the objective to correct the lack of consistency in applying *ex ante* obligations, to a greater degree than the ERG.[111] Given the nature of its duties and the legal effect of its opinions, it is questionable whether BEREC is the right measure for achieving consistency. As with functional separation, there is an apparent contradiction between the rhetoric and the measures that have been adopted, the latter of which risks to increase the national and European administrative and procedural burden without offering significantly better outcomes.

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[105] Regulation 2009/1211/EC, art 3(1).
[106] ibid.
[107] ibid.
[108] ibid.
[109] ibid art 3(3).
[110] Commission, 'The operating framework for the European Regulatory Agencies' (Communication) COM(2002) 718 final.
[111] L De Muyter, 'Does Europe Need a Single European Telecom Regulator?' (2008) 4 *European Competition Journal* 516, 580. Even more problematically, De Muyter argues that all the issues to be addressed by BEREC that were identified by the Commission in the Explanatory Memorandum to the Draft Regulation [(i) fixed/mobile termination, (ii) geographic segmentation, (iii) data roaming and (iv) voice over IP] were likely to be 'solved by the ERG' well before the adoption of the regulation. A recent controversy between BEREC and the Commission (March 2013), relating to network access regulation, corroborates concerns of BEREC's incapacity to create consistency. See 'Radiobruxelleslibera Telecoms Blog' <http://radiobruxelleslibera.wordpress.com/2013/03/11/european-commission-berec-and-broadband-behind-the-happy-family-picture/ - comments> accessed 13 March 2013.

6.4.3. Mismatch between regulatory incentives

A regulatory feature of telecommunications that the scholarship has increasingly criticized relates to measures to reconcile the conflict between the regulatory objectives of encouraging investment in new infrastructures and *ex ante* regulatory obligations for cost-based access, in other words, between facilitating competition at the low investment service level *and* encouraging capital-intensive investment at the network level.[112] Doubts about the quality of the policy analysis have emerged in the scholarship,[113] and the Commission has recently begun to respond.[114] I return to this in analyzing regulatory expertise below.

6.5. Governance Analysis

6.5.1. Regulatory Mandate

Obtaining political endorsements from the EP and the Council before conducting the public consultations gave the Commission's 1990s policy interpretations and regulatory mandate greater political authority, which was needed to overcome national resistance during the initial period of adopting positive integration measures. Obtaining a regulatory mandate from 2000 became much more an exercise in re-regulation of a sector that was liberalized and harmonized.

The Commission conducted public consultations, published its conclusions and, in 2000, tabled its legislative proposals. An explicit political endorsement of the

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[112] See, eg JM Bauer, 'Regulation, Public Policy, and Investment in Communications Infrastructure' (2010) 34 *Telecommunications Policy* 65; J Huigen and M Cave, 'Regulation and the Promotion of Investment in Next Generation Networks: A European Dilemma' (2008) 32 *Telecommunications Policy* 713; M Cave, 'Encouraging Investment via the Ladder of Investment' (2006) 30 *Telecommunications Policy* 223.

[113] N Garnham, 'Contradiction, Confusion and Hubris: A Critical Review of European Information Society Policy' (European Communications Policy Research Conference, 2005) <http://www.cprsouth.org/wp-content/uploads/2011/11/garnham-debate.pdf> accessed16 August 2012; N Garnham, 'Europe and the Global Information Society: The History of a Troubled Relationship' (1997) 14 *Telematics and Informatics* 323; A de Streel, 'Current and Future European Regulation of Electronic Communications: A Critical Assessment' (2008) 32 *Telecommunications Policy* (2008) 722; JM Bauer, 'Regulation, Public Policy and Investment in Communications Infrastructure' (2010) 34 *Telecommunications Policy* 65; J Huigen and M Cave, 'Regulation and the Promotion of Investment in Next Generation Networks: A European Dilemma' (2008) 32 *Telecommunications Policy* 713; C Cambini and Y Jiang, 'Broadband Investment and Regulation: A Literature Review' (2009) 33 *Telecommunications Policy* 559; M Cave, 'Encouraging Infrastructure Competition via the Ladder of Investment' (2006) 30 *Telecommunications Policy* 223.

[114] See Nellie Kroes, 'Enhancing the Broadband Investment Environment' (Midday Briefing, Brussels, 12 July 2012) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/552&format=HTML&aged=0&language=en&guiLanguage=en>.

proffered regulatory mandated followed: the Lisbon European Council of March 2000 urged rapid legislative adoption during 2001.[115] These proposals were broadly incremental in regulatory policy terms relative to earlier harmonization, reflecting a broad consensus that both a consolidation of legislation and a re-calibration upwards of the threshold for *ex ante* regulation were needed.[116]

By 2006, when the Commission began to solicit input and to prepare a review of the operation of the 2003 Framework, several Better Regulation initiatives had been adopted along with a Commission-drafted framework for the creation of European regulatory agencies. The Commission had also adopted guidance on using external expertise. The measure with real normative force was the practice of conducting IAs as part of the Better Regulation action plan. The introduction of IAs made a qualitative difference in terms of establishing regulatory mandates. Impact assessments convey more normative weight in regulatory governance than public consultations. The criticisms of positive integration measures seen in the scholarship in Chapter 1 do not offer much of a basis on which to evaluate the authority of the regulatory mandate in this context. The contestability of the locus of policy development for telecommunications is modest: there is broad public, private and academic agreement that the telecommunications sector requires a European definition of policies.

Scharpf's view that some positive integration is necessary for the establishment of the internal market supports this analysis. With the second generation of legislation, when the Commission is fine-tuning, streamlining, and updating the existing regulatory regime, Scharpf's criticism that positive integration measures risk creating unintended excessive intrusion into the national prerogatives of Member States cannot be discerned. Up until the 2007 legislative revision, EU regulation of telecommunications could just about be justified entirely by reference to the establishment of the internal market. Most of the economic regulation of

[115] 'The European Council calls in particular upon....the Council and the European Parliament to conclude as early as possible in 2001 work on the legislative proposals announced by the Commission following its 1999 review of the telecoms regulatory framework'.
<http://www.europarl.europa.eu/summits/lis1_en.htm> accessed 26 August 2012.

[116] It is probable that the consolidation and simplification of the earlier legislation would have occurred even without the Commission's adoption of an official simplification strategy which was part of the Lisbon strategy. See Commission, 'Implementing the Community Lisbon Programme: A Strategy for the Simplification of the Regulatory Environment' COM(2005) 535 final.

2002/2003 either simplified or modernized existing policy. The exception to this was the creation of a central veto power over the analyses of national regulators with the introduction of a review procedure. Such a review procedure was unique to economic regulation in the EU and was only adopted with the strong support of the EP such was its contentiousness.[117] The Member States regarded the implementation of regulation as a national prerogative subject to Commission oversight under the terms of the Treaty. The Parliament considered that the need to ensure the achievement of the single market required the Commission to have the power to veto draft measures at the national level. The Council ultimately conceded authority to the Commission to veto market analyses within the legislative conciliation phase of the co-decision procedure under Article 294 TFEU.[118]

Here, the criticisms of excessive centralization may appear to have some merit but, under closer scrutiny, are not well-founded. The endorsement by the EP conveyed an important aspect of political legitimacy to the measure. In the policy framing of 2000, some measure was required to deal with the identified problem with the variations in the application of the rules by NRAs. The weakness of the Commission's approach in its 2000 proposals was its reliance on centralization and the creation of direct powers over NRAs in a manner not foreseen in the Treaties *and* which simultaneously made use of soft law instruments. If a more thorough assessment of the policy problems and options had been made in 2000, alternatives to this approach might have been identified and considered, and weaknesses could have been addressed with compensatory measures, or at least acknowledged. Perhaps the lack of analytical thoroughness reflected the appreciation of the period that such measures would be transitional. The measure was intended to facilitate the development of competition that would render the imposition of *ex ante* regulation

[117] The draft legislation proposed to create a right for the Commission to veto any draft national measure. See Commission, 'Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services' COM(2000) 393 final, art 6(4). In its second reading, the EP endorsed the proposal to give the Commission powers to oversee market analyses and require NRAs to withdraw draft regulatory measures where considered to create a barrier to the single market which the Council sought to remove. 2000/184 (COD). See the legislative history of the 2003 Framework <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2000/0184(COD)> accessed 7 February 2013.

[118] The author was involved in the legislative adoption procedure as a representative of the Commission.

unnecessary.[119] Some momentum had been created in facilitating market entry, albeit in the low investment end of the spectrum. Rather than adopt more onerous regulation and construct elaborate regulatory machinery at the EU level, the 2003 Framework aimed to make as much economic regulation as possible ultimately redundant.[120] When the 2006 analysis proposed heavier obligations and the establishment of a European telecommunications authority, the third generation of legislation seemed to be moving into a longer-term *ex ante* regulatory perspective than initially was the case.

The 2009 legislation duly adopted more stringent *ex ante* regulation and created a regulatory authority. The continuum of *ex ante* regulation was evolving as if competition were less fully developed in 2006 than in 2000. The creation of such an agency implied little expectation of removing *ex ante* regulation. The claim that such regulation was temporary and only meant to manage the transition to competition until markets became fully competitive is seen as just that: an unsupported claim. Whether or not in good faith, it was simply wrong in theoretical terms because it lacked an understanding of the true nature of regulatory challenges of the future. Thus viewed, it confirms the assessment that telecommunications policy makers:

> ...do not well understand the processes they are analysing and exaggerate the possible scope of the understanding, but are unwilling, maybe congenitally unable, to accept either the very limited scope of their powers or admit to their failures.[121]

If sustainable competition has not developed, analysis should examine why, despite many years of regulation, expected developments have not occurred. If competition has 'not yet' developed in the sector, then further analysis of the problem is appropriate, rather than merely suggesting that the sector is still in transition from monopoly to competition. Either the earlier analyses were in some sense inadequate, or there is a case of regulatory failure.[122] If policy developers have not analytically

[119] See COM(1999) 539 final, 3 where the Commission explains the intention to use *ex ante* regulation to manage the transition to full competition and to remove regulation in function thereof.
[120] The second type of regulation, that which was designed to meet general interest objectives, was never intended to be repealed. On the contrary, it was expected to be adapted to ensure its effectiveness in an evolving sector. ibid.
[121] Garnham (n 113) 7.
[122] Some of the literature on regulatory failure was considered in ch 2. Regulatory failure can occur for many reasons. The norms to be applied may be qualitatively high, but applied imperfectly. The

isolated the 'why' or 'why not' of regulatory outcomes, then a re-regulatory exercise is unlikely to produce a convincing regulatory mandate. The link with expertise gains additional importance to the establishment of an authoritative regulatory mandate. Expertise may be shaped by public expectations, which tie into the notion of a shared perception of the public interest. An ability to interpret technological developments is also part of the composition of expertise as is an appreciation of the actual and likely behaviors of market participants. These factors should be part of the problem definition and analysis and contribute to the regulator's analysis when making regulatory claims.

While no further veto powers emerged, a political compromise created significant legal uncertainty, potentially until the Court clarifies the meaning of a Commission 'recommendation' that a national regulator is 'required' to follow but from which it can deviate with a reasoned opinion.[123] When the Commission seeks to strengthen its powers of direct regulation in more intrusive ways, the case for such changes should be robust and capable of independent evaluation. Absent such justification, the criticism of excessive centralization would appear to have considerable force, undermining the authority for claiming such a regulatory mandate.

For features of the legislative framework that lacked a convincing analytical and empirical foundation, the Commission's authority for the regulatory mandate was considerably diminished, and thus impaired its regulatory legitimacy. The Commission's policy analysis may be driven in part by the incentives Majone identified.[124] When the Commission engages in problem solving, it has limited

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norms may be misaligned with the regulatory objectives to be achieved and applied correctly, thus distorting the conditions of the markets and the relative position of undertakings or consumers in the market. Or regulators may be captured by their industry. Majone summarized the US experience as 'Just as the market fails in certain circumstances to serve the public interest, so does public regulation....[R]egulatory failure may have more serious consequences than market failure'. Majone identified numerous forms of regulatory failure. G Majone, *Regulating Europe* (Routledge 1996) 17-18. See also RB Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications* (OUP 1989) ch 2.

[123] The legal interpretation may follow the holding in *Vodafone España,* where the GC found that the legal effects of Commission comments to the Spanish NRA in a market analysis procedure were not such as to create a reviewable act within the meaning of art 263 TFEU [ex-art 230 TEC], nor did the undertaking whose interests would be affected once the NRA took a decision have standing to contest such Commission comments. *Vodafone* (n 97) paras 162 and 167.

[124] Majone observed that the real costs of most regulatory programmes are borne by the firms and individuals who must comply with them. By comparison, the resources needed to produce the

options in terms of policy solutions to propose. Majone suggested that it is difficult to *overstate* the significance of the structural difference between the Commission and national administrations that militates in favor of the Commission producing regulatory policy proposals in which the economic, political and administrative costs are borne by Member States. While the predictions of the rise of the regulatory state are borne out in practice, the analytical observer must draw the conclusion that normative authority is weakened when all problems are deemed to resolve around the law of the harmonizing instrument or Maslow's hammer.[125]

In the next section on expertise, it will be seen that the evidence base put forward by the Commission for these two features of the 2006 legislative proposals was analytically and factually weak. Thus the criticisms of excessive centralization that undermine the validity of positive integration measures have some force here. Conducting a normative regulatory analysis, as well as an analytically sound impact assessment, has a direct bearing on the regulatory authority of the Commission and thus on its credibility as a legitimate regulator. Being required robustly to defend its policy proposals using credible and policy analyses would force the Commission to re-consider how it defines its policy options and thus its regulatory mandates. The quality of the policy analysis is essential to establishing the justification for the regulatory mandate requested; if the quality of the analysis is impoverished, the problems identified and the policy options to address them will be analytically impaired. This is examined further in the section on expertise.

The fact that services and content available via the Internet have become a major contributing factor in the development of transmission networks should figure largely in the evaluation of the interests at stake and the public interest in regulating the telecommunications sector. With the explicit link to the Lisbon agenda, the policies underpinning telecommunications regulation are meant to serve both the interests of the sector as well as the broader interest of society in an Internet-enabled environment. Some commentators have identified a source of regulatory illegitimacy within the US administrative law system which is equally true of the Commission:

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regulations are trivial. G Majone, 'The Rise of the Regulatory State in Europe' in W Müller and V Wright (eds), *The State in Western Europe, Retreat or Redefinition?* (Frank Cass 1994) 87.

[125] Maslow wrote 'I suppose it is tempting, if the only tool you have is a hammer, to treat everything as a nail'. AH Maslow, *The Psychology of Science: A Renaissance* (Maurice Bassett 1966) 15.

'the lack of development of a robust and conceptually independent construct of public interest within the regulatory context and the polity more generally'.[126] The values upon which the EU was founded are undermined when there is 'a failure to establish and articulate with adequate clarity a construct of public interest'.[127]

The 2006 review invoked the well-worn notion of creating an open and competitive internal market that promotes growth and jobs, but it did not articulate how the regulation would in future serve the evolving markets and a much broader class of related, but not regulated, Internet-mediated stakeholders. Nor did it explain how telecommunications regulation would contribute to the social aims of the Lisbon strategy for society as a whole; or how the Lisbon strategy generally would be served, while making numerous assertions on growth and jobs.[128] These conceptual omissions reveal analytical deficiencies in identifying a credible version of the public interest to be served which can impact on the quality of the resulting regulatory mandate and the credibility of the Commission as a regulator.

The lengthy analysis above demonstrates the relative importance of different governance criteria in different regulatory phases and contexts. As telecommunications regulation went through a second and third re-regulatory cycle, the Commission's right to identify appropriate European regulatory mandates, and thus to validate its institutional authority, needed to be, perceived as legitimately exercised. A governance analysis casts considerable doubt on the quality of its analysis calling into question the robustness of the ensuing mandate. Thus the Commission's authority to pursue that mandate was impaired, at least with respect to the provisions that created a formal European regulatory authority, a legally ambiguous co-operative regulatory procedure, and the heavily burdensome *ex ante* obligation of functional separation.

At this advanced stage in the re-regulatory cycle and in the proliferation of related Internet-based markets, the criterion of expertise has acquired considerable significance, and has developed a much richer meaning for policy development in

[126] M Feintuck, 'Regulatory Rationales beyond the Economic' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010) 54.
[127] ibid.
[128] One commentator has been consistently scathing in criticizing the incoherence of the bundle of competition, industrial, research and social policy objectives embedded in the EU concept of an Information Society. See Garnham (n 113); and N Garnham, 'Europe and the Global Information Society: The History of a Troubled Relationship' (1997) 14 *Telematics and Informatics* 323.

the sector, by virtue of the better law-making and smart regulation initiatives. Being required to articulate and defend its policy proposals robustly using credible policy analyses ought to oblige the Commission to re-consider how it defines its policy options and thus its regulatory mandates. The quality of the analysis is essential to establishing a credible justification for the regulatory mandate requested.

6.5.2. Regulatory Expertise

Regulatory expertise can be seen in three cycles of policy development. At the beginning of the liberalization period in the 1980s, expertise related to identifying the structural problems in telecommunications in the internal market that were incompatible with general Treaty provisions and aspirations. The major problems identified were exclusive national rights and divergent national policies for network development. From 2000, telecommunications policy development required an analysis of the context considerably changed from that of the 1980s or the 1990s. In other words, the regulatory expertise needed to come to an accurate definition of the problems to be addressed by regulation related not to structural measures of the Member States but to the reasons for continued market failures despite *ex ante* regulation.

In this section, I examine the expertise reflected in the first regulatory revision (2002-2003). Then I examine the expertise reflected in the second revision including the use for the first time in telecommunications of a regulatory impact assessment procedure. Two assessments were published, one in 2006 and a second in 2007, to accompany draft legislative proposals. The 2007 assessment largely reproduced the analytical elements of an earlier assessment. Impact assessments have a long history in other jurisdictions, notably the US but also the UK and Australia, and now are used in most OECD countries. In regulatory governance, they are particularly important to an analysis of expertise, inasmuch as such assessments essentially constitute a vehicle for demonstrating the expertise of the regulator, or a lack thereof.

6.5.2.1. First Revision

Having successfully introduced competition into the sector by 1999, the next phase was to create regulatory incentives for markets to become more sustainably

competitive, using competing networks. Regulation needed to retain economic rules that facilitated service-based competition but that progressively brought about infrastructure-based competition. In trying to create regulatory incentives that achieved such a transition, conflicting aims for regulation were laid down, ie to facilitate competition by making market entry easy using existing infrastructure, and to encourage investment in new network infrastructure.[129]

A political consensus to create a harmonized competitive internal market in telecommunications was well established when the 1999 review of telecommunications legislation took place, a consensus that was strengthened by being linked to the Lisbon Agenda. The Commission's analysis made reference to considerable information and feedback obtained through public consultations and external studies.[130] The Commission consulted and reported widely on its analysis of technological evolution and convergence, market developments, regulatory principles to guide regulators and policy makers, and on its proposals for regulatory measures.[131] The review in 1999 noted the phenomenon of technological convergence of IT, media and telecommunications and concluded that the new measures should have both pro-competitive economic welfare objectives and safeguard public and consumer interests not served by competition (eg universal service, data protection).

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[129] In addition to competitive tension between two opposing regulatory objectives, the Lisbon strategy related to high speed broadband rollout added industrial policy objectives. For an early and consistent criticism of the perennial tensions between industrial, competition and research policies in the EU, see Garnham (n 113).

[130] There were 16 studies linked to the 1999 Review. These were available online. COM(1999) 539 final, Annex II. The Commission had consulted widely on technological convergence. See Commission, 'On the convergence of telecommunications, media and information technology sectors and the implications for regulation towards an information society approach' (Green Paper) COM (97) 623 final.

[131] Commission, 'On the further development of mobile and wireless communications' (Communication) COM (97) 21; COM (97) 623 final; Commission, 'Results of the public consultation on the Green Paper on the convergence of the telecommunications, media and information technology sectors' (Communication) COM (99) 108; Commission, 'Action plan: Satellite communications in the information society' COM (97) 9; Commission, 'Strategy and Policy Orientations with regard to the further Development of Mobile and Wireless Communications (UMTS)' COM (97) 513; Commission, Final Annual Report on progress in implementing the action plan for the introduction of advanced TV services in Europe' COM(98)44; Commission, 'On radio spectrum policy in the context of European Community policies such as telecommunications, broadcasting, transport, and R&D' (Green Paper) COM(98)596; Commission, 'Satellite communications in the information society: Recent activities, present situation and outlook' (Communication) COM (99)108; Commission, 'Towards a new framework for electronic communications infrastructure and associated services: the 1999 communications review' (Communication) COM (1999) 539 final (Review Communication).

When presenting its regulatory conclusions, the Commission explained how it had taken comments into account, both those which received broad support and those which had not.[132] The Commission re-stated the views of those who endorsed its proposed approach to *ex ante* regulation and those who expressed concerns and identified problems.[133] The Commission distinguished between those policy options which had been widely endorsed and those which had not. The Commission reported 'In all but one area, the Commission has decided to maintain the original proposal (of its Review Communication)'.[134] In this respect, the Commission acknowledged that it had changed its policy position on an important regulatory measure by abandoning its initial two-threshold approach to imposing *ex ante* obligations.[135] However, its analysis of an important aspect of regulation, that of using soft law in the interpretation and implementation of legislative norms, was underanalyzed.

Intending to cater for dynamic market conditions when imposing *ex ante* obligations, the Commission found that:

> an effective way of introducing much-needed flexibility into the new regulatory framework can be via the **increased use of Recommendations and Guidelines.** It recognises the legitimate concerns of stakeholders about transparency, effectiveness, legal certainty and democratic control in respect of such measures [emphasis in original].[136]

While flexibility is a regulatory desirable for dynamic markets, it may be doubted that the Commission truly recognized such concerns. This bland statement effectively ignored such concerns. The Commission may have believed at that time that such soft law measures would be removed in line with removing *ex ante* regulation as competition increased or it may have assumed that such measures were justified since they were frequently used in the application of competition law, even

[132] COM(2000) 239 final, 20-26.
[133] ibid 18.
[134] ibid 20
[135] '[T]here were divided views in the public consultation as described in chapter 2 of this Communication. In all but one area, the Commission has decided to maintain the original proposal...[T]he Commission has decided not to introduce two thresholds for ex-ante obligations in respect of access and interconnection. Instead, it proposes a new approach in this area, which is described in detail in section 3.3.' ibid 20.
[136] ibid.

in telecommunications.[137] Having articulated these concerns, the Commission failed to show if and how it had taken them into account.

The Commission did, at least, reflect the role of expertise in its consultation documents. For example:

> This [Review] Communication presents the main elements of the Commission's policy proposals for a new regulatory framework...This responds to a key message of the consultation on convergence of the media, telecommunications and information technology sectors that there should be a more horizontal approach to regulation of communications infrastructure. This Communication also takes into account the key messages of a number of other recent consultations, reports and independent studies, in particular the Communication on the consultation on the Radio Spectrum Green Paper, the Report on the development of the market for Digital Television in the European Union, and the fifth report on the Implementation of the Telecom Regulatory Package.[138]

The Communication summarized the conclusions reached by consultations that were linked to the review process and noted seventeen external studies commissioned to examine regulatory issues relevant to evaluating earlier regulation.[139] The studies were listed in annex II and accessible online. Prior to adopting draft legislation, the Commission set out its conclusions based on an assessment of the views that it received. It distinguished between those proposals that received broad support, those where there were divided views and proposals not originally included in its earlier review.[140] The Commission acknowledged that the proposals for regulating access to infrastructure were not universally or unequivocally supported but that the majority of respondents agreed that this was the key issue for the forthcoming framework.[141]

Achieving a 'regulation-free' sector was the explicit goal, and the forthcoming legislation was meant to 'set the path to move from the current sector-specific regulation in the telecommunications sector to reliance on the competition rules'.[142] The use of an economic market analysis and soft law would provide the necessary flexibility for NRAs 'to fit the regulatory framework to its national

[137] See Notice providing guidance on the application of the competition rules in Articles 81 and 82 (ex-85 and ex-86) [now arts 101 and 102 TFEU] of the Treaty to access and interconnection agreements, 98/C 265/02 <http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/en/comm-en.htm> accessed 10 February 2013.
[138] COM(2000) 239 final, 3.
[139] ibid 16.
[140] ibid 20.
[141] ibid 10.
[142] ibid 22.

situation while maintaining the integrity of the single market through strong coordinating procedures at European level'.[143]

However the Commission revealed an aspect of its analytical weakness when explaining its assessment of the issues of legal certainty and flexibility using soft law. The Commission argued that (1) putting the list of *ex ante* obligations available to NRAs and (2) defining national administrative processes for assessing these obligations into EU legislation, 'hard law', would provide legal certainty. NRAs would need to act in a transparent manner and justify their decisions in relation to case law and Commission guidelines in order to 'minimise the need for discretionary decisions by regulators'.[144] But the instruments to be used and applied in these definitional processes would be soft law measures adopted by the Commission.

The Commission had established a need for legal certainty and flexibility *in principle*. There was an explicit intention to remove *ex ante* regulation in future. In effect, the Commission wished to impose binding regulatory processes on NRAs in reaching decisions, with informal measures for itself. While the aim of establishing a single market justified *ex ante* regulation, the argumentation used to justify the use of hard law and formal procedures for NRAs and soft law for the Commission needs to be considered further. What was missing from this approach to legal certainty and flexibility was recognition of the risks to a regulator's credibility and to regulatory legitimacy created by the use of soft law and a proper analytical evaluation of the benefits and disadvantages with a reasoned opinion justifying its use notwithstanding its risks. That task was undetected.

Given the use of *legislative* instruments as implementing measures in the earlier framework, a switch to soft law ought to have provoked some deeper analysis of the cost-benefit arguments in using such non-binding measures especially in light of concerns expressed about transparency, effectiveness, legal certainty and democratic control. For reasons that are not given, the analysis failed to do this. The choice to use soft law may have been linked to the switch of using the competition law concept of 'dominance' as a threshold for imposing *ex ante* obligations, defining markets and assessing market power on the basis of economic analysis. Since

[143] ibid 22.
[144] ibid 23.

European competition authorities routinely use soft law measures for guidance, the concerns expressed may not have registered as they ought to have.[145] Thus lip service was paid to these concerns but they were effectively overridden.

What the Commission failed to recognize and acknowledge in its analysis were the differences in the legal positions and rights of undertakings in the two policy areas, in relation to *how the Commission discharges its institutional responsibilities*. When using such informal procedures to give guidance to NRAs in implementing the rules on *ex ante* regulation, the Commission's decisions are not reviewable unless they are formal veto decisions taken by the Commission.[146] Yet they are routinely followed by NRAs and undertakings lack the power to appeal the Commission measure unless a formal veto decision is taken by the Commission.[147]

An appeal will lie from a decision of the NRA which might be regarded as a sufficiently justificatory argument for the use of soft law measures and informal guidance. But it is ironic that, at the same time as EU competition policy enforcement was responding to the normative criticisms directed to the use of soft law in enforcement practices,[148] the Commission concluded that soft law measures were normatively acceptable for imposing *ex ante* obligations. Even the arguments of pragmatic necessity and time-limited regulation might have contributed to a justification. But the Commission did not make this or any other argument because it did not address the issue.

The normativity of the Commission's overall regulatory expertise needs to be considered in context. It identified the interests to be served, the regulatory goals to

[145] Practices involving some soft law measures in competition policy enforcement cases had been widely criticized in the scholarship. Comfort letters, used by the Commission in the period of the previous administrative system of competition law, were criticized as a fundamental flaw in the system and its enforcement. See, eg L McGowan and S Wilks, 'The First Supranational Policy in the European Union: Competition Policy' (1995) 28 *European Journal of Political Research* 141. The Commission no longer has recourse to comfort letters following the change in approach to notifying agreements, as reflected in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now arts 101 and 102 TFEU] [2003] OJ L1/1.

[146] In the cases of *Vodafone España and Vodafone Group v Commission* (n 97) and *Base NV v Commission of the European Communities* (n 97) the General Court found that undertakings could not appeal Commission decisions addressed to NRAs on the basis that the Commission's opinions do not have legally binding effects until they are adopted by NRAs under the administrative procedure laid down for imposing *ex ante* obligations by NRAs.

[147] De Muyter (n 111) 572.

[148] See Commission, 'On Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' (White Paper) COM No 99/027 <http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf> accessed 8 February 2013.

be specified, and reached a defensibly balanced judgment on the basis of comments received and external studies. Although the Commission did not *mention* the use of expertise, it provided its reasoning and justification for the measures that it endorsed, with few exceptions. By providing information and explanation by way of background, reporting extensively on views expressed and disagreements, the Commission provided a basis for assessing to what extent its decisions and policies reflected appropriate expertise. That basis suggested that its regulatory expertise was sufficiently normative to contribute considerably to the legitimacy of its policy conclusions.

Yet even regulatory expertise can have a political aspect where tensions between different interests are resolved in an unconvincing manner, which they were in respect of the introduction of soft law into *ex ante* regulation, which is not objectionable as a matter of principle. However, since it would apply to a key feature of economic regulation the Commission ought to have addressed and resolved the serious normative concerns identified. Where such normative concerns are present as in the 2003 Framework and beyond, there is a need for the other criteria of regulatory governance, such as accountability and due process to be sufficiently robust as a matter of complementarity. This was not well recognized in 2000 or in the next regulatory cycle, which I analyze in the next section.

6.5.2.2. Second revision: the last regulatory cycle

By 2006, many direct and indirect links had developed with other sectors and services, some of which are regulated (eg broadcasting) and some of which are not (eg Internet service providers, websites). This section evaluates the expertise reflected in policy development of the last re-regulatory cycle when the complexity of markets and technology and, correspondingly, the importance of regulatory expertise, had grown.

Diverse even opposing interests needed to be considered and balanced along with an understanding of the patterns of new technologies and their implications. Conflicting regulatory objectives related to static and dynamic efficiency had to be catered for, all of which rendered the identification of appropriate regulation extremely challenging. Thus the introduction of IAs at this point should have

contributed significantly to establishing a robust case for regulatory expertise but this was not the case. Assessments identified only a narrow range of those who were considered the primary stakeholders in the sector, including NRAs.[149] The analysis did not recognize or analyze explicitly that policy development in 2007 should reflect the new Internet-mediated environment. The earlier emphasis on whether and how to regulate dominant incumbents in their relationships with new entrants continued.[150]

By explicitly requiring regulators to (1) define the problem to be solved, and (2) identify the context and interests to be served before possible options are identified, evaluated and compared, IAs inform the evaluative process better than mere communications.[151] The latter need not conform to any analytical structure or framework of policy analysis. In significant respects, the regulatory IAs conducted for the 2007 review fall short of a normative standard. Space does not permit an exhaustive analysis of IAs, although weaknesses can be seen in the use of external studies and engagement with relevant scholarship, with the definition of the problems to be addressed, and with the identification and evaluation of possible alternative policy options.

In this section, I analyze the expertise reflected in the assessment of two regulatory objectives, encouraging innovation and investment and achieving consistent regulatory outcomes, with *ex ante* obligations. These were selected for their relevance to establishing the legitimacy of economic regulation. As it happens, the analysis suggests a surprising lack of skill and judgment. The analysis was taken from the 2007 IA that accompanied the draft proposals for legislation.[152]

6.5.2.3 Conflicting objectives of regulation

In the context of global competition, the analysis noted an overall performance gap between the US and the EU due to lower investments in and less efficient use of ICT

[149] The key players affected by the review proposals were operators, service providers, broadcasters and others. This is not a homogeneous group: its members may often have conflicting interests; and NRAs. COM(2007) 1472, 7.
[150] For a criticism of the narrowness of telecommunications policies, see Editorial, 'From Telecommunications Policy to Internet Governance' (2012) 36 *Telecommunications Policy* 449.
[151] SEC(2009) 92, 21-48.
[152] SEC(2007) 1472.

in the EU.[154] The challenge was to determine to what extent the regulatory system in the EU encourages investment and innovation:

> [T]he question for this review is whether in this sector where technologies develop quickly and demands for higher speed and capacity of networks are always on the rise, the current EU framework has found the right balance between encouraging investment and innovation and promoting price-orientated service competition.[155]

The analysis found that the situation in most Member States reflected a lack of competition in relation to the markets for fixed (as opposed to mobile) access by users. These fixed access markets broadly correspond to the primary connection available to much of the public for high speed broadband services.[156] This connection is typically provided over the copper telephone network, which was installed under monopoly conditions and constitutes a bottleneck resource in a static efficiency framing. It can also be provided by cable TV networks and by wireless technologies to a fixed location.

Some analysis was formulated in a manner suggesting the analytical model used was one of static efficiency:

> [E]x ante regulation should be targeted on those areas where there are enduring bottlenecks that determine access to the marketplace ... regulatory measures should...make market entry possible for operators that are willing to invest in providing services, whilst safeguarding the long-term economic sustainability of the dominant network providers.[157]

But the regulatory context is not static, and the long-term aim of regulation is to achieve sustainable competition in the form of network competition. Regulation needs to avoid encouraging misaligned investment in new access networks that the analysis characterized as follows:

> In policy terms, the issue is to strike a regulatory balance between, on the one hand, allowing incentives for investors in new core and access networks – in the face of considerable uncertainty over the evolution of demand for these services – and, on the other hand, avoiding the

[154] SEC(2007) 1472, 21.
[155] ibid 23.
[156] At the moment, high speed mobile access to broadband connectivity is not yet widespread across the EU but is emerging. This dynamic aspect of technology is one of the variables within a complex set of features of electronic communications markets.
[157] SEC(2007) 1472, 27.

> immediate foreclosure of new markets by sanctioning the reassertion of monopoly privileges by the dominant market players over these new infrastructures.[158]

But there was a lack of consensus on how to achieve the aim:

> The literature on regulation, investment and innovation has not yet been able to confirm an unambiguous empirical relationship between the current framework and investment....[159]

Nonetheless, it had been found that:

> [A] better performing regulatory regime, as measured by the OECD index,[160] does contribute to higher levels of investment...Other factors that have an important positive influence on company investment levels are *GDP per capita; the land area and population density of the country in which they operate; and the size of the company*, as measured by total asset value of the company [footnote omitted, emphasis added].[161]

An external study had confirmed the OECD's findings. The Commission reported:

> ...[A]n econometric study, commissioned to support this impact assessment, has been able to provide estimates of the level of eCommunications investment in the EU and to examine its main drivers.....the results suggest that effective national regulation under the EU framework is associated with higher levels of investment in the sector alongside other positively correlated factors such as GDP per capita, market scale and population density [footnotes omitted][162]

Clearly, in the factors that shape network investment choices, there are significant demographic factors at work, *as well as* regulatory factors.

New entrants argued that mandated access was essential to maintain as part of the regulatory framework to encourage market entry that would allow progressive

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[158] ibid.
[159] ibid 23-24.
[160] The OECD regulatory index measures the level of restrictions on market entry, level of public ownership and market structure. See <http://www.oecd.org/eco/regulatoryreformandcompetitionpolicy/indicatorsofregulationinenergytransportandcommunicationsetcr.htm> accessed 7 February 2013.
[161] An assessment of the regulatory framework for electronic communications – growth and investment in the EU eCommunications sector, London Economics and PricewaterhouseCoopers, 2006 <http://ec.europa.eu/information_society/policy/ecomm/doc/library/ext_studies/assessmt_growth_invst/investment.pdf> accessed 13 February 2013.
[162] SEC(2007) 1472 final, 23-24.

upward investment in the value chain. The well-known arguments of new entrants were that (1) removal of access obligations would inhibit the emergence of infrastructure competition and that (2) *ex ante* access obligations were 'strongly correlated' with increased investment and innovation.[163]

The analysis identified three policy options, the first two of which would readily be seen to be inappropriate even without recourse to an impact assessment: (1) to adopt an automatic access regime ('open access') for *all* new infrastructure; (2) to remove *all* ex ante access regulation ('regulatory holidays'); or (3) to maintain the current model of regulation (but with significant adaptations in relation to Commission powers).[164] The first two options exactly corresponded to the respective positions of the new entrants (using a service-based business model) and to that of incumbents (who argued that freedom from regulation was required to justify their new investments). The analytical outcome could have been predicted without reading the analysis. However, the analysis of the options was drafted in a manner suggesting that at least part of the intention underlying the analytical approach was to introduce an exceptionally intrusive new *ex ante* remedy (of functional separation of networks from services) 'through the back door', that is, by setting it up as a 'straw man' option to be rejected for 'open access' (option 1), but re-introducing it as an amendment to the 'no change' (option 3) in the conclusions. Before considering the analysis of these options, it is worth re-stating that the focus of analysis was on three possible approaches to the regulatory challenge of creating suitable incentives to encourage investment that leads to innovation and service variety, rather than service-based competition that largely involves reselling existing services at prices facilitated by regulated access prices.

6.5.2.3 (a) Option 1: 'Open access' in three flavors

This section reveals how analyses that seem to be credible can actually be deeply flawed when carefully examined. The first option (for trying to create both network investment incentives *and* low-price competition) related to 'open access'. The

[163] ibid 27.
[164] ibid 28.

analysis incorporated a significant number of assumed premises which were not expressed or addressed.[165]

Open access was defined as the separation of infrastructure provision from service provision.[166] When network facilities are 'non replicable assets' and constitute 'natural monopolies', behavioral remedies (transparency, non-discrimination, pricing measures) available in *ex ante* regulation may not be satisfactory because network operators may discriminate in practice. The analysis found that alternative ways were needed to correct persistent discriminatory *behavior*. That behavioral problems are meant to be addressed by competition law was not mentioned.

Three types of separation remedies were identified: accounting, functional and structural separation. The first could not remedy problems with non-price discrimination that might arise with delays or differences in service quality. This option was rejected with the remark that measures must remove the 'incentives to discriminate', which both functional and structural separation would achieve.[167]

Structural separation would make the coordination of investments in infrastructure and service development complex such that regulators would have difficulty in deciding where to separate network operations from other services. The remedy would involve heavy costs for undertakings and would be virtually irreversible once implemented. Shareholder value could be destroyed rather than created. Prices could even rise, rather than fall. Whether it would create public welfare outcomes was doubtful. So 'very significant benefits...would have to be demonstrated for it to be a suitable remedy'.[168] Unsurprisingly, the analysis concluded that this solution would be difficult to justify against the costs.[169] Functional separation remained.

Functional separation was found to have several advantages over structural separation, in the efficiency aspects of being a generic remedy for many markets and

[165] For purposes of focus and economy, I will disregard these considerations but they are not trivial. The analysis entirely failed to address the possible problems with the Treaty rules on ownership of property in art 345 TFEU. Nor did it consider the possibility that such changes might otherwise be *ultra vires*, and/or disproportionate. The self-evident proposition of political implausibility was also not considered.
[166] SEC(2007) 1472, 28.
[167] ibid 29.
[168] ibid 34.
[169] ibid 43.

in respect of the ease of enforcement.[170] It could remove the tactic of delaying investments in network upgrades. But the risk was that network competition could be weakened when functional separation was imposed because it then becomes more attractive to 'rent' access rather than invest in infrastructure.[171] Network investment may be delayed or even abandoned. The solution to overcome this was regulatory: by controlling the rate of return allowed to the network operator, the regulator could avoid either under or overshooting the incentives to invest. Success using this option would depend on the 'skill of the regulator'.[172] This conclusion may have been intended to underpin the false 'no change' option which the analysis would ultimately endorse. Functional separation should be 'reserved for situations where there is an enduring problem of behavioral price-discrimination that cannot be otherwise resolved'.[173] Thus an 'open access' option (option 1) could not be considerable a viable policy option *per se,* although the analysis clearly implied that functional separation might be a reserve measure when all else failed, which constituted precisely the argument made in the IA, in respect of option 3, misleadingly labeled 'no change'.

6.5.2.3 (b) Option 2: 'Regulatory holidays'

The second option would have exempted certain investments from regulation (perhaps only temporarily). A disadvantage of regulatory holidays was the risk of disrupting the playing field between market players at different levels of the value chain which could harm consumer welfare without a reliable indication that it would lead to more investment. 'The mere installation of new technology or new infrastructure does not merit "regulatory holidays" and cannot in itself change existing access obligations'.[174] They yield primarily short term benefits rather than sustainable investments. The suggestion that a suspension of regulation is a necessity to justify capital investments can be countered by a suitable alignment of pricing obligations that recognizes the higher risk premium of investing in a new network to

[170] ibid 35.
[171] ibid 42-43.
[172] ibid 35.
[173] ibid 36.
[174] ibid 45.

provide a greater return on capital.[175] The existing provisions of the 2003 Framework provided this flexibility.[176] This conclusion set up a favorable analysis for option 3.

The argument that such a measure would have provided greater regulatory predictability - and thus given network operators a clear financial incentive for investing in new infrastructures - was rejected by asserting that the option would undermine the pro-competitive intent of the existing regulatory system. This has been a consistent Commission position for several years.[177] However, the review was an opportunity to evaluate this position, to engage with the analysis of the scholarship within which there is a vigorous debate on the subject.[178] The analysis failed to do so, as well as failed to capture the opposing interests and conflicting incentives of the different measures, thus conveying the impression that the option was underanalyzed.

6.5.2.3 (c) Option 3: 'No change'

'No change' meant a continuation of the system of *ex ante* obligation that avoided technology-specific rules and applied neutral economic analysis to structural problems of competition whatever the actual or potential competition in the market.[179] Comments were less analytical than complimentary: continuity would be preserved; flexibility would be maintained. Future regulation could build on past achievements and regulation could be tailored by national regulators to take account of the realities of each market to introduce measures to foster 'both infrastructure and service-based competition'.[180]

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[175] ibid 45.
[176] Directive 2002/19/EC, art 12.
[177] See, eg 'From Service Competition to Infrastructure Competition: The Policy Options Now on the Table' (ECTA Conference, Brussels, November 2006) <http://ebu.info/CMSimages/fr/BRUDOC_INFO_EN_321_tcm7-48301.pdf> accessed 9 February 2013.
[178] JS Gans and SP King, 'Access Holidays and the Timing of Infrastructure Investment' 80 (2003) *Economic Record* 248; P Baake, U Kamecke and C Wey, 'A Regulatory Framework for New and Emerging Markets' (SSRN 2007) <http://ssrn.com/abstract=978730> accessed 9 February 2013; CB Blankart, G Knieps and P Zenhäusern, 'Regulation of New Markets in Telecommunications?: Market Dynamics and Shrinking Monopolistic Bottlenecks' (Working Paper, Diskussionsbeiträge, Institut für Verkehrswissenschaft und Regionalpolitik, No112) <http://www.econstor.eu/bitstream/10419/32309/1/524511845.pdf> accessed 9 February 2013; G Knieps, 'Telecommunications Markets in the Stranglehold of EU Regulation: On the Need for a Disaggregated Regulatory Contract' (2005) 6 *Journal of Network Industries* 275.
[179] SEC(2007) 1472, 39.
[180] ibid 40.

As for market data, three types of competition were cited,[181] none of which involved investment in *new* access infrastructure but which nonetheless constituted some form of network competition.[182] New entrants would need to make varying levels of investments in equipment to provide their services. Progressively, copper-based access networks were likely to be replaced with fiber networks. Intermediate and alternative technologies are complex and include varieties of hybrid usages, such as point-to-multipoint fiber infrastructures, Very High Speed Digital Subscriber Lines (VDSL), [183] and Gigabit Optical Passive Networks (G-PON)[184] that involve fiber networks wherein a single fiber line is shared between several users which cannot easily be unbundled or shared with new entrants.

Rather than focus on each regulatory objective separately, the analysis jumped between the two opposing objectives when initial conditions differed in different Member States. The experience of Member States with pre-existing sets of networks (usually cable TV and copper-based) that could be upgraded to achieve high broadband penetration were a validation of the pro-investment aims of regulation while the outcomes in other Member States, such as France and the UK, that achieved greater broadband penetration using access to the incumbent's network, also constituted successful regulation and validated the service-based competition

[181] These were (1) resale and re-labelling of incumbent's broadband service, eg 'Virgin Broadband'; (2) re-using and reselling incumbents' broadband services with added services, such as voice, broadband *and* content (TV) services (called 'bitstream access'; and (3) local loop unbundling (ULL), ie the use of the connection between the telephone exchange and the customer's premises where new entrants rent the physical line to the customer. Ofcom defines ULL as 'the process where the incumbent operators (BT and Kingston in the UK) makes [sic] its local network (the copper cables that run from customers premises to the telephone exchange) available to other companies. Operators are then able to upgrade individual lines using DSL technology to offer services such as always on high speed Internet access, direct to the customer'. <http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/dsl_facts/LLUbackground.htm> accessed 2 February 2013.

[182] SEC(2007) 1472, 41.

[183] VDSL1 and VDSL2 belong to a family of access technology that exploits the existing infrastructure of copper wires that were originally deployed for traditional telephone service as a way of delivering very high speed internet access. The main high-speed link (eg a fibre optic connection) terminates at a hub near the customer's location. The existing copper wire infrastructure is then used to carry the high speed connection for the short remaining distance to the customer's premises. It can be deployed from central offices, from fiber-optic connected cabinets located near the customer premises, or within buildings. It was defined in standard ITU-T G.993.2 and finalized in 2005. <http://en.wikipedia.org/wiki/Very-high-bit-rate_digital_subscriber_line_2> accessed 5 February 2013.

[184] A passive optical network is a point-to-multipoint, fibre to the premises, network architecture that uses optical splitters to serve multiple premises with a single optical fibre. <http://en.wikipedia.org/wiki/Passive_optical_network> accessed 5 February 2013.

objectives.[185] The analysis did not appreciate that it was selectively linking regulatory aims that accorded with specific Member State outcomes, rather than asking whether the right regulatory incentives were in place to encourage investment where two sets of pre-existing networks did not exist.

The Commission argued that maintaining the current regulatory framework would give national regulators flexibility to develop appropriate measures but, elsewhere, the proposal was to remove all discretion from NRAs when imposing *ex ante* obligations, by giving the Commission a veto over the entire procedure, thus undermining the argument here. This revealed the logical inconsistency of various analyses. In the concluding remarks of the analysis of these options, the Commission found that the flexibility of the regime carried a danger of 'heterogeneous' implementation of *ex ante* remedies resulting in regulatory inconsistency. This was presumed to hamper to emergence of pan-European services. This proposition was contestable on several grounds because the absence of pan-European services might be explained by factors other than regulatory outcomes. The analysis also failed to mention that a variety of regulatory outcomes can be explained by reference to other factors.

However, the intention was to lay the ground for the suggestion to introduce a 'more appropriate' modified 'no change' option in which mandatory functional separation would be added as a measure available to the NRA's 'regulatory toolkit'.[186] In the conclusions on the three options, the analysis found that the addition of such a remedy could:

> ...enhance competition in an environment where standard remedies were insufficient to improve market failure and where there was little prospect of infrastructure competition within a reasonable timeframe.[187]

6.5.2.4 Conclusion to policy analysis of conflicting aims

The quality of the regulatory expertise that was reflected in the analysis sketched above left much to be desired. Analytically the suggestion that discriminatory behavior required such a structural remedy should have been better explained and

[185] SEC(2007) 1472, 40-42.
[186] ibid 47.
[187] ibid 47.

analyzed. The analysis was confusing. Including a vertical separation model in the 'open access' option allowed the Commission to introduce a highly sympathetic treatment of a measure, functional separation of networks and services, in a context in which it was initially rejected, without explicitly signaling that it would be taken up in the context of option 3. When the measure is re-introduced in the context of a no change option, there is psychological and cognitive surprise but less logical and normative resistance to the proposal. This approach smacks of disingenuousness.

Thus the analysis here should be seen as a form of analytical incapacity possibly even dishonesty. Genuinely defensible policy options were not identified and analyzed. The introduction of functional separation as an *ex ante* remedy was also analytically unsound. It tried to create an association of reasonableness with a measure that is fraught with difficulties of application and contradictions with the long-term aims of *ex ante* regulation. Despite the Commission guidelines for impact assessment explicitly calling for an identification and quantification of costs and benefits, very little of the analysis brought in quantified costs and benefits and trade-offs, and in places where the trade-offs were mentioned they were generally well known in advance thus adding little to an evaluation. However, the fundamental flaw in the overall approach was the patent attempt to simulate three policy options that, however analyzed, amounted to two paper tigers and one pre-established regulatory policy choice. The next section examines the combined regulatory agenda of creating a regulatory authority and creating Commission veto powers over *ex ante* obligations.

6.5.3 The Regulatory Objective of Consistency in Implementation[188] or 'going for the full veto'

Once again, examination of the Commission's analysis reveals a regulatory expertise shortfall. The analysis found that the Commission's exercise of its review and veto

[188] The impact assessment relevant to this objective included two other objectives, ie 1) to encourage pan-European services; and 2) to improve the effectiveness of national appeal procedures. These seem to have been added to pad out the case for a European regulatory authority but do not withstand much assessment. The first is a category of non-existent services whose non-appearance may be explained by reference to factors other than those credited, and the second would effectively have transferred judicial powers of reviewing national regulatory decisions to a European telecommunications agency, along the lines of the European Office for Harmonization in the Internal Market, based in Alicante, Spain. In addition, the external cost-benefit study did not address the third objective. Neither of these objectives is analyzed here.

powers over *ex ante* obligations had already strengthened the single market.[189] However, the framework in which NRAs decided on the obligations to impose on undertakings with SMP had raised questions as to whether an 'optimum degree of regulatory consistency' had been achieved using the existing model. Defining the problem in that manner, rather than whether the objectives of the *ex ante* regulation had been achieved, focused the policy analysis on the wrong question and allowed policy proposals to be considered that favored a specific approach and analytical outcome.[190] As with the analysis of the aim of encouraging innovation and investment, some rather extreme suggestions were presented.

The first option was the creation of a European regulatory agency with discretionary decisional powers that would have involved a transfer of national regulatory powers to the European level. The second option was the creation of an authority with no decision-making powers designed primarily to assist the Commission and NRAs in exercising their discretionary decision-making powers. The third option was simply to improve co-ordination between the Member States on an ad hoc basis. A major weakness of the analysis of the agency was a failure to acknowledge the highly speculative nature of the activities to be undertaken by it. The external cost-benefit study on the creation of such an agency explicitly mentioned this significant aspect of the policy option confirming its speculative nature.[191] Such an omission did not reflect well on the transparency of the assessment process or on the expertise of the Commission.

What was the evidence of the problem for which these options were credible solutions? According to the Commission, a significant degree of consistency had

[189] SEC (2007) 1472, 66-67.
[190] ibid 67.
[191] The European Evaluation Consortium, 'Cost-Benefit Analysis of Options for Better Functioning of the Internal Market in Electronic Communication: Final Report' (2007) <http://ec.europa.eu/information_society/policy/ecomm/doc/library/ext_studies/cba_teec_eecma_pdf_fin_ver.pdf> accessed September 2012. The externally conducted cost-benefit analysis for the creation of a European electronic communications authority was published in 2007. Because of the far reaching recommendations of the Commission's impact assessment internal evaluation board, infra, a cost-benefit study was rapidly conducted meaning that the consultants were obliged to work under significant time pressure. In addition, their evaluation was said to be based upon extremely limited information: 'The exercise had to be carried out under severe time constraints and finalized in a six-week period between July and August 2007....This has *severely limited the methodological approach* that had to be based on secondary sources only, without having the possibility of more sophisticated quantitative models or accessing new sources of information'. ibid 8.

already been achieved by 2007.[192] The problem was the analytical failure to identify the harm to the single market caused by such lack of consistency. There may have been valid reasons that different remedies were imposed by different NRAs. The NRAs were meant to use similar methods but were not required to reach similar conclusions because market conditions in different Member States were not identical. The argument that the Commission did *not* make and which would have made sense was that NRAs reached different conclusions and imposed different obligations in similar circumstances.

The analysis seemed to be more concerned with harmonization of results rather than harmonization of methods. The problem definition was vague and anecdotal: 'market players particularly continue to complain about regulatory inconsistency, that there are differences in approach of national regulatory authorities in different countries'.[193] The formulation of this was:

> A number of inconsistencies have emerged in the remedies imposed in a given market situation by different NRAs...non-discrimination remains unenforced [Was there an infringement procedure?]...there are considerable variations between MS in applying certain regulatory obligations such as scope of access obligations and price control.[194]

The difficulty with this problem definition is a lack of clear delineation of the dimension of the problem, ie whether the extent of different national factors affected these outcomes. Using the same method, NRAs might well adopt different obligations based on the differences in costs of the undertakings involved. Nor did the analysis offer an explanation of attempts at resolving these problems, or what results good or bad had been achieved with existing powers.

To correct this under defined problem, the analysis identified two extreme options and one moderate option. The extremes were, respectively, (1) transfer and centralization of national powers of *ex ante* regulation a European regulatory agency, or (2) 'no change'. The third, obviously preferred, option was to leave the NRAs with the formal power of imposing *ex ante* regulation but to give the Commission full *ex ante* veto control over the national decisional process. It would be assisted by an advisory European Regulatory Authority. The defined aim was to ensure

[192] SEC(2007) 1472, 67.
[193] ibid 76.
[194] ibid 67.

consistency across the EU in applying remedies[195]. Elsewhere, the analysis had argued in favor of greater flexibility for NRAs but the preferred option in this context was to remove it.

The analysis is simplistic, as if standardization of remedies is a desirable outcome in its own right. National and regional differences would be expected to require differences in regulatory obligations. But, if not, then why not? The analytical weakness of the usage of the concept of inconsistency or the generality of the arguments allowed the Commission to make several assertions that were intended to be taken as evidence of the problem, but which in fact they were not, some examples of which were:

> Consistency in regulation at the wholesale level is particularly important as it provides input to retail services for customers.[196]
>
> Services of cross-border nature or potential would also benefit from a more consistent regulatory approach.[197]
>
> The ability to access consistent EU-wide wholesale offers is becoming increasingly important with the shift to internet-based services...[198]
>
> Regulatory consistency across the EU is particularly important for providers of services to international business users.[199]

Procedural problems with judicial appeals from national decisions required more consistency, as did problems with telephone numbers and frequency assignment procedures in Member.[200] But these problems were either of an inconsequence not to support the case for an agency, ie in the European Telephony Numbering Space,[201]

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[195] In effect, the Commission wanted to see a standardized set of regulatory outcomes, but the assessment doesn't identify or engage with the questions of whether and to what extent underlying differences might themselves warrant different outcomes and if not, why not. That considerable differences exist between Member States was already noted in the commentary on broadband penetration but seems irrelevant to the question of remedies.
[196] SEC(2007) 1472, 67.
[197] ibid 68.
[198] ibid 67.
[199] ibid 69.
[200] ibid 69-72.
[201] The European Telephony Numbering Space (ETNS) was a parallel system of telephone numbering alongside that of national and global numbering schemes. The purpose was to facilitate pan-European telephone services, where global or national numbers were not considered suitable. Such was the level of disinterest in the service that it was discontinued and the ITU reclaimed the code previously assigned for such numbers in 2010. See <http://www.archive.ero.dk/0CB3EE2A-52CD-44B5-9498-7068A4377788.W5Doc?frames=no&> accessed 9 February 2013.

or they could not realistically be addressed with a European agency for reasons discussed below.

The creation of a European regulatory agency with decision-making and appellate review powers was highly improbable. The precedent set in the *Meroni* case[202] called into question any suggestion of creating an agency with discretionary powers, and thus would have encountered insurmountable legal constraints of which the Commission would certainly have been aware but which were not mentioned. Again this reflected either lack of transparency or lack of expertise, the latter of which was unlikely. However, as part of its analysis, the Commission used arguments related to the potential for less effectiveness in outcomes if such powers were created:

> some stakeholders fear that the European authority might be too far removed from the markets and therefore less effective than NRAs, thus rendering the full-fledged authority option unviable from the point of view of subsidiarity.[203]

Thus, a political concession to subsidiarity and a normative one to effectiveness could appear to be made when the reality was more likely to be one of legal impediment.

The analysis of the options of creating a federal-like agency or doing nothing could reliably be predicted to come to the conclusion that only the middle way option of creating an authority to assist the Commission with its increased powers would be appropriate. Like the baby bear's porridge in Goldilocks and the Three Bears, the analysis eschewed the 'too much' of a full-blown agency and the 'too little' of simply doing nothing, to conclude that the optimal choice was the creation of a regulatory authority to assist the Commission in exercising its veto powers, assuming that a veto over *ex ante* obligations would be added. At least the external cost-benefit analysis acknowledged the uncertainties involved and the assumptions made. It reported that, out of the hundreds of draft decisions submitted to the Commission for vetting, only seven had been vetoed; it estimated that a maximum of no more than 50

[202] Case 9-56, *Meroni & Co Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR 133, Judgment of the Court of 13 June 1958. The Court found that there was no power to delegate discretionary power to bodies other than those established by the Treaties.
[203] SEC(2007) 1472, 80.

per year would require in-depth review, of which only one or two might be vetoed.[204] The analysis ought to have engaged more specifically with the nature and dimension of the problem so that it could be appreciated what the evidence revealed about the problem for the single market and the proportionality of creating the regulatory agency.

The Commission wished to see improvement in the consistency of remedies but it offered no statistics on the level of problematic cases related to remedies and no identification of the 'pros' and 'cons' or a cost-benefit analysis. The Commission could have elaborated in its analysis on the comments that it had made to NRAs, which were not binding, but which could have revealed more clearly and explicitly the nature and the dimension of the problems with consistency. Someone outside of the process of Commission reviews of draft national measures would not be in a position to evaluate the claims made in an analytical fashion or to contest the Commission's assessment of the evidence.

There were significant flaws at the levels of problem definition and analysis of policy options. The level of assumptions, the speculative nature of the work to be undertaken by the agency and the incompleteness of the data used for the analysis necessarily had the effect of significantly undermining the accuracy, authority and persuasiveness of the analysis. This diminished the Commission's claim for regulatory expertise and undermined its authority for the measure proposed.

Nor were significant problems with the quality of the analysis emerging for the first time in the review process. The Commission's own internal evaluation board had noted numerous problems in an initial draft of the impact assessment, particularly the absence of *any* evaluation of a European regulatory authority.[205] The Recommendations of the Board were far reaching. They were qualitative and emphasized that the impact assessment needed in several respects to better explain what the changes would be and why. There needed to be a clearer explanation of the relationship between the proposed policy actions in five different problem areas. An

[204] European Evaluation Consortium (n 190) 21.
[205] Avis du Comité des Evaluations d'Impact, SEC(2007) 1475 <http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2007/sec_2007_1475_en.pdf > accessed 18 March 2013.

explanation was also needed for why all of the actions were bundled into one impact assessment.[206]

6.5.4. Conclusions on expertise in early 2000s

What conclusions can be drawn about the level of expertise of the second regulatory cycle and its contribution to regulatory legitimacy? In 2000, the Commission broadly identified and articulated the interests concerned, and including the larger Internet community. The implications of technology had been thoroughly researched and reported upon prior to the review of the regulation from the 1990s. The policy conclusions as to the overall approach to *ex ante* regulation were largely sound, justified by reference to the policy objectives that catered for different interests, i.e., the pro-growth ambitions of the Lisbon Agenda and the consumer protection aspects of providing services and protecting personal data.

The judgment to raise the threshold for imposing *ex ante* obligations in light of greater competition of markets, given the broad consensus to this effect, reflected a balance that took account of the evolution of the sector and the level of market entry. The Commission correctly identified the trends of dynamism detected in market structures as a result of technological progress and noted that this was expected to continue. It appreciated that this needed to be catered for by means of in-built regulatory flexibility while retaining national implementation.

At this stage of policy development, the Commission continued to demonstrate a robust level of regulatory expertise for most of its policy proposals. There was no apparent conflict between views of experts. The neutrality of its regulatory discourse did not suggest that it alone was sufficiently knowledgeable to come to sound policy decisions. Rather, it revised a key policy proposal following public consultation. When reporting on the outcome of its policy processes, the Commission broadly explained its reasoning, in understandable terms.

Nonetheless the blind spot, with respect to the choice of using recommendations and guidelines for important aspects of regulation, was significant. In and of itself, the use of soft law measures is not normatively problematic. The basic conclusion that flexibility was needed *in principle* to regulate dynamic markets

[206] ibid 2.

was sound. But their use needed to be explained and justified when concerns of a serious nature were expressed. That this did not happen suggested that the Commission did not possess the regulatory expertise needed to appreciate and respond to such normative concerns. The use of soft law measures was perhaps assumed to be justified because of the time required to adopt Union legislation and the delay that would have meant for implementation in a dynamic environment. Also the Commission may have associated the use of such soft law with informal measures interpreting EU competition law, eg in the form of Commission notices, as a means of guidance for enforcement.[207] There have been normative issues of lack of justification with the use of 'comfort letters' and 'Article 6 letters' that were deemed to be non-binding and non-reviewable acts of the institution.[208]

But the Commission failed to respond meaningfully to concerns that were expressed about such measures, and which it acknowledged were legitimate. A better approach would have analyzed the nature of concerns expressed, identified the risks and benefits, and drawn upon other values important to the regulatory process such as the effectiveness of regulation. A refined analysis would have brought out the formally non-binding legal nature of the measures and explored the nature of authority they contained, recognizing that they may in practice become *de facto* binding. The analysis could have pointed to the authority of the legislative mandate to adopt such measures, which therefore conveyed considerable authority and legitimacy. The analysis would have identified and evaluated more globally the normative strengths and weaknesses of the use of soft law before coming to a conclusion. On this occasion, there was no analysis, no identification or analysis of normative issues and no conclusion.

Pragmatically, the Commission could have indicated that the intention was to withdraw soft law measures coincident with dismantling *ex ante* regulation, as an explicit signal of its expectation that such informal measures and *ex ante* obligations would be temporary, and as an indication that the concerns expressed were taken

[207] For a complete list of competition notices, see <http://ec.europa.eu/competition/antitrust/legislation/legislation.html> accessed 7 February 2013.
[208] Formerly art 6 of Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty [1998] OJ L354, 18; now art 7 of Regulation Article 6 of Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty [now arts 101 and 102 TFEU) [2004] OJ L123/18.

seriously. This lack of willingness to engage with either the practical or the theoretical and normative weaknesses in the use of soft law for key aspects of applying *ex ante* regulation diminished the Commission's regulatory legitimacy in this policy area. The failure to do more than acknowledge these concerns reflected a lack of requisite expertise and ultimately poor regulatory judgment in addressing an important and politically sensitive issue. This shortfall significantly diminished but did not fatally undermine its regulatory expertise overall.

Given the crucial role that soft law measures will play in the application of *ex ante* regulation going forward, it was remiss of the Commission not to deal with this aspect of soft law. The issue would come back to haunt the Commission when criticisms emerge later of the use of such measures.[209]

The next section draws conclusions in respect of regulatory expertise reflected in the third regulatory cycle in relation to the policy proposals examined.

6.5.5 Conclusions on expertise '2007'

Since telecommunications liberalization had begun in 1988, expectations of positive policy outcomes by 2006 were not unreasonable and had indeed been claimed in annual reports, reviews and communications. In expertise terms, an understanding was needed of the deeper implications of how the regulation of telecommunications impacted well beyond the immediate sector itself, particularly the relationship of the sector with the Internet and services provided over it. But did the analytical expertise of the Commission in developing policy for the sector evolve accordingly? There is considerable room for doubt.

In respect of the establishment of a European regulatory authority, the analysis was unconvincing and lacking in transparency. Problem definition was weak and slanted towards a specific conclusion. The objective was elaborated as requiring removal of persisting inconsistencies in implementation with respect to application of regulatory remedies, to which were added two further and entirely speculative objectives not considered in an external cost-benefit analysis. Having sketched a problem definition in vague terms, the usual extreme options were identified: (1) a federal-like, centralized authority with discretionary decision-making powers; (2) a

[209] See, eg De Muyter (n 111).

'tame' regulatory agency without decision-making powers to advise and support a re-enforced EU oversight procedure (with Commission veto); or (3) no legislative change but better ad hoc co-ordination between the Member States.

The relationship of the so-called persistent inconsistencies in implementation and the dimension of the problem relative to the internal market were difficult to appreciate given the lack of statistics or metric by which to judge the orders of magnitude of the problem. It would have been relevant to know the level of disruption to the single market that gave rise to such a significant institutional proposition. This would have allowed the three options to be considered against the dimension of the problem. The majority of national decisions, it turns out, were unproblematic from the point of view of the internal market. So it was important to explain why there was nonetheless a need to create further institutional solutions for what might seem like a problem that could be solved with a less institutional approach and a more proportionate solution, if the intention was genuinely to create an *ex ante* regulatory framework that could be reasonably easily dismantled.

By 2007, some commentators had begun to observe that no empirical evidence could be found to show that the policy instruments of the previous twenty years had produced the results for which the regulation had been adopted.[210] Others were expressing similar sentiments in more diplomatic terms, but clearly urging a significant adaptation in approach notably in respect of balancing the tension between the conflicting regulatory aims of encouraging investment *and* achieving short-term competition.[211]

The options considered in the policy assessments fell below a normative standard of policy conception. The construction of 'straw man' policy options is not a serious policy analysis. This undermined the credibility of the relevant analysis. Majone's model would identify this as a major deficiency in conferring regulatory legitimacy on economic regulators. Regulatory design tools such as impact assessments are not box ticking exercises. They require cognitive and analytical capacities that must be demonstrated, not taken for granted. This means that, for impact assessments to be considered sufficiently justificatory, and especially for contentious proposals, the accompanying policy analyses need to reflect a

[210] Garnham (n 113); de Streel (n 104).
[211] Bauer (n 112); Cave (n 112).

sufficiently normative level of expertise in conducting a qualitative analysis, and not just in satisfying the process rules for assessment. Moreover, they need to contain the elements of analysis that show whether a measure's benefits are likely to exceed its costs. Both benefits and costs should be quantified if not monetized. Equally they should show whether alternatives are more effective or less costly. None of the above features was included in the 2007 analyses.

Bureaucratic tendencies militate against the application of a high level of 'regulatory craft',[212] that is, against the application of the kind of expertise that focuses on problem solving with no reference to an existing regulatory paradigm. Given the institutional investment already made in the telecommunications regulatory regime, as well as the career disincentives, the unwillingness and inability to engage in such agnostic thinking imply that the 'better regulation' programme offers little realistic prospect of genuine regulatory improvement, unless success can be demonstrated, and this implies a determination of outcomes.

For the Commission to introduce functional separation an *ex ante* obligation at this stage of liberalization, *and* to seek complete veto powers over national regulatory decisions, suggested an inability to think independently and conceptually. Telecommunications policy analysis in 2007 was effectively stuck in an analytical rut. The Commission interpreted sub-optimal empirical outcomes, not as regulatory failure, but as providing an evidence-base to do more of the same. In this re-regulatory context, the authority of the regulatory mandate and the expertise of the Commission are innately inter-twined. A minimally desirable level of regulatory expertise seemed to be lacking.

After competition has developed but even before markets are fully competitive, policy analysis needs to shift gears, and become more 'agnostic' in its orientations. The Commission's measures in the area of better regulation, such as the Guidelines for impact assessment and the smart regulation programme, endorse this approach. Better regulation is about choosing *less* interventionist, *less* prescriptive, and *less* coercive measures, yet the policy analysis in telecoms went in the opposite direction even as the number of regulated markets declined. This was incongruent.

[212] M Sparrow, *The Regulatory Craft*, quoted in R Baldwin, 'Is Better Regulation Smarter Regulation?' (2005) *Public Law* 485, 503 n 87.

Has the Commission lost its right to be the arbiter of public interest for economic regulation in telecommunications? Such a broad-brush claim would be unmerited as this analysis has focused narrowly on only a few specific policy proposals out of many. But the measures analyzed are fundamental to the economic regulation of the telecommunications. The measures were selected in full recognition of their contentiousness. It is just such measures that require normative justification. These selected policy measures deserve further research, as does the question of how impact assessments can contribute to the regulatory legitimacy of the Commission.[213] The point to be emphasized here is the importance of compliance with both substantive and process requirements of regulatory governance in preparing policy analyses. One without the other will impair the normativity of the entire exercise. That in turn will diminish legitimacy. I return to this in my conclusions.

It has now been seen in the analysis of regulatory authority and expertise that the quality of a regulator's ability to demonstrate or reflect the values inhering in normative regulatory governance criteria can decline as the regulatory cycle evolves. Thus, while the authority for and credibility of the Commission's ongoing telecommunications regulatory mandate *in general terms* may be relatively intact, the authority and expertise for the more contentious features of recent re-regulatory harmonization were markedly impaired, notably when the expertise associated with policy design of these features did not demonstrably reach a level of suitable quality.

6.6. The Criterion of Efficiency

It was seen in chapter 2 that efficiency for a supranational regulator has links with the principle of proportionality. Efficiency and proportionality both relate to two aspects of regulatory governance: the challenge on the part of the regulator to achieve its mandate with a minimum of costs and the ambition on the part of the legislator to adopt the minimum of measures needed to achieve the objectives of regulation. Efficiency avoids over-regulation.

Even in a well-established and non-contentious regulatory policy area such as telecommunications, it is possible to craft regulatory measures that are inefficient

[213] For an early exercise in regulatory stock-taking and analysis of the tools of 'better regulation', see Radaelli and De Francesco (n 43); for a critical appreciation of the added value of impact assessments, see Radaelli (n 28).

and disproportionate relative to the aims for which regulation was adopted. The two cycles of policy developments reviewed in this chapter provide a strong contrast in terms of efficiency. For economic regulation, an evaluation of efficiency may find in terms of allocative efficiency that resources have been optimally distributed as an outcome of regulation or that a cost-benefit test is satisfied by reference to the gains exceeding the harm done by regulation.[214] From the 2000s, economic regulation was premised on market failure. No formal or legal impediments to competition existed in the sector, merely economic ones.

6.6.1. The efficiency of the regulatory cycle 2000

The efficiency of consolidating, streamlining and modernizing the twentieth century legislation was considerable. Reducing the number of legislative measures and creating a forum for regulatory cooperation were efficient measures. It should also be acknowledged that the adoption of soft law measures also represented considerable efficiency, creating a much-needed element of regulatory flexibility that could not be provided using legislative instruments of implementation as was done in the '1998 package'.

The use of studies to identify and analyze important regulatory issues was an efficient use of resources as the regulatory context had become broader and no less complex. The use of procedures for extended consultations also constituted an efficient mechanism for policy development and the Commission conducted numerous such consultations before undertaking an overall assessment of the 1998 legislative package. Was the same true for the 2007 exercise?

6.6.2. The efficiency of the regulatory cycle 2007 policy for innovation and investment

The regulatory incentives for sustainable competition to develop in the telecommunications sector are well known. They relate to investment in further innovation, in infrastructure. This was clearly acknowledged by the Commission. Yet the concrete regulatory measures that it devised and which were adopted, in trying to achieve the long term ambition of sustainable competition, appear to thwart

[214] See Baldwin and Veljanovski (n 40).

an important regulatory objective of this sector. The efficiency value of creating a European regulatory authority with legal personality, an office in Riga, Latvia and an EU budget (of €4.6 million[215]) may be doubted. Why?

The inter-institutional agreement on better regulation provides that an impact assessment should be carried out on legislative proposals that have been amended before they are adopted. In the case of the telecommunications measures adopted in 2009, the original proposals of the Commission underwent significant amendment.[216] No assessment was made of the relative advantages and disadvantages, or costs and benefits of the amended proposals. If this had been done properly, the assessment would have re-considered the added value of creating a European regulatory authority as compared to re-enforcing the ERG status and powers.

The Commission claimed that the creation of a European regulatory authority would achieve the objective of regulatory consistency and harmonization. In the Commission's framing, this was an efficient measure for the single market. That argument was premised on the existence of veto powers that would be exercised under the advice of BEREC. The legislative compromise was not to give the Commission veto powers but broadly to retain the status quo for Commission powers while creating an elaborate but inconclusive administrative cooperation procedure and a European regulatory authority. It is arguable that the measures have achieved the opposite of efficiency. Moreover, this seems to have been borne out in a recent case in which the Commission expressed serious concerns with the remedies described in draft *ex ante* measures of the Czech NRA.[217] When asked for its opinion of the Commission's evaluation, BEREC rejected the Commission's view.[218] This

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[215] Budget available at <http://berec.europa.eu/eng/document_register/subject_matter/berec_office/budget_of_the_office/annual_budget_of_the_office/1072-transfers-by-the-administrative-manager-in-berec-office-budget-2012-between-21-sept-and-1-nov-2012> accessed 12 February 2013.

[216] The draft proposals not only would have given the Commission the power to veto the obligations chosen by NRAs but also the power to require NRAs to impose a specific remedy in some circumstances (Draft Framework Directive, art 7(8)) and to require NRAs to designate certain undertakings as having the equivalence of dominance (significant market power) and impose remedies upon them in some circumstances (Draft Framework Directive, art 16(7)). The Commission obtained none of these powers in the legislation adopted.

[217] The Commission's letter can be found at <https://circabc.europa.eu/sd/d/591e4d39-3582-48f8-993a-0fc71f1029fc/CZ-2012-1392-1393 Adopted_EN.pdf>.

[218] The BEREC opinion can be found at <http://berec.europa.eu/files/document_register_store/2013/1/BoR_(13)_04_BEREC_opinion_CZ-2012-1392_2013.01.21.pdf>.

case highlights the scope for legal uncertainty, conflict of authority, sub-optimal institutional outcomes and inconsistency, all of which undermines efficiency in empirical terms.

What about the measures adopted to encourage innovation and investment? Recall that this is meant to be an empirical determination in Baldwin and Cave's framing. Regulatory efficiency relates to resource conservation *while* achieving results, preferably according to independently defined criteria. Empirical determinations of the extent to which regulation can be seen as the causal factor in achieving sustainable competition are either unavailable or are empirically contestable. In the Commission's analysis, there were ample statistics on the extent of broadband penetration in Member States and on those Member States where construction of new networks had occurred. There was even robust evidence that an effective regulatory framework is associated with higher investment in IT. But the uncertainty of a *causal link* between EU *ex ante* regulation and investment makes the efficiency of regulatory design measures difficult to determine without some *ex post* evaluation. I return to this issue of *ex post* evaluation in the section on accountability and in my conclusions chapter.

In practice, efficiency evaluations of regulatory design features challenge even the best regulators. Recognizing the difficulties of determining a causal relationship between regulatory obligations and network investment, some literature has begun to suggest a different and more dynamic methodology to evaluate some of the inefficiencies attributed to the regulatory framework currently in force.[219] Recent indications from the Commission also suggest that controversial new measures to encourage network investment are now being considered that respond to some criticisms of approach and take account of the broader picture in which telecommunications networks operate.[220] As some have called for, the Commission

[219] Huigen and Cave (n 112); C Cambini and Y Jiang, 'Broadband Investment and Regulation: A Literature Review' (2009) 33 *Telecommunications Policy* 559.

[220] '...regulated wholesale access prices should get the "buy or build" signals right'. '...give other operators a clear incentive to build out their own networks, and so to use their own assets to drive infrastructure-based competition'. Possibly signalling a departure from past practice, the Commissioner said: '...regulation should address investment risks by aiming at full cost recovery...'; more precisely, where new entrants enjoy access to the legacy network, or where a second network infrastructure exists, 'NRAs need *not* apply cost orientation directly to NGA ['next generation access'] wholesale access products'. Kroes (n 114).

may accept the value of pursuing only one over-riding regulatory objective above all.[221] That is not yet the reality.

As designed and as adopted, the policy choice of establishing a European telecommunications regulatory agency raises significant efficiency concerns. The impact assessment and the accompanying cost-benefit analysis fell below a satisfactory level of quality. Better regulation measures are meant to improve the design and results of EU regulatory measures so as to contribute more efficiently and effectively to social well-being and public welfare. Whether or not this is achieved depends on an evaluation, not just of impact assessments and the associated cost-benefit studies, but also on the types and quality of resources used in policy development, the administrative structures and rules that are used, and the actual regulatory decisions adopted.[222]

The notion of efficiency in which a regulator uses a minimum of resources to implement its mandate cannot in any sense be validated with respect to the establishment of a telecommunications regulatory agency, on the basis of the factors outlined above. The impact assessment and cost-benefit study were only able to evaluate the agency in theoretical conceptual terms using numerous assumptions, many of which turned out to be unwarranted. Even making such assumptions, the case for an efficient achievement of the aim of consistency and harmonization was contestable on the basis of the absence of meaningful, quantified, data and the extent of the extrapolations that were inferred from assumptions made. Very little of the analysis used quantified cost and benefit data, but relied largely on assumptions that were unproven, such as, the assumption that *ex ante* regulation creates public welfare benefits and that cost savings in allocating frequency of pan-European services would be generated. The latter function attributed to the agency was a matter of pure speculation and could not be validated. The first proposition was far too broadly drawn.

The legislative outcome on the regulatory authority, in conjunction with Commission powers, raises another problematic feature from an efficiency angle. There was no evaluation of the comparative efficiency of re-using and re-structuring

[221] See, eg de Streel (n 104) 733, who called for establishing the sole objective of telecommunications regulation that of maximizing the long-term public welfare.
[222] Wiener (n 26) 460.

the existing ERG network. While it is theoretically possible that such an evaluation would have concluded in favor of creating an advisory telecommunications authority rather than adapting the ERG forum, no such evaluation was made. The inter-institutional agreement explicitly engages the three legislative institutions to conduct both *ex ante* and *ex post* impact assessments.[223] Such evaluation would assist an *ex post* assessment of the arguments, analysis and efficiency considerations that were used in reaching a legislative conclusion.

The value of efficiency in the policy measures examined for the 2007 review was rather limited. But a weakness in one criterion can be offset by others and regulatory legitimacy can be established cumulatively. Regrettably, with respect to the regulatory measures adopted in 2009, other criteria examined thus far offer rather little normative weight. Even accepting that each regulatory context merits a specific combination of weighted regulatory governance criteria, an assessment of efficiency suggests that a satisfactory level of normativity was not met, with a consequent loss of authority and credibility in relation to the measures adopted.

6.6.3. The Criterion of Due Process

Some important normative parameters for due process were established in chapter 3. A policy process was deemed to be legitimate when certain values are satisfied. Due process concerns focused on the scope for sub-optimal decision-making and impairment of regulatory expertise and judgment. The use of procedural due process does not guarantee that procedures will actually address the policy issues properly; in fact, it may distort the development of expertise and the exercise of expert judgment. Where there is a high level of transparency, such distortions become apparent more readily.

In the regulatory cycle of 2000, the Commission acted transparently. It conducted and reported on public consultations of many kinds.[224] It elected to

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[223] European Parliament, Council, and Commission, 'Interinstitutional Agreement on Better Law-Making' [2003] OJ C321/1 para 30.

[224] Prior to conducting a review of the 1998 package, the Commission had examined and reported on several issues adjacent to telecommunications such as convergence and radio spectrum usage in telecommunications, broadcasting, transportation and R&D. See, eg Results of the Public Consultation on the Green Paper on Convergence, COM (1999) 108 final; Commission, 'Next Steps in Radio Spectrum Policy: results of the public consultation on the Green Paper' (Communication) COM(1999) 538 final.

commission numerous external studies and it published them.[225] The legislative measures that it intended to propose were set out in a comprehensive communication that articulated principles to follow in developing and applying regulation, identified the regulatory aims to be achieved and followed a clearly reasoned line of argument. After consulting extensively, the Commission published a comprehensive résumé of the views received, by what respondents, and stated its conclusions. It noted the proposals where consensus did and did not exist and identified the measures about which it had changed its views as a result of the views expressed. It described the substance of the forthcoming legislative proposals that were subsequently adopted. There was considerable transparency and coherence in the way the Commission had conducted the entire policy development process. Thus the value of procedural due process of the 2000 policy development procedures carried a significant level of normativity.

Another regulatory cycle began in 2006 with a call for input and a publication of a first IA. A second assessment was published in 2007 together with draft legislative proposals. An external cost-benefit analysis was published examining the added value for the creation of a European telecommunications agency. All of the above reflected a high level of transparency of procedure. But transparency of reasoning is also an important consideration. Some of the methods used in the Commission's analysis of the policy measures examined here do not reflect positively on the value of transparent reasoning within a regulatory policy analysis. Such transparency links directly to the indirect mechanisms of accountability for modern regulators.[226] The introduction of the *ex ante* obligation of functional separation and the creation of a European regulatory authority did not enjoy a

[225] The studies examined a breadth of issues, eg submarine cable landing rights, tariff transparency, fees for licensing, the scope of universal service, number portability, costing models and emerging services delivered over the Internet. See COM(1999) 539 final, annex I.

[226] R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, OUP 2012) 340. The authors note that some models of accountability via due process offer a continuum of mechanisms for controlling discretionary decision-making, including a participatory approach called 'regulatory democracy' that resembles the US approach. See also M Lodge and L Stirton, 'Accountability in the Regulatory State' in R Baldwin, M Cave and M Lodge, *The Oxford Handbook of Regulation* (OUP 2010) 351-58. They note traditional ways to take account of concerns about the exercise of regulatory discretion, such as cost-benefit analyses, judicial reviews and parliamentary oversight but note that polycentric regulatory settings provide difficult cases in which to design devices for regulatory accountability that capture the values of transparency, justifiability and reasonableness the latter of which I would characterize as expertise.

sufficiently transparent and normative analysis in governance terms. The distinctively unpersuasive analysis of these measures owed a great deal to the logical sleight of hand used in creating an aura of plausibility.

Whether or not such presentational tricks were intended to hide a weak case for their adoption is immaterial. Seen from a procedural due process perspective, they do not reflect a robust standard of independent verification and do not create confidence in the analytical outcomes. What is important to an evaluation of transparency in the policy development process is not whether the analyses support the policy conclusion, but whether the wider public is able to access the information sufficiently to identify the elements of analysis to determine whether the standard has been satisfied in order to justify the conclusions drawn by the regulator.

This is not to argue that due process will guarantee good results. It cannot. The point relates to the ability on the part of external 'observers'[227] and the wider public to evaluate how well the policy process has been conducted, and how the regulator has defended its reasoning in reaching a conclusion, on the basis of evidence that can be independently confirmed. Having required the Commission to structure its analysis in a defined manner for review by public scrutiny, the areas where normative weaknesses may have arisen can more readily identified. If some normative weakness is identified, as was the case for the use of soft law measures, there is an institutional need transparently to respond to these on the merits in an open manner. The Commission did not do so. Moreover, the area of regulation to which these weaknesses related was not trivial, and touched upon central aspects of regulation. The Commission to date has still not acknowledged that it understood the true nature of the problem with the concerns expressed in relation to soft law.

The picture of procedural due process in the 2000s is a bit mixed. While there is a high level of institutional procedural due process that has consistently included the use of normative regulatory design tools, the most recent cycle of policy development suggests that, in contrast to that at the beginning of the century, at least

[227] Moeller as a political scientist develops a construct of an 'observer', or an evaluator, outside of regulatory processes but part of the structure of regulatory governance analysis. 'Public governance is an output oriented concept that pays particular attention to efficiency and economic success....Democratic accountability...could annihilate the expertocratic criteria as well as the external observing perspective.' See C Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 CMLR 313, 317, 320.

some of the structured procedures for policy design may have become box ticking exercises rather than a reflection of genuinely cognitive and analytical processes.

6.6.4. The Criterion of Control and Accountability

The period examined has begun to show the limited ability of other governance criteria to contribute to regulatory legitimacy. Robust mechanisms to verify the relationship between regulatory measures and real world outcomes were not available. Although the Commission has continued to refer to telecommunications regulation as a success story, and has re-branded telecommunications as electronic communications, many commentators have challenged the assessment, not in relation to the regulation generally but in relation to the core economic objectives for adopting regulation for the single market. Not only has the case not been established that telecoms regulation has led to economic welfare outcomes of higher investment and innovation, the system for adopting regulation even with modern policy design tools can be flawed in practice and result in contestable outcomes that do not have a robust evidence-based rationale.

Paradoxically, the use of 'better regulation' techniques for policy development has produced some of the most contentious policy proposals adopted in the area of telecommunications. This showed that even qualitative design tools do not guarantee a quality outcome. This finding also fits with the observation that the use of normative procedural due process methods for compiling an evidence base for policy measures does not guarantee quality outcomes either. Thus measures can be adopted, for example, in the creation of a European regulatory authority or in introducing a burdensome *ex ante* obligation of functional separation that is highly contestable because the evidence base relied upon to propose and adopt them was normatively unsatisfactory. It is precisely because of the mechanism of structured policy analysis that it is possible to detect the weaknesses in regulatory governance, such as a shortfall in regulatory expertise.

Once regulatory measures have been adopted, despite their contestability, further mechanisms are needed to evaluate their relationship to outcomes. The Commission has not yet proposed a specific *ex post* evaluation tool for EU regulation. For the moment, evaluations of regulatory outcomes are conducted by the Commission - which has an institutional bias in terms of wanting to show the

effectiveness of its measures - and by private typically industry bodies who have no obligation to be independent or neutral in their analysis. In the absence of an authoritative mechanism of accountability for the wider public, the assessments made by both types of policy actors above will be contestable. The need for an instrument of accountability is becoming acute because of the extent of EU regulation already adopted and in light of the expansive remit for adopting EU regulation in future.

Once regulations are adopted to re-regulate rather than create markets, an even greater need exists and for a strong evidence-based rationale for regulatory measures and for a sound system of supranational accountability for normative and democratic reasons. Scharpf and Majone would agree that regulation that demonstrably corrected market failures and created greater economic welfare rationale would enjoy normative and output legitimacy. For regulators to focus on demonstrating appropriate outcomes, a mechanism that determines the impacts of regulation independently is needed and was missing. Without some effective system of wider accountability for EU regulation, few incentives exist for the supranational regulators to engage in efficient and effective problem-solving that can be established by reference to verifiable outcomes.[228] As a regulator, the Commission seems to have confused policy process with outcome, and thus may have ignored the risks as well as the signs of policy failure.[229] The irony of 'better regulation' in telecommunications is that the tools for ensuring a higher quality of efficient and effective regulation have achieved a seemingly more contestable outcome than previously. This is not necessarily an indication of systemic failure. The reasons may be related more to the nature and contestability of re-regulation rather than to measures for market creation. But the point is that a robust evidence-based case is needed for market-intervening regulatory measures, both in design and in output. Qualitative modern policy design tools can and do lead to unconvincing measures.

Nonetheless the Commission's reputation as a regulator of the sector is intact for the most part and for most observers.[230] Overall there is a significant level of

[228] G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP 2009) ch 6.
[229] ibid.
[230] For two strident doubters, see de Streel (n 104) and Garnham (n 113).

regulatory legitimacy associated with the EU telecommunications regime, which likely relates more to the perception that it is based, correctly and in contrast to the US, on technologically neutral regulatory principles and uses a sophisticated economic model of analysis to determine a need for regulating undertakings in the market. But there is no room for complacency. I return to the need for further accountability in my conclusions.

6.6.7. Conclusion

This chapter has analyzed governance practices in telecommunications against European governance norms and the governance model of Chapter 3. The Commission's governance practices underwent a radical evolution in the 2000s and were brought into the analytical framework. The Commission is still learning in regulatory governance terms. A consultation was launched in mid-2012 on the practical aspects of measures for evaluating regulation *ex post*.[231] No follow-up has been reported. The Commission may have accepted the principle that regulation has consequences and that, as a regulator, it should seek to determine how well or badly the regulation worked in practice. This does no more than bring the Commission's aim into line with other established, albeit national, regulators, such as Australia, the UK and the US.

The latest iteration of telecommunications legislation in the Union raises difficult questions as to the nature of the true trajectory that the policy is taking and about the use of regulatory governance more generally. Some new features in the arrangements for imposing *ex ante* obligations mean that existing cooperation procedures between NRAs and the Commission have become more formalized and bureaucratic with the creation of an independent European regulatory body with legal personality. Mutual consultation procedures have become somewhat heavier in consequence. The addition of functional separation as an *ex ante* obligation, which is a much more intrusive regulatory obligation than those previously included, is a

[231] The consultation document bears no identifying institutional number, or document label, eg staff working document, communication, etc. It stated: 'The consultation will run as an internet consultation open to all citizens and stakeholders from 27 June to 21 September [2012]. All contributions will be published on the "Your Voice in Europe" website, and we will produce a summary report and the Commission's response'. Stakeholder Consultation (n 24).

measure that is fraught with complexity and uncertainty.[232] Constructing and supervising the arrangements for functional separation will involve considerable governance costs to be borne by the NRA.[233] This measure is controversial even as a sanction in competition law. It was not contemplated for purposes of economic regulation until 2006 and it is all the more surprising that it has been adopted after a long period of full liberalization.[234] [235]

The trends do not suggest that European telecommunications markets are moving towards competition. That, in turn, implies regulatory failure or significant impairment in achieving the regulatory goal of sustainable competition and withdrawal of regulation. This calls into question whether the policy design is credible.

The creation of a formally constituted regulatory authority with legal personality was not persuasively supported with an evidence-based analysis, was not evaluated when modified during the legislative process, and also seems contradictory, when a major regulatory objective is ultimately to withdraw *ex ante* regulation. At a minimum, it gives cause for doubt as to the expectation and therefore likelihood of withdrawal any time soon.

The Commission's practices of developing proposals to address the problems encountered with re-regulation need considerable improvement. What should change

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[232] M Cave, 'Six Degrees of Separation: Operational Separation as a Remedy in European Telecommunications Regulation' (2006) 64/4 *Communications & Strategies* 1.

[233] ERG, 'Opinion on Functional Separation' (2007) 44 ERG 3.

[234] In a speech on 27 June 2006, Commissioner Reding referred to 'the policy option of structural separation' as a solution for 'many' of the competition problems European markets that needs to be discussed intensively in the forthcoming months. V Reding, 'The Review 2006 of EU Telecom Rules: Strengthening Competition and Completing the Internal Market' (Annual Meeting of BITKOM, Brussels, June 2006) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/422&format=HTML&aged=1&language=EN&guiLanguage=en>.

[235] The precedent for this remedy was the functional separation by BT of its wholesale business whereby BT Group plc set up a new and operationally separate business which is now responsible for BT's local access and backhaul telecoms network. What is notable is that BT offered undertakings which were accepted by Ofcom in September 2005 under UK national competition law, the National Enterprise Act 2002, and not under national or European telecommunications regulation. Breaches of the undertakings would create the possibility for fines against BT and for legal action by private parties. One commentator observed: 'Much of the UK case in favour of operational separation rest[ed] on the proposition that BT had the means and the motive to practise non-price discrimination in relation to such products as unbundled loops, wholesale line rental, and bitstream, and had in fact done so…' Cave (n 2321) 3. **Karen: This is footnote 237 so presumably need to switch the references?]**.For a fuller account of the case, see 'Final Statements on the Strategic Review of Telecommunications, and Undertakings in Lieu of a Reference under the Enterprise Act 2002' (Ofcom 2005) <http://www.ofcom.org.uk/consult/condocs/statement_tsr/>.

is the quality of the analytical case, that is, the evidence-base of the Commission's problem definition, coupled with an agnostic approach to policy alternatives and a quantified cost-benefit analysis. These are appropriate standards of analysis which are moreover called for by the Guidelines on Impact Assessment. The failure of the Commission's internal assessment board to ensure that relevant institutional standards are complied with indicates that the use of internal control systems is inherently weak and ineffective. All this, coupled with the absence of any *ex post* assessment mechanism demonstrate that the weaknesses of the institutional arrangements examined in Chapter 3 remain in place.

That the Commission has adopted well-recognized qualitative regulatory governance standards, as have other regulators, is to be welcomed but it has struggled to be able to put them into practice as intended.[237] Thus, the Commission's ongoing adaptations of its governance offer, but have not yet delivered, a basis for attributing normative regulatory legitimacy to economic regulation in telecommunications. For a supranational regulator whose *raison d'être* is founded on output legitimacy, the signs of an uptake in robust regulatory tools are encouraging but the shortfall in achievement needs urgently to be addressed before EU regulatory governance can be transformed into an effective tool in constructing and defending the Commission's supranational regulatory legitimacy.

An evaluation of impact assessments by the Court of Auditors identified a number of weaknesses in the Commission's current approach to preparing such assessments. One criticism related to the Commission's approach related to *ex post* evaluations of regulatory measures:

> A public intervention (and its actual impact) should be assessed through ongoing monitoring and *ex post* evaluation to improve further development of interventions. To enable learning and feedback for future initiatives, *ex post* evaluations would need to collect relevant information on compliance with legislation and the effectiveness of the rules as compared with the envisaged results initially set out in the impact assessment. [238]

[237] For global standards of excellence in regulatory governance, see OECD (n 159).
[238] European Court of Auditors, *Impact Assessments in the EU Institutions: Do They Support Decision-Making*, Special Report No 3 (European Court of Auditors 2010) <http://ec.europa.eu/governance/impact/docs/coa_report_3_2010_en.pdf>accessed 12 October 2012.

Thus the Court of Auditors recommended an examination *ex post* of regulatory measures on their merits. It identified the use of impact assessments and their follow-up as part of a cycle of administering and managing the annual legislative work programme of the Commission. Such an approach if applied appropriately could contribute to a positive validation of EU regulation directly by reference to outcomes, and thus enhance the credibility and legitimacy of the Commission and other EU institutions indirectly. To this end, the Commission needs urgently to address the question of follow-up, of completing the regulatory cycle with appropriate and verifiable *ex post* regulatory outcomes alongside the continued use of modern regulatory governance techniques.

On balance, the value of accountability within the policy development processes of the EU has not yet been adequately represented notwithstanding the governance measures adopted since 2000. That said, the current indications and the overall trend that the Commission seems to be on a 'learning curve' offer some positive perspectives for the future. Overall, the picture that emerges from the 2000s suggests that there is a certain irony in observing that the introduction of regulatory governance tools like IAs correlates positively with a decline in the quality of the regulatory measures, or at least with a decline in the regulatory case that was made for the measures. Institutionally, the Commission has wrong-footed itself: it has formally recognized that governance practices for regulation need to reflect qualitative practices but failed to deliver. At the market building stage, having no formal regulatory governance policy, the normative quality of regulatory governance was robust. After the Commission as an institution recognized their importance, its governance practices have worsened while its legitimacy has diminished.

Conclusions

This research has attempted to dis-entangle the question of how well the Commission performs as a regulator from the much-debated and widely-held proposition that the EU suffers from a 'democratic deficit'. Much of the debate has failed to identify the useful query of whether the Commission's performance as an economic regulator for the single market satisfies a standard of regulatory governance sufficiently well to be considered credibly legitimate.

A strong democratic normativity exists for the remit to create a single European market. Even from eurosceptics, there is little disagreement as to the desirability of a single market. But views vary on the extent to which regulatory measures for the internal market are needed and, even where consensus exists that *something* is needed, opinions will vary on what specific regulatory measures are appropriate. So the normativity of the Treaty mandate does not automatically legitimate the *exercise* of the powers conferred by the Treaties. The exercise of those powers should satisfy a different normative standard, that of normative regulatory governance. My approach to constructing a model of evaluation was to examine some of the scholarship on national regulatory regimes and regulatory theories of regulation, and to compare these with the analyses of two prominent scholars of European regulatory governance in particular (Majone and Scharpf), the models of which are largely mutually exclusive. My research demonstrates that neither school of thought provides a satisfactory model for constructing a normative framing on its own.

The elements of the supranational regulatory governance model proposed here were derived from established theories of regulation and governance from which I selected five qualitative criteria, i.e. authoritative regulatory mandates; regulatory expertise; regulatory efficiency; procedural due process; and accountability. These criteria provided the analytical elements by which to evaluate the legitimacy of the Commission's discharge of its Treaty remit to establish a single market and ensure its proper functioning. For empirical testing, I used a case study in the field of telecommunications regulation, which spans a twenty-three-year period within which three complete cycles of regulatory policy development took place, and during which a monopolized sector was entirely liberalized and re-regulated; and

where regulators face considerable challenges in responding appropriately and effectively to changing technology and competitivity.

In my model for transnational regulators, I adapted the substantive meanings normally attributed to the criteria in existing scholarship and EU policy documents to take greater account of an absence of democratic regulatory processes at the EU level. For example, the criterion of an authoritative regulatory mandate for a national regulator relates to the typically *legislative origin* of its authority to act. But the Commission's authority to regulate the single market is Treaty-based and requires the Commission to interpret a broad Treaty mandate, rather than to achieve specific regulatory goals. Another criterion that I adapted to the specific regulatory profile of the Commission was that of regulatory due process, again because there is no democratic mechanism to review the manner in which the Commission discharges its regulatory remit in the Treaty. I used the values inherent in due process, such as transparency, accessibility and non-discrimination, as an overlay with which to assess the normativity of the decision-making procedures and methods of EU regulation. I found that there is a considerable shortfall at present that should be redressed, as elaborated below. While there is considerable overlap between the five criteria typically applied to evaluate national regulatory models and the one used here, there are also qualitative differences in my model that allow a more meaningful analysis to be conducted and conclusions to be drawn in respect of the normativity of a transnational regulator's performance. My claim is that the added value of my research offers an improvement over available models of evaluation and a robust approach to determinations of regulatory legitimacy.

My key findings can be summarized as follows. First, effectiveness of policies – outcomes – on its own is insufficient as a claim for normative regulatory legitimacy, because means and methodology are as important as outcomes and this is so to satisfy democracy-based norms of what constitutes a legitimate exercise of public authority. That is not the same as arguing that legitimacy always requires democratic institutions to be involved before the exercise of delegated regulatory authority may be deemed legitimate. The delegation of authority and the exercise of authority may be evaluated by different standards both of which withstand normative democratic analysis. Thus, as an alternative analysis to traditional political science

arguments of democratic participation, a regulatory governance framing provides an instrumental or purposive use of normative criteria and principles within regulatory processes to act as *proxies* for systems of control seen in participatory democracies.

Second, constructing and defending regulatory legitimacy on the part of a supranational regulator should neither consist of, nor be evaluated as, a broadly political process, even if establishing normative regulatory legitimacy necessarily forms part of a larger set of complex political processes. For a transnational regulator such as the Commission, I suggest that a normative form of legitimacy could and should be constructed by means of broadly recognizable qualitative criteria relating to the use of regulatory powers that were democratically delegated by Member States. Such an approach is entirely without prejudice to the construction of social or popular legitimacy using mechanisms of discourse described by sociologists. Nor does it preclude the ambition to create genuinely democratic EU legitimacy, which is an entirely political matter. For regulatory legitimacy to be normative, the emphasis should shift away from politics to institutional practices, administrative procedures and mechanisms of *ex post* evaluation. To some extent this has been achieved but more needs to be done. A supranational regulator such as the Commission needs a meaningful form of normative legitimacy as a separate consideration from any question of a systemic democratic deficit. Legitimacy is attributed, or not, to a regulator on the basis of an evaluative process of its regulatory governance. Such legitimacy can be constructed by the quality of the regulatory governance involved in the design and adoption of regulatory measures, with governance defined as the administrative procedures comprising the processes of policy development.

Third, and turning to the case study more specifically, I analyzed the extent to which regulatory governance contributed to the Commission's regulatory legitimacy for the single market in telecommunications. Different criteria within the analytical model carried different levels of weight throughout the period examined. I found regulatory legitimacy to be high when the regulation was directly linked to the establishment of a single market in telecommunications. It remained reasonably robust but somewhat impaired during the first revision. Normative weaknesses in regulatory governance emerged clearly in the most recent legislative revision despite the use of modern regulatory design tools, which confirmed that the *use* of the tools

alone does not guarantee a reliable regulatory outcome. Some of the developments in the last policy development cycle suggest that Majone may have been close to the mark in relation to institutional incentives that result from the limited resources available to the Commission to engage in regulation. While this may be a validation of Majone's point, it also highlights the necessity for a normative standard of policy making, particularly regulatory expertise that allows the regulator properly to conduct impact assessments and interpret the results correctly. The threshold for evidence-based policy making should be set as high as possible, given the in-built tendency towards regulatory expansion and power accretion. To enhance regulatory legitimacy at the supranational level, regulatory governance should be distanced as much as possible from the explicitly political processes and institutions that create political legitimacy. The Commission has taken a major step in that regard, and now uses regulatory governance design measures.

But there are several reasons why regulatory reform in policy development is no panacea for the criticisms of scholars such as Scharpf and Majone, albeit in different respects. Even if the qualitative flaws of Commission impact assessments could be overcome, EU legislators may not take account of such assessment. Thus, over-regulation or under-regulation can still arise when the message of the assessment is lost or ignored by legislators. The Commission, with only limited resources, may prefer legislative solutions in which it has more institutional control, and this may negate the positive effects of regulatory reform. If an impact assessment identifies a non-legislative regulatory solution, the Commission may not necessarily endorse that solution, although subsidiarity would militate against it. Another reason why self-defined governance reform is an incomplete answer for regulatory legitimacy may be that analyses are not founded on hard data, thus unwittingly undermining the evidence base, as was the case for the study conducted on a European telecommunications regulatory agency.

Recent European governance practices have created scope for enhanced legitimacy in policy development processes. That measures such as impact assessments are now systematically conducted on EU policy proposals significantly contributes to the value of the criteria of an authoritative mandate, expertise, efficiency and due process in the regulatory design process. Such indicia of

competence and transparency can enhance regulatory legitimacy. When modern regulatory tools are used properly, policy development processes are transparent, and thus capable of being evaluated by the wider public.

With re-regulatory cycles that characterize the telecommunications sector, such evaluations and comments can be seen as, and assimilated into, a feedback mechanism that would accord with *ex post* evaluation mechanisms at the European level, if ever adopted. Even without an explicit mechanism of *ex post* accountability, the scholarship has begun to identify the mismatches between policy objectives and regulatory methodologies in telecommunications. A continued application of and improvement in using regulatory assessment tools in policy design processes should correspond to regulation that reflects the values of the regulatory governance model of chapter 3. Now that twenty-plus years of regulatory experience can be examined, it is possible to observe and evaluate regulatory processes in evolutionary terms. That some scholarship has also begun to examine the empirical outcomes in telecommunications regulation, by reference to how it is conceived and constructed, is welcome. Also welcome is the emergent scholarship on regulatory governance *as such* that examines the quality of the Commission's practices and outputs. Thus far, findings suggest that problems with quality of outputs exist.

In the 2010 Communication on its 'smart regulation' concept, the Commission emphasized the Governance White Paper (2001) aim of widening access to the policy development process. Smart regulation targets the whole policy cycle, from the design of legislation to implementation, including enforcement, evaluation and revision. Nonetheless, Commission control over the regulatory design process remains, even if it is attended by more bells and whistles. The Commission's public consultations on regulatory measures should now reflect the Treaties' wider remit in a meaningful way. If the Commission were to frame its consultations both more broadly and agnostically, seeking the views obtained in wide consultations, it could give rise to a more satisfactory, and more normative, conception of optional policy measures. This has yet to be discerned. The Commission also needs to give attention to re-regulatory challenges. Although the Commission has engaged with the idea of an *ex post* evaluation of legislation, it has yet to operationalize this. The related 2012 consultation on *ex post* evaluations suggested making such evaluations

an integral part of smart regulation, in which the effectiveness and the efficiency of EU regulation are evaluated. However, an evaluative body, independent of European and, specifically, Commission regulatory processes, has not emerged.

The Commission has thus recognized that regulation is a dynamic process, that regulatory impact assessments have limitations, that a regulatory cycle exists and that it must be catered for in terms of good regulatory practices. The question becomes, of course, whether the Commission gets its policy measures right. But what is right? There is scant experience with the smart regulation approach. Perhaps it is another case of re-branding. It is too early to make a meaningful assessment of success or failure of smart regulation and regulatory quality. Nonetheless, the Commission's discourse over the past few years suggested an awareness of regulatory practices and a willingness to embrace them. But the 2012 consultation had no follow-up. It will not be the first time that the Commission's discourse suggests a positive evolution in normative governance. Nonetheless, the search for methods to validate important measures of market intervention that affect the functioning of markets, the success of undertakings and the investments in innovative technology, thus ultimately affecting all EU citizens, should continue. The legitimacy of the regulator and the regulation may depend upon it.

Finally, and noting in particular that the Eurozone crisis continues to unfold, the wider value of my research seems clear. The analysis developed in this thesis resonates strongly with the current regulatory crisis in the Eurozone that forms part of a bitterly divisive period in the EU. While there are many national and non-national actors involved, the activities of an independent and politically unaccountable central banking authority are increasingly called into question. The dimensions of political influence in financial regulation and the absence of normative governance have been revealed in all their tawdry detail. Ever closer union to some citizens now means that German politicians and banking regulators can dictate the terms of another Member State's financial policies. Although the use of regulatory governance tools, as in telecommunications, does not guarantee good policy results, it does provide an opportunity to observe the processes unfolding and comment thereon.

Moreover, the purpose of creating supranational European regulatory authorities was to moderate political influence in decision-making, not to concentrate it within a single Member State. The situation requires another approach even if it seems that catastrophic failure may take place before there is a recognition of the need for a change. Had those regulators been held to a high standard of regulatory governance, they may have been required to defend their policy propositions against a *broader* community of interests. They may have needed to articulate the problems to be solved and identify *all* of the interests to be served, before proposing policy options. Had the criteria used in this research applied, the greater transparency of the process should have considerably reduced the extent of closed-door negotiation and political horse-trading. Undue political influence within the regulatory process creates possible consequences for moral hazards. In particular, when politicians in one Member State can unilaterally shape the measures to be applied in another, there is no reason for them to take account of the interests of citizens in the Member States affected. Scharpf identified the democratic unacceptability of this outcome fifteen years ago. In the participatory democracies of the EU Member States, this situation should not be tolerated.

All of this underscores the point that regulation has critical real world consequences and dimensions that should not be relegated to secondary importance in order to serve political or ideological purposes. Regulation is a form of public authority and that authority, under democratic theory, derives not from governments, but from people. Ultimately, regulation should serve society and the people. Regulators wielding delegated sovereign powers must be subject to democratically acceptable forms of practice and accountability, without which their actions should not be considered legitimate or appropriate. The current financial crisis underscores the inherent tensions in a system intended to 'create Europe through concrete achievements which first create a de facto solidarity.' Once again, the EU proves the point that output legitimacy is limited in its substantive reach while input legitimacy is complex in its design.

Appendix: Timeline

1979	Commission of the European Communities, Faced with the Challenge of New Information Technologies: A Community Response, COM(79) 650 final, 26 November 1979
1982	Joined Cases 188 and 190/80 *Italy v European Commission* [1982] ECR 2545
1983	Commission of the European Communities, Telecommunications: Communication from the Commission to the Council, COM(83) 329 final, 9 June 1983
	Case 41/83 *Italy v European Commission* [1983] ECR 873
1987	Towards a dynamic European economy: Green Paper on the development of the common market for telecommunications services and equipment, COM(87) 290 final, 30 June 1987
1988	Commission of the European Communities, Towards a competitive Community-wide telecommunications market in 1992, Implementing the Green Paper on the Development of the Common Market for telecommunication services and equipment, COM(88) 48 final
	Commission Directive 88/301/EEC of 16 May 1998 on competition in the markets in telecommunications terminal equipment, OJ L131/73, 27 May 1988
	Commission of the European Communities, Progress Report on the implementation of a Community telecommunications policy, COM(88) 240 final – I, 31 May 1988
	Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992, OJ C257/1, 4 October 1988
	Commission of the European Communities, Telecommunications: Progress on the definition of open network provision (ONP): a short status report, COM(88) 781 final
1990	Green Paper on a common approach in the field of satellite communications in the European Community, COM(94) 490 final
	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 L191/1, 24 July 1990 (the ONP Directive)
	Commission Directive 90/388/EEC on competition in the markets for telecommunications services, OJ L192/10, 24 July 1990 (the Services Directive)
	Council Directive of 17 September 1990 on procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors (90/531/EEC) OJ297/1, 29 October 1990
1991	Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications equipment, including the mutual recognition of their conformity, OJ L128/1, 23 May 1991
	Case C-202/88 *France v Commission* [1991] ECR I-1233
	Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941
1992	1992 Review of the Situation in the Telecommunications Services Sector, SEC(92) 1048 final
	Commission Communication on the 1992 Review of the situation in the telecommunications sector, SEC(92) 1048 final, 21 October 1992
	Joined Cases C-271/90, C-281/90 and C-289/90 *Spain, Belgium and Italy v Commission* [1992] ECR I-5833

1993	European Parliament Resolution of 19 January 1993 on a common approach in the field of satellite communications in the European Community, A3-042/92; OJ C42/30, 15 February 1993
	European Parliament Resolution of 20 April 1993 on the Commission's 1992 review of the situation in the telecommunications sector, A3-0113/93; OJ C150/39, 31 May 1993
	Communication of 28 April 1993 to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector, COM(93) 159 final, 28 April 1993
	Council Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market, OJ C213/1, 6 August 1993
	White Paper on Growth, Competitiveness, Employment – The challenges and ways forward into the 21st century, COM(93) 700, 5 December 1993
	Case C-320/91 *Procureur du Poi v Corbeau* [1993] ECR I-2533
1994	Green Paper on a common approach in the field of mobile and personal communications in the European Union, COM(94) 145 final
	Communication from the Commission to the Council and the European Parliament on satellite communication: the provision of – and access to space segment capacity, COM(94) 210 final, 10 June 1994
	Council Resolution of 17 February 1994 on universal service principles in the telecommunications sector, OJ C48/1, 16 December 1994
	Commission Directive of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, 94/46/EEC, OJ L268/15, 19 October 1994
	Commission Directive 94/46/EC amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L258/15, 19 October 1994
	Green Paper on Liberalisation of Telecommunications Infrastructure and Cable Television Networks, Part One, Principle and Timetable, COM(94) 440 final, 19 October 1994
	Communication to the Council and the European Parliament, Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks – Part I: Principle and Timetable, COM(94) 440 final, 25 October 1994
	Council Resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures, OJ C379/4, 31 December 1994
1995	Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks, Part Two, A Common Approach to the Provision of Infrastructure for Telecommunications in the European Union, COM(94) 682 final, 25 January 1995
	Communication on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services, COM(95) 113 final, Brussels, 4 April 1995
	Commission Communication on the consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks, COM(95) 158 final, 3 May 1995
	Council Resolution of 18 September 1995 on the implementation of the future regulatory framework for telecommunications, OJ C258/1
	Commission Directive 95/51/EC of 18 October 1995 amending Commission Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television

	networks for the provision of already liberalised telecommunications services, OJ L256/49, 26 October 1995
	Council Directive 95/62/EC of 13 December 1995 of the European Parliament and Council of the European Union on the application of open network provision (ONP) to voice telephony, OJ L321/6, 30 December 1995
1996	Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L74/13, 22 March 1996
	Status Report on European Union Telecommunications Policy, Working Document DG XII/A/1, April 1996
	The Consultation on the Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks, COM(95) 158 final, 25 November 1996
1997	Communication from the Commission: 'European Union Action Plan: Satellite Communications in the Information Society' COM(97) 91 final, 5 March 1997
	Decision No 710/97/EC of the European Parliament and the Council on a co-ordinated authorisation approach in the field of satellite personal communication services in the Community, OJ L105, 23 April 1997 (as amended by Decision No 1215/2000 EC, OJ L139/1, 10 June 2000)
	Directive 97/13/EC of 10 April 1997 of the European Parliament and Council of the European Union on a common framework for general authorizations and individual licenses in the field of telecommunications services, OJ L117/15, 7 May 1997
	Communication from the Commission to the Council, The European Parliament, the Economic and Social Committee and the Committee of the Regions on the implementation of the telecommunications regulatory package, COM(97) 236 final
	Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision, OJ L199/32, 26 July 1997, as amended by Directive 98/61/EC (OJ L268/37, 3 October 1998)
	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 L295/23, 29 October 1997
	The implementation of the telecommunications regulatory package: first update [Second report] COM(1997) 504 final
	Green Paper on the Convergence of the Telecommunications, Media and Technology Sectors, and the Implications for Regulation – Towards an Information Society Approach, COM(97) 623, 3 December 1997
	Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C/5 372, 9 December 1997
	Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [1998] OJ L24/1
1998	Commission Recommendations 98/195/EC of 8 January 1998 on Interconnection in a liberalised market – Part I: Interconnection Pricing
	Third Report on the Implementation of the Telecommunications Regulatory Package, COM(1998) 80 final

	Directive 98/13/EC of the European Parliament and of the Council of 12 February 1998 relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity, OJ L074, 12 March 1998
	Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (replacing European Parliament and Council Directive 95/62/EC), OJ L101/24, 1 April 1998
	Fourth Report on the Implementation of the Telecommunications Regulatory Package, COM(1998) 594 final
	Commission Recommendation of 8 April 1998 on Interconnection in a liberalised telecommunications market. Part 2: Accounting separation and cost accounting COM(1998) 960, final
	Commission's Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector [1998] OJ C265/2, 22 August 1998
	Communication from the Commission – Fourth Report on the Implementation of the Telecommunications Regulatory Package, COM(1998) 594, 25 November 1998
	Green Paper on Radio Spectrum Policy in the context of European Community policies such as telecommunications, broadcasting, transport, and R&D, COM(1998) 569 final, 9 December 1998
	Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community, OJ L17/1, 22 January 1999
1999	Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM(1999) 108, 10 March 1999
	DGXIII, Discussion Document, Subject: The 1999 Review: regulatory principles, Brussels, 21 May 1999
	Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities, OJ L175/39, 10 July 1999
	Communication from the Commission, 'Fifth Report on the Implementation of the Telecommunications Regulatory Package' COM(1999) 537, 10 November 1999
	Communication from the Commission, 'Towards a new framework for Electronic Communications Review' COM(1999) 539, 10 November 1999
	Commission Recommendations of 24 November 1999 on leased lines inter-connection pricing in a liberalised telecommunications market, C(1999) 3863.
2000	Communication COM(2000) 237 final
	Communication from the Commission, 'The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework' COM(2000) 239 final, 26 April 2000
	Communication from the Commission, 'Sixth Report on the Implementation of the Telecommunication of the Telecommunications Regulatory Package' COM(2000) 814, 7 December 2000
	Proposal for a Recommendation on unbundled access to the local loop, C(2000) 1059

	Regulation (EC) No 2887/2000 of the European Parliament and of the Council on Unbundled Access to the Local Loop, Brussels, 5 December 2000, OJ L336/4, 30 December 2000
2002	Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of , electronic communications networks and services, OJ L108/7
	Directive 2002/20 of the European Parliament and Council of 7 March 2002 on the authorisation of electronic communications networks and services [2002] OJ L108/21
	Directive 2002/21/EC of the European Parliament and Council on a common regulatory framework for electronic communications networks and services, OJ L108/33
	Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ L108/51, 24 April 2002
	Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002/C/165/03, OJ C165/6, 11 July 2002
	Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L201/37, 31 July 2002
	Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ L249/21, 17 September 2002
2003	Commission Recommendation of 11 February on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services , C(2003) 497, 2003/311/EC, OJ L114/45, 8 May 2003
	Commission Decision of 24 July 2003 on the minimum set of leased lines with harmonised characteristics and associated standards referred to in Article 18 of the Universal Service Directive, OJ L186/43, 25 July 2003
	Commission Communication on barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications, COM(2003) 410 final, 9 July 2003
2005	Commission Recommendation on the provision of leased lines in the European Union, part 1: major supply lines for wholesale lines COM(2005) 103/2, 21 January 2005
	Commission Recommendation of 29 March 2005 on the provision of leased lines in the European Union, part 2: pricing aspects of wholesale leased lines part circuits (notified under document number C(2005) 951) [2005] OJ L83
	Commission Recommendation of 6 April 2005 on broadband electronic communications through powerlines (text with EEA relevance) [2005] OJ L93
	Commission Communication 'i 2010 – A European Information Society for growth and employment' COM(2005) 229 final, 1 June 2005
	Commission Staff Working Document, 'Explanatory Memorandum of the Commission Regulation on accounting separation and cost accounting systems under the regulatory framework for electronic communications' (19 September 2005)
2006	Commission Communication on Market Reviews under the EU Regulatory Framework Consolidating the internal market for electronic communications COM(2006) 28 final, 6

	February 2006
	Commission Communication on the Review of the EU Regulatory Framework for electronic networks and services COM(2006) 334 final, 29 June 2006
2007	Commission Communication on market reviews under the EU Regulatory Framework (2nd report) Consolidating the internal market for electronic communications COM(2007) 401 final, 11 July 2007
	Proposal for a Directive amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services COM(2007) 697 final, 13 November 2007
	Commission Staff Working Document Impact Assessment Accompanying Document to the Proposal for Directive amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 2002/21/EC, Proposal for a Directive amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC, Proposal for a Regulation establishing the European Electronic Communications Market Authority SEC(2007) 1472, 13 November 2007
	Commission Staff Working Document Summary of the Impact Assessment Accompanying Document to the Proposal for Directive amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 2002/21/EC, Proposal for a Directive amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC, Proposal for a Regulation establishing the European Electronic Communications Market Authority SEC(2007) 1473, 13 November 2007
	Commission Staff Working Document, Explanatory note accompanying accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 2nd edn SEC(2007) 1483/2, 13 November 2007
	Commission Communication Report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services in accordance with Directive 2002/21/EC and Summary of the 2007 Reform Proposals COM(2007) 696 final, 13 November 2007
	Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, OJ L344/65, 28 December 2007
2008	Commission Recommendation of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002
2009	Directive 2009/140/EC of 25 November 2009 amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L337/37, 18 December 2009.
2009	Directive 2009/136/EC of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L337/11, 18 December 20

	Regulation (EC) No 1211/2009 of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L337/1, 18 December 2009.
	Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ L124/67, 20 May 2009
2010	Commission Communication Smart Regulation in the European Union, COM(2010) 543 final, 8 October 2010
	Commission Recommendation of 20 September 2010 on regulated access to next generation access networks (NGA) [2010] OJ L251

Bibliography

Table of European Cases

Amministrazione delle Finanze dello Stato v Simmenthal SpA (106/77) [1978] ECR 629

Base NV v Commission of the European Communities (T-295/06) [2008] ECR II-28

Commission of the European Communities v Council of the European Communities (C-300/89) [1991] ECR I-2867

Commission of the European Communities v Federal Republic of Germany (178/84) [1987] ECR 1227

Commission v Denmark (C-192/01) [2003] ECR I-9693

Commission v Italy (270/02) [2004] ECR I-1559

Commission v Netherlands (C-41/02) [2004] ECR I-11375

Commission v Sweden (T-229/04) [2007] ECR II-2441

Costa v ENEL (6/64) [1964] ECR 1251

French Republic v Commission (C-202/88) [1991] ECR I-223

French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities (Joined Cases 188 to 190/80) [1982] ECR 2545

International Fruit Company and Others v Producktschap voor groenten en fruit (Joined cases 51 to 54/71) [1971] ECR 1107

Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission (Joined Cases 6/73 and 7/73) [1974] ECR 223

Italian Republic v Commission of the European Communities (41/83) [1985] ECR 873

Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission of the European Communities (Joined Cases C-271/90, C-281/90 and C-289/90) [1992] ECR I-5833.

Meroni & Co Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community (C-9/56) [1958] ECR 133

Ministère Public v Deserbais (286/86) [1988] ECR 4907

Partie Ecologiste ‘Les Verts’ v Parliament (294/83) [1986] ECR 1339

Regina v Henn and Darby (34/79)[1979] ECR 3795

Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (120/78) [1979] ECR 649

State of Belgium v Andre Marchandise (C-332/89) [1991] ECR I-1027

Torfaen Borough Council v B & Q PLC (145/88) [1989] ECR 3851

Union Departementale des Syndicats CGT de l’Aisne v Sidef Conforama (C-312/89) [1991] ECR I-997

Van Gend & Loos v Nederlandse Administratie der Belastingen (26/62) [1963] ECR 1

Vodafone España and Vodafone Group v Commission (T-109/06) [2007] ECR II-5151

Von Colson and Kamann v Land Nordrhein-Westfalen (14/83) [1984] ECR 1891

Cases from Other Jurisdictions

Lawton v Steele 152 US 133 (1894)

JW Hampton & Co v United States 276 US 394 (1928)

Legislation

Administrative Procedure Act 1946 (US)

Amended proposal for a Council Directive on the application of open network provision (ONP) to voice telephony COM (93) 182 final

Charter of Fundamental Rights of the European Union (2000/c 364/01) OJ C364/1

Communications Act 1934 (US)

Consolidated Version of the Treaty on European Union [2010] OJ C83/13

Council Decision 676/2002/EC of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) OJ L108

Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment [1986] OJ L217

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 [1990] OJ L192/

Council Directive of 28 July 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision [1990] OJ L192/1

Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [1992] OJ L165/27

Council Directive 95/62/EC of 13 December 1995 on the application of open network provision (ONP) to voice telephony

Council Directive 97/13/EC of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services [1997] OJ L117/15

Council Directive 97/33/EC of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) [1997] OJ L199/32

Council Directive 98/10/EC of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment [1998] OJ L101/24

Council Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002) OJ L108/33

Council Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009 (unofficially consolidated version)

Council Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) [2002] OJ L108/7

Council Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) [2002] OJ L108/21

Council Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) as amended by Directive 2009/140/EC (unofficially consolidated version)

Council Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Services Directive) [2002] OJ L108/51
Council Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Services Directive) as amended by Directive 2009/139/EC (unofficially consolidated version)
Council Directive 2002/31/EC as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 [2009] OJ L337/37
Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37
Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) as amended by Directive 2006/24/EC and Directive 2009/136/EC (unofficially consolidated version)
Council Directive 2009/136/EC of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L337/11
Council Directive 2009/140/EC of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37
Council Recommendation of 5 June 1992 on the harmonized provision of a minimum set of packet-switched data services (PSDS) in accordance with open network provision (ONP) principles [1992] OJ L200/1
Council Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services [2003] OJ L114/45
Council Regulation (EC) 17, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204
Council Regulation (EC) 19/65/EEC of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [1965] OJ L36/533
Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1
Council Regulation (EC) 1211/2009 of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1

Council Regulation (EU) 182/2011 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13
Council Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty [1998] OJ L354
Council Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty [2004] OJ L123/18
Council Resolution of 30 June 1988 on the Development of the Common Market for Telecommunications Services and Equipment Up to 1992 [1988] OJ C 257/1
Council Resolution of 17 December 1992 on the assessment of the situation in the Community telecommunications sector [1992] OJ C2/5
Council Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market [1993] OJ C213/1
Council Resolution of 7 February 1994 on universal service principles in the telecommunications sector [1994] OJ C48/1
Council Resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures [1994] OJ C379/4
Consolidated Version of the Treaty on European Union [2008] OJ C115/13
Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47
Maastricht Treaty 1992
Single European Act (SEA) 1987
Treaty of Rome 1957
Treaty of the European Union, Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2010] C83/206

European Commission Documents

Commission, '1992 review of the situation in the telecommunications services sector' (Communication) SEC (92) 1048 final
—— 'Action plan: Satellite communications in the information society' COM (97) 9
—— 'Action plan: Simplifying and improving the regulatory environment' COM (2002) 278 final
—— 'Call for input on the forthcoming review of the EU regulatory framework for electronic communications and services including a review of the Recommendation on relevant markets' (2005)
—— 'Completing the internal market' (White Paper) COM (85) 310 final
—— 'Concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 'Cassis de Dijon' (Communication) OJ 256
—— 'The consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks' (Communication) COM (95) 158 final
—— 'Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services' [2002] OJ L200/38

—— Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets [1996] OJ L74/13
—— Directive 95/51/EC of 18 October 1995 amending Directive 90/338/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services [1995] OJ L256/49
—— Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services [2002] OJ L249/21
—— 'Draft regulation for establishing the European Electronic Communications Market Authority' COM (2007) 699 final
—— 'Europe 1992: The overall challenge' SEC (88) 524 final
—— 'European electronic communications regulation and markets 2006 (12th report) (SEC(2007) 403)' (Communication) COM(2007) 155 final
—— 'European governance' (White Paper) COM (2001) 428 final
—— 'Europe's way to the information society: An action plan' (Communication) COM (94) 347 final
—— 'Fourth Report on the implementation of the telecommunications regulator package' (Communication)
—— 'Fifth Report on the implementation of the telecommunications regulatory package' (Communication) COM (1999) 537 final
—— 'Final Annual Report on progress in implementing the action plan for the introduction of advanced TV services in Europe' COM(98)44
—— 'i2010 – A European Information Society for growth and employment' (Communication) COM(2005) 229 final
—— 'Impact assessment' (Communication) COM (2002) 276 final
—— 'Implementing the Community Lisbon Programme: A strategy for the simplification of the regulatory environment' COM (2005) 535 final
—— 'Lines of action' (Communication) COM (83) 573 final
—— 'Inter-Institutional Common Approach to Impact Assessment (IA)' (2005)
—— 'Next Steps in Radio Spectrum Policy: results of the public consultation on the Green Paper' (Communication) COM(1999) 538 final.
—— *Nineteenth Report on Competition Policy* (Brussels 1990)
—— 'On barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications' (Communication) COM (2003) 410 final
—— 'On broadband electronic communications through powerlines (text with EEA relevance)' (Recommendation) [2005] OJ L93
—— 'On competition in the markets for telecommunications services' (Directive) OJ L192/10
—— 'On market reviews under the EU Regulatory Framework consolidating the internal market for electronic communications (SEC(2006) 86)' COM(2006) 28 final
—— 'On modernisation of the rules implementing articles 85 and 86 of the EC Treaty' (White Paper) Programme No 99/27
—— 'On radio spectrum policy in the context of European Community policies such as telecommunications, broadcasting, transport, and R&D' (Green Paper) COM(98)596
—— 'On relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with

Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory' (Recommendation) OJ L114
—— 'On the consultation on the review of the situation in the telecommunications services sector' (Communication) COM (93) 159 final
—— 'On the convergence of telecommunications, media and information technology sectors and the implications for regulation towards an information society approach' (Green Paper) COM (97) 623 final
—— 'On the further development of mobile and wireless communications' (Green Paper) COM (97) 21
—— 'On the implementation of the telecommunications regulator package' (Communication) COM (97) 236 final
—— 'On the implementation of the telecommunications regulatory package: first update' (Communication) COM (97) 504 final
—— 'On the liberalisation of telecommunications infrastructure and cable television networks, 1: Principle and timetable' (Communication) COM (94) 440 final
—— 'On the liberalisation of telecommunications infrastructure and cable television networks, 2: A common approach to the provision of infrastructure for telecommunications in the European Union' (Green Paper) COM (94) 682 final
—— 'On the provision of leased lines in the European Union, part 1: major supply conditions for wholesale leased lines' COM (2005) 103/2
—— 'On the provision of leased lines in the European Union, part 2: pricing aspects of wholesale leased lines part circuits (notified under document number COM (2005) 951) text with relevance' [2005] OJ L83
—— 'On the Review of the EU Regulatory Framework' (Communication) COM (2006) 334 final, 8.
—— 'On the review of the EU Regulatory Framework on electronic communications networks and services' (Communication) SEC (2006) 816-17
—— 'On the status of the Community telecommunications policy' (Communication) COM (85) 276 final
—— 'Present status and future approach for open access telecommunications networks and services (Open Network Provision)' (Communication) COM (94) 513 final
—— 'Progress Report on the Single European Electronic Communications Market 2008 (14th Report)' COM (2009) 140 final
—— 'Progress Report on the thinking and work done in the field and initial proposals for an action programme' (Communication) COM (84) 277 final
—— 'Proposal for a Council Directive on the application of open network provision to leased lines' (Preparatory Act) COM (91) 30 final
—— 'Proposal for a Council Directive on the application of open network provision (ONP) to voice telephony' COM (92) 247
—— 'Proposal for a Council Recommendation on the harmonised provision of a minimum set of packet-switched data services in accordance with open network provision (ONP) principles' COM (91) 208 final
—— 'Proposal for a Directive amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services' COM(2007) 697 final

—— ‘Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/12/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services’ COM (2007) 697 final
—— ‘Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services’ COM (2000) 393 final
—— ‘Recommendations on telecommunications’ (Communication) COM (80) 422 final
—— ‘Reducing Administrative Burdens in the European Union: Annex to the 3rd Strategic Review on Better Regulation’ (Working Document) COM (2009) 16 final
—— ‘Reform of the EU state aid rules on services of general economic interest’ (Communication) COM (2011) 146 final
—— ‘The result of the public consultation on the 1999 Communications Review and orientations for the new Regulatory Framework’ (Communication) COM (2000) 239 final
—— ‘Results of the public consultation on the Green Paper on the convergence of the telecommunications, media and information technology sectors’ (Communication) COM (99) 108
—— ‘Satellite communications in the information society: Recent activities, present situation and outlook’ (Communication) COM (99)108
—— ‘Sixth report on the implementation of the telecommunications regulatory package’ (Communication) COM (2000) 814
—— ‘Smart regulation in the European Union’ (Communication) COM (2010) 543 final
—— ‘Staff Working Document, Explanatory memorandum of the Commission Recommendation on accounting separation and cost accounting systems under the regulatory framework for electronic communications’ (19 September 2005)
—— ‘Staff Working Document, Explanatory note Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 2nd edn SEC (2007) 1483/2
—— ‘Staff Working Document, Impact Assessment accompanying document to the Proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 2002/21/EC Proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC Proposal for a Regulation of the European Parliament and the Council establishing the European Electronic Communications Markets Authority’ SEC(2007) 1472
—— ‘Stakeholder consultation on smart regulation in the EU: Follow up to the 2010 communication on smart regulation’ (2012)
—— ‘Status report on European Union telecommunications policy’ DGXIII/A/1

— — ‘Strategy and Policy Orientations with regard to the further Development of Mobile and Wireless Communications (UMTS)’ COM (97) 513
— — ‘Telecommunications’ (Communication) COM (83) 329 final
— — ‘Television without frontiers’ (Green Paper) COM (84) 300 final
— — ‘Third report on the implementation of the telecommunications regulatory package’ (Communication) COM (1998) 80 final
— — ‘Towards a competitive community-wide telecommunications market in 1992’ (Communication) COM (88) 48 final
— — ‘Towards a dynamic European economy’ (Green Paper) COM (87) 290 final
— — ‘Towards a new framework for electronic communications infrastructure and associated services: the 1999 communications review’ (Communication) COM (1999) 539 final
— — ‘Towards Europe-wide systems and services’ (Green Paper) COM (90) 490 final
— — ‘Towards the personal communications environment’ (Green Paper) COM (94) 145 final
— — ‘Working together for growth and jobs: A new start for the Lisbon Strategy’ (Communication) COM (2005) 24 final
— — *XXIInd General Report on the activities of the European Communities 1988* (Office for Official Publications of the European Communities 1989)
Mandelkern Group on Better Regulation, Final Report (13 November 2001)

European Parliament Documents

Szájer, J, ‘Report on the power of legislative delegation’ (Session Document) A7-0110/2010
— — ‘Report on the proposal for a regulation of the European Parliament and of the Council laying down the rules and principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers’ (Plenary Sitting) A7-0355/2010

Sources

Ahdar RJ, ‘Battles in New Zealand’s Deregulated Telecommunications Industry’ (1995) 23/2 *Australian Business Law Review* 77
Ahdieh RB, ‘From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction’ (2007) 57 Emory LJ 1
Alabau A, *The European Union and Its Electronic Communications Policy: Thirty Years in Perspective* (Fundación Vodafone España 2006)
Aleinikoff TA, ‘Transnational Spaces: Norms and Legitimacy’ (2008) 33 Yale JIL 479
Alemanno A, ‘The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission’s Walls or the Way Forward?’ (2009) 15 ELJ 382
Armstrong K and Bulmer S, *The Governance of the Single European Market* (Manchester UP 1998)
— — ‘The Governance and Regulation of the Single Market’ in *The Governance of the Single European Market* (Manchester UP 1998)
Australian Government, Department of Industry, Tourism and Resources, ‘Regulatory Performance Indicators: A Guide for Departments and Agencies’ (nd)

AT Kearney and the Carnegie Endowment for International Peace, 'Globalization's Last Hurrah?' (2002) Jan/Feb *Foreign Policy* 38
Baake P, Kamecke U and Wey C, 'A Regulatory Framework for New and Emerging Markets' (SSRN 2007)
Bach D and Neuman AL, 'The European Regulatory State and Global Public Policy: Micro-Institutions, Macro-influence' (2007) 14 JEPP 827
Bache I and Flinders M, *Multi-level Governance* (OUP 2004)
Baldwin GR and Veljanovski C, 'Regulation by Cost-Benefit Analysis' (1984) 62 *Public Administration* 51
Baldwin R, *Rules and Government* (OUP 1995)
—— 'Is Better Regulation Smarter Regulation?' (2005) Public Law 485
—— 'Regulation Lite: The Rise of Emissions Trading' (2008) LSE Law, Society and Economy Working Papers 3/2008 (London School of Economics and Political Science, Law Department)
Baldwin R and Cave M, *Franchising as a Tool of Government* (Centre for the Study of the Regulated Industries 1996)
—— *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999)
Baldwin R and Lodge M, *The Oxford Handbook of Regulation* (OUP 2011)
Baldwin R and McCrudden C, *Regulation and Public Law* (Weidenfeld and Nicholson 1987)
—— *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, OUP 2012)
Baldwin R and others, 'Is Regulation Right?' (CARR Launch Paper, LSE 2000)
Baldwin R, Scott C and Hood C (eds), *A Reader on Regulation* (OUP 1998)
Balhoff MJ, 'Gigabits v Megabucks' (International Summit on Communications/Media, New York, October 2008)
Barav A, 'The Judicial Power of the European Economic Community' (1979-1980) 53 Southern California LR 461
Barzelay M and Jacobsen AS, 'Theorizing Implementation of Public Management Policy Reforms: A Case Study of Strategic Planning and Programming in the European Commission' (2009) 22 Governance 319
Bauer, JM, 'Regulation, Public Policy, and Investment in Communications Infrastructure' (2010) 34 *Telecommunications Policy* 65
Beetham D and Lord C, 'Legitimacy and the European Union' in M Nentwich and A Weale (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge 1998)
Bellamy R, 'Still in Deficit: Rights, Regulation and Democracy in the EU' (2006) 12 ELJ 725
—— and Castiglione D, 'Building the Union: The Nature of Sovereignty in the Political Architecture of Europe' (1997) 16 *Law and Philosophy* 421
——, Bufacchi V and Castiglione D (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995)
Benkler Y, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale UP 2006)
Berman PS, 'Global Legal Pluralism' (2006) 80 Southern California LR 1155
—— 'A Pluralist Approach to International Law' (2007) Yale JIL 301
Bermann GA, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Columbia LR 331
Bernstein M, *Regulating Business by Independent Commission* (Princeton UP 1955)

Besson S, 'From European Integration to European Integrity: Should European Law Speak with Just One Voice?' (2004) 10 ELJ 257
Better Regulation Task Force, 'Regulation – Less is More: Reducing Burdens, Improving Outcomes' (2005)
Bignami F, 'The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts' (2008) 41 Cornell ILJ 211
Black J, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 *Current Legal Problems* 103
—— 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 163
—— 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137
—— 'Legitimacy and the Competition for Regulatory Share' (2009) Law Society Economy Working Paper 14/2009, London School of Economics and Political Science, Law Department
Blankart CB, Knieps G and Zenhäusern P, 'Regulation of New Markets in Telecommunications?: Market Dynamics and Shrinking Monopolistic Bottlenecks' (Working Paper, Diskussionsbeiträge, Institut für Verkehrswissenschaft und Regionalpolitik, No112)
Blom-Hansen J, 'The EU Comitology System: Who Guards the Guardian?' (Fourth Pan-European Conference on EU Politics, Riga, September 2008)
—— 'The Origins of the EU Comitology System: A Case of Informal Agenda-Setting by the Commission' (2008) 15 JEPP 208
Bodansky D, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 AJIL 596
Boedeltje M and Cornips J, 'Input and Output Legitimacy in Interactive Governance' (2004) Netherlands Institute for Government Research Paper NIG2-01
Bogdandy A von, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15 EJIL 885
Böllhoff D, 'Developments in Regulatory Regimes: An Anglo-German Comparision on Telecommunications, Energy and Rail' (2002) *Gemeinschaftsgüter: Recht, Politik und Ökonomie* 5
Borrás S and Jacobsson K, 'The Open Method of Co-ordination and New Governance Patterns in the EU' (2004) 11 JEPP 185
Borzel T, 'Mind the Gap!: European Integration between Level and Scope' (2005) 12 JEPP 217
—— 'European Governance: Negotiation and Competition in the Shadow of Hierarchy' (2010) 48 JCMS 191
Bös D and Nett L, 'Privatization, Price Regulation, and Market Entry: An Asymmetric Multistage Duopoly Model' (1990) 51 *Journal of Economics* 221
Boylaud O and Nicoletti G, 'Regulation, Market Structure and Performance in Telecommunications' (2000) OECD Working Paper No 237
Bradley KStC, 'The European Parliament and Comitology: On the Road to Nowhere?' (1997) 3 ELJ 230
Brandsma GJ and Blom-Hansen J, 'The Post-Lisbon Battle over Comitology: Another Round of the Politics of Structural Choice' (EUI Working Paper SPS 2011/03)
Büchs M, *New Governance in European Social Policy: The Open Method of Coordination* (Palgrave Macmillan 2007)

Burca G de, 'The Constitutional Challenge of New Governance in the European Union (2003) 28 EL Rev 814
—— 'Developing Democracy Beyond the State' (2008) 46 *Columbia Journal of Transnational Law* 101
Burke-White WW, 'International Legal Pluralism' (2004) 25 Michigan JIL 963
Burley A-M and Mattli W, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41
Busuioc M, 'Accountability, Control and Independence: The Case of European Agencies' (2009) 15 ELJ 599
Cadman R, 'Means not Ends: Deterring Discrimination through Equivalence and Functional Separation' (2010) 34 *Telecommunications Policy* 366
Cambini C and Jiang Y, 'Broadband Investment and Regulation: A Literature Review' (2009) 33 *Telecommunications Policy* 559
Cameron D, 'EU Speech at Bloomberg' (23 January 2013)
Canoy M, Liddle R and Smith P, 'The Single Market: Yesterday and Tomorrow' (2006) <http://ec.europa.eu/dgs/policy_advisers/publications/docs/single_market_yesterday_and_tmorrow_en.pdf>
Cariño LV, 'Regulatory Governance in the Philippines: A Profile' (Centre on Regulation and Competition Working Paper Series, Manchester 2002)
Carter C and Scott A, 'Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union' (1998) 4 ELJ 429
Cave M, 'Encouraging Investment via the Ladder of Investment' (2006) 30 *Telecommunications Policy* 223
—— 'Six Degrees of Separation: Operational Separation as a Remedy in European Telecommunications Regulation' (2006) 64 *Communications & Strategies* 89
Cecot C, Hahn RW and Renda A, 'A Statistical Analysis of the Quality of Impact Assessment in the European Union' (AEI-Brookings Joint Centre for Regulatory Studies, Working Paper 07/09)
Chalmers D, Davies G and Monti G, 'The Internal Market' and 'The Free Movement of Goods' in European Union Law Cases and Materials (2nd edn, CUP 2010)
Chiti E, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies' (2004) 10 ELJ 402
Christiansen T and Reh C, *Constitutionalizing the European Union* (Palgrave Macmillan 2009)
Coase RH, 'The Problems of Social Costs' (1960) 3 *Journal of Law and Economics* 1
Coelli TJ and others, *An Introduction to Efficiency and Productivity Analysis* (Springer 2005)
Coen D, 'Managing the Political Life Cycle of Regulation in the UK and German Telecommunications Sectors' (2005) 76 *Annals of Public and Cooperative Economics* 59
—— 'The Politics of Regulation in Europe' (2002) 9 JEPP 141
—— and Thatcher M, 'The New Governance of Markets and Non-Majoritarian Regulators' (2005) 18 Governance 329
Coglianese, C, Nash J and Olmstead T, 'Performance-based Regulation: Prospects and Limitations in Health, Safety and Environmental Regulation' (2003) 55 *Administrative Law Review* 705
Cohen J and Sabel C, 'Directly-Deliberative Polyarchy' (2001) 3 ELJ 313

Collins R, *Broadcasting and Audio-Visual Policy in the European Single Market* (Libbey 1994)
Conant L, 'Review Article: The Politics of Legal Integration' (2000) 45 JCMS 45
Cooter R and Ilen T, *Law and Economics* (Pearson 1988)
Cover RM, 'The Supreme Court 1982 Term, Forward: *Nomos* and Narrative' (1983) 97 Harvard LR 4
Craig P, 'Constitutions, Constitutionalism and the European Union' (2001) 7 ELJ 125
—— 'Competence and Member State Autonomy: Causality, Consequence and Legitimacy' in HW Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012)
—— *Democracy and Rulemaking within the EC: An Empirical and Normative Assessment*, Jean Monnet Program
—— and Burca G de, *EU Law Texts Cases and Materials* (4th edn, OUP 2008)
Crombez C, 'The Democratic Deficit in the European Union: Much Ado About Nothing?' (2003) 4 *European Union Politics* 101
Curtin D, 'The Constitutional Structure of the European Union: A Europe of Bits and Pieces' (1993) 32 CMLR 1
—— 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13 ELJ 523
—— and Meijer AJ, 'Does Transparency Strengthen Legitimacy?' (2006) 11 *Information Polity* 109
Dahl R, *A Preface to Democratic Theory* (Chicago UP 1956)
Defraigne P, 'From Hush-a-phone to Investment Ladder: An Introduction to Telecom Regulation' (DGTIC, Namur, September 2006)
Dehousse R, 'Regulation v Integration? On the Dynamics of Regulation in the European Community' (1992) 30 JCMS 383
—— 'Constitutional Reform in the European Community: Are There Alternatives to the Majoritarian Avenue?' (1996) *West European Politics* 118
—— 'Regulation by Networks in the European Community: The Role of European Agencies' (1997) 4 JEPP 246
Department of the Taoiseach, 'Regulating Better: A Government White Paper Setting out Six Principles of Better Regulation' (Stationery Office [Dublin] 2004)
Dicey A, *Introduction to the Study of the Law of the Constitution* (6th edn, Macmillan Publishers 1902)
Dobson L and Follesdal A, *Political Theory and the European Constitution* (Routledge 2004)
Dodds A, 'The Core Executive's Approach to Regulation: From "Better Regulation" to "Risk-Tolerant Deregulation"' (2006) 40 *Social Policy & Administration* 526
Doleys T, 'Members States and the European Commission: Theoretical Insights from the New Economics of Organization' (2003) 7 JEPP 532
Dorf MC and Sabel CF, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia LR 267
Dunsire A, 'Manipulating Social Tensions: Collibration as an Alternative Mode of Government Intervention' (MPIFG Discussion Paper 93/7, 1993)
Eberlein B and E Grande, 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State' (2005) 12 JEPP 89
Editorial, 'From Telecommunications Policy to Internet Governance' (2012) 36 *Telecommunications Policy* 449

'Editorial Comments: Some Thoughts Concerning the Draft Treaty on a Reinforced Economic Union' (2012) 49 CMLR 1
Edward E and Nic Shiubhne N, 'Continuity and Change in the Law Relating to Provision of Services' in A Arnull, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jabobs* (OUP 2008)
Eeckhout P, 'The European Court of Justice and the Legislature' (1998) 18 YEL 1
Ehlerman, K-D, '1992 Project: Stages, Structures, Results and Prospects' (1989-1990) 11 Michigan JIL 1097
Eijk NANM, 'Cable Television Networks in Europe' (Institute for Information Law, University of Amsterdam 1995)
Eising R and Kohler-Koch B (eds), *The Transformation of European Governance in the European Union* (Routledge 2005)
Eleftheriadis P, 'Aspects of European Constitutionalism' (1996) 21 EL Rev 32
—— 'Begging the Constitutional Question' (1998) 36 JCMS 255
ERG, 'Opinion on Functional Separation' (2007) 44 ERG
Eriksen EO, 'Governance between Expertise and Democracy: The Case of European Security' (2011) 18 JEPP 1169
Esty D, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' 115 Yale LJ 1490
European Citizen Action Service, *Mind the Gap: Towards Better Enforcement of European Citizens' Rights of Free Movement* (ECAS 2009)
European Court of Auditors, *Impact Assessments in the EU Institutions: Do They Support Decision-Making*, Special Report No 3 (European Court of Auditors 2010)
European Evaluation Consortium, *For a Cost Benefit Analysis of Options for Better Functioning of the Internal Market in Electronic Communication: Final Report* (European Evaluation Consortium 2007)
European Parliament Press Service, 'What is Comitology and Does It Still Have a Role under the Lisbon Treaty?' (nd)
European Union Committee, *The Treaty of Lisbon: An Impact Assessment* (HL 2007-08, 62-I)
Evaluation of Regulatory Impact Assessments, 2006-2007 (TWO and National Audit Office 2007)
Faulhaber GR and Farber DJ, 'The Open Internet: A Customer-Centric Framework' (2010) 4 *International Journal of Communication* 302
Featherstone K, 'Jean Monnet and the "Democratic Deficit" in the European Union' (1994) JCMS 149
Federal Communications Commission, 'Policy Statement' (2005, FCC 05-151)
—— *Connecting America: The National Broadband Plan* (FCC nd)
Feintuck M, *The 'Public Interest' in Regulation* (OUP 2004)
—— 'Regulatory Rationales beyond the Economic' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010)
Felleth RC, *The Interstate Commerce Omission: The Public Interest and the ICC* (Grossman 1970)
Fesler JW, 'The Brownlow Committee Fifty Years Later' (1987) Jul/Aug Public *Administration Review* 291
Finke B, 'Civil Society Participation in EU Governance' (2007) 2 Living Reviews in European Governance 3

Forrester I, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 EL Rev 817
—— 'A Bush in Need of Pruning: The Luxuriant Growth of "Light Judicial Review"' in C-D Ehlermann and M Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011)
Finke B, 'Civil Society Participation in EU Governance' (2007) 2 *Living Reviews in European Governance* 2
Finlayson JA and Zacher MW, 'The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions' (1981) 35 International Organization 561
Flinders M, 'Distributed Public Governance in the European Union' (2004) 11 JEPP 520
Follesdal A and Hix S, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533
Forrester IS, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' (European University Institute, EU Competition Law and Policy Workshop 2009)
Franck TM, *The Power of Legitimacy Among Nations* (OUP 1990)
—— 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46
Freedman JO, 'Expertise and the Administrative Process' (1976) 28 *Administrative Law Review* (1976) 363
—— *Crisis and Legitimacy: The Administrative Process and the American Government* (CUP 1978)
Frug GE, 'The Ideology of Bureaucracy in American Law' (1984) 97 Harvard LR 1276
Fuchs G, 'Policy-making in a System of Multi-Level Governance: The Commission of the European Community and the Restructuring of the Telecommunications Sector' (1997) 1 JEPP 177
Gans JS and King SP, 'Access Holidays and the Timing of Infrastructure Investment' 80 *Economic Record* 248
García-Valiñas MA and Muñiz MA, 'Is DEA Useful in the Regulation of Water Utilities?: A Dynamic Efficiency Evaluation (A Dynamic Efficiency Evaluation of Water Utilities)' (2007) 39 *Applied Economics* 245
Garnham N, 'Europe and the Global Information Society: The History of a Troubled Relationship' (1997) 14 *Telematics and Informatics* 323
—— 'Contradiction, Confusion and Hubris: A Critical Review of European Information Society Policy' (European Communications Policy Research Conference, 2005)
Garrett G, 'The Politics of Legal Integration in the European Union' (1995) 49 *International Organization* 171
Gaus D, 'Legitimate Political Rule without a State?' (ARENA Centre for European Studies, University of Oslo RECON Online Working Paper 2008/12) www.reconprojecteu/projectweb/portalproject/RECONWorkingPapers.html
Geradin D and Petit N, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform' (Jean Monnet Working Paper, 01/04, NYU School of Law 2004)
Geroski PA, 'European Industrial Policy and Industrial Policy in Europe' (1989) 5/2 *Oxford Review of Economic Policy* 20
Ghazaryan N, 'Pre and Post Lisbon Democracy of the European Union' (The European Union: Back to the Future? New Developments and Challenges

after Lisbon conference, Edinburgh, October 2008) <http://www.law.ed.ac.uk/conferences/eubacktothefuturepapers.aspx> accessed 12 December 2012
Gilmor D, *We the Media: Grassroots Journalism by the People, for the People* (O'Reilly 2006)
Giuffrida I, 'Accountability and the Reform of European Governance: Comitology and Agencies in the Regulation of GM-Food and Chemicals' (PhD thesis, Queen Mary, University of London 2009)
Glaeser E and Schleifer A, 'The Rise of the Regulatory State' (2001) 41 *Journal of Economic Literature* 401
Goodman JW, *Telecommunications Policy-Making in the European Union* (Edward Elgar Publishing 2006)
Golub J, 'In the Shadow of the Vote?: Decision Making in the European Community' (1999) 53 *International Organization* 733
—— 'Institutional Reform and Decision Making in the European Union' (Political Studies Association UK 50th Annual Conference, London, April 2000)
Gouzy J-P, 'Jubilé des traités de Rome' (Conférence à la Maison de l'Europe, Paris, March 2007)
Green MJ (ed), *The Monopoly Makers* (Grossman 1973)
Griffiths J, 'What is Legal Pluralism?' (1986) *Journal of Legal Pluralism and Unofficial Law* 1
Grimm D, 'Treaty or Constitution?' in Eriksen E, Fossum J and Menendez A, *Developing a Constitution for Europe* (Routledge 2004)
Gürtler O, 'On Delegation under Relational Contracts' (2008) 15 *International Journal of the Economics of Business* 85
Haas EB, 'International Integration: The European and the Universal Process' (1961) 15 *International Organization* 366
Habermas J, 'The European Nation-State and the Pressures of Globalization' (1999) May/June *New Left Review* 235
—— 'Why Europe Needs a Constitution' (2001) Sept/Oct New Left Review 5
Hahn R and others, 'Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12866' (2000) 23 *Harvard Journal of Law and Public Policy* 859
Hahn RW and Litan RE, 'Counting Regulatory Benefits and Costs: Lessons for the US and the EU' (2005) 8 *Journal of International Economic Law* 473
Hall D, *Administrative Law: Bureaucracy in a Democracy* (4th edn, Pearson 2009)
Hanretty C and Koop C, 'Measuring the Formal Independence of Regulatory Agencies' (2012) 19 JEPP 198
Harcourt A, *The European Union and the Regulation of Media Markets* (Manchester UP 2005)
Hardin R, *Liberalism, Constitutionalism and Democracy* (OUP 1999)
Hartley TC, *The Foundations of European Union Law* (7th edn, OUP 2010)
Heathcote N, 'The Crisis of European Supranationality' (1966) 5 JCMS 140
Héritier A, 'Elements of Democratic Legitimation in Europe: An Alternative Perspective' (1999) 6 JEPP 269
Hitchens L, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (Hart Publishing 2006)
Hodge GA and Coghill K, 'Accountability in the Privatized State' (2007) 20 Governance 675

Hodulik JC, 'Gigabits vs Megabucks' (International Summit on Media and Communications, New York, October 2008)
Hofman H, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality' (2009) 15 ELJ 482
Hogan & Hartson LLP and Analysys Consulting, 'Preparing the Next Steps in Regulation of Electronic Communications: A Contribution to the Review of the Electronic Communications Regulatory Framework' (July 2006)
Hood C, Rothstein H and Baldwin R, *The Government of Risk: Understanding Risk Regulation Regimes* (OUP 2001)
Hooghe L and Marks G, *Multi-level Governance and European Integration* (Rowman & Littlefield Publishers 2001)
—— 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2008) 39 *British Journal of Political Science* 1
Höreth, M, 'The European Commission's White Paper on Governance: A "Tool-Kit" for Closing the Legitimacy Gap of EU Policy-Making?' (2001) Zentrum für Europäische Integrationsforschung Discussion Paper C94
Horwitz RB, *The Irony of Regulatory Reform* (OUP 1989)
Huang I and others, 'The Convergence of Information and Communication Technologies Gains Momentum' in S Dutta and B Bilbao-Osorio (eds), *The Global Information Technology Report 2012: Living in a Hyperconnected* World (INSEAD, World Economic Forum, Geneva 2012)
Huigen J and Cave M, 'Regulation and the Promotion of Investment in Next Generation Networks: A European Dilemma' (2008) 32 *Telecommunications Policy* 65
Humphreys P and Simpson S, 'Globalization, the "Competition" State and the Rise of the "Regulatory" State in European Telecommunications' (2008) 46 JCMS 849
Hyde A, 'The Concept of Legitimation in the Sociology of Law' (1983) Wisconsin LR 379
Hysing E, 'From Government to Governance?: A Comparison of Environmental Governing in Swedish Forestry and Transport' (2009) 22 Governance 647
Jachtenfuchs M, 'Theoretical Perspectives on European Governance' (1995) 1 ELJ 115
Jacobs FG, 'Constitutional Developments in the European Community and the Impact of the Single European Market after 1992' (1990) 11 Michigan JIL 887
James O and Lodge M, 'The Limitations of "Policy Transfer" and "Lesson Drawing" for Public Policy Research' (2003) 1 *Political Studies Review* 179
Jarvis M, 'Book Review: *Democracy and Constitutional Culture in the Union of Europe*' (1996) 59 MLR 315
Jenkins H, *Convergence Culture: Where Old and New Media Collide* (New York UP 2008)
Jensen CB, 'Inspecting the Inspectors: Overseeing Labor Inspectorates in Parliamentary Democracies' (2004) 17 Governance 335
Jordana J and Levi-Faur D (eds), *The Politics of Regulation: Institutional and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing 2004)
Jordon A, 'The European Union: An Evolving System of Multi-level Governance…or Government?' (2001) 29 *Policy & Politics*193

Kassim H and Menon A, 'The Principal-Agent Approach and the Study of the European Union: Promise Unfulfilled?' (2003) 10 JEPP 121
Kassim H and Stevens H, *Air Transport and the European Union: Europeanization and its Limits* (Palgrave Macmillan 2010)
Katz AV (ed), *Foundations in the Economic Approach to Law* (OUP 1998)
Kiessling T and Blondeel Y, 'The EU Regulatory Framework in Telecommunications: A Critical Analysis' (Telecommunications Policy Paper, Brussels, 1998)
Kilpatrick C and Armstrong K, 'Law, Governance and New Governance: The Changing Open Method of Coordination' (2007) 13 *Columbia Journal of International Law* 519
King LA, 'Deliberation, Legitimacy, and Multilateral Democracy' (2003) 16 Governance 23
Kingsbury B, 'Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgement' (1998) 92 AJIL 713
Kingsbury B, Krisch N and Stewart RB, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15
Kingsbury B and Wiener JB, 'Global Governance as Administration: National and Transnational Approaches to Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 1
Klabbers J, 'Treaty Conflict and the EU in the Global Constitutional Mosaic' (Europe's Constitutional Mosaic seminar, Edinburgh, April 2009)
Knieps G, 'Telecommunications Markets in the Stranglehold of EU Regulation: On the Need for a Disaggregated Regulatory Contract' (2005) 6 *Journal of Network Industries* 75
Knill C and Lehmkuhl D, 'Private Actors and the State: Internationalization and Changing Patterns of Governance' (2002) 15 Governance 41
Koh HH, 'Transnational Legal Process' (1996) 75 Nebraska LR 181
Kohler-Koch B, 'The Evolution and Transformation of European Governance' (ECSA, Sixth Biennial International Conference, Pittsburgh, June 1999)
—— and Eising R (eds), *The Evolution and Transformation of Governance in the European Union* (Routledge 1999)
Kolko G, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Free Press 1963)
Kramer G and Pesavento G, 'Ethernet Passive Optical Network (EPON): Building a Next-Generation Optical Access Network' (2002) February *IEEE Communications Magazine* 66
Kreher A, 'Agencies in the European Community - A Step towards Administrative Integration in Europe' (1997) 4 JEPP 225
Krisch N and Kinsbury B, 'Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 EJIL 1
Kroes N, 'Enhancing the Broadband Investment Environment' (Midday Briefing, Brussels, 12 July 2012)
—— Letter to Mr Dvorak, Chairman of the Council (10 December 2012) C(2012) 9523
Kumm M, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907
—— 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 ELJ 262

Landis J, *The Administrative Process* (Yale UP 1938)
Lee N and Kirkpatrick C, 'Evidence-Based Policy-Making in Europe: An Evaluation of the European Commission Integrated Impact Assessments' (2006) 24 *Impact Assessment and Project Appraisal* 22
Lenaerts K, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205
—— 'Interpretation and the Court of Justice: A Basis for Comparative Reflection' (2007) *International Lawyer* 1011
—— and van Nuffel P, *Constitutional Law of the European Union* (2nd edn, Sweet & Maxwell 2004)
Lehtonen M, 'Sustainable Development and Organisational Discourse: Could and Should the OECD Discourse ever change?' (University of Sussex 2011)
Leibenstein H, 'Allocative Efficiency vs "X-Efficiency"' (1966) 56 *American Economic Review* 392
Lessig L, *Code, and Other Laws of Cyberspace* (Basic Books 1999)
Levi-Faur D, 'The Governance of Competition: The Interplay of Technology, Economics, and Politics in European Union Electricity and Telecom Regimes' (1999) 19 JPP 175
—— 'Regulatory Networks and Regulatory Agencification: Towards a Single European Regulatory Space" (2011) 18 JEPP 810
Levy B and Spiller PT (eds), *Regulations, Institutions, and Commitment: Comparative Studies of Telecommunications* (CUP 1996)
Leys C, *Market-Driven Politics: Neoliberal Democracy and the Public Interest* (Verso 2001)
Leibenstein H, 'Allocative Efficiency vs "X-Efficiency"' (1966) 56 *American Economic Review* 392
Lijphart A, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale UP 1984)
—— 'Majority Rule in Theory and Practice: The Tenacity of a Flawed Paradigm' (1991) 129 *International Social Science Journal* 483
Lindseth PL, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010)
Lintner P and Vaccari B, 'The European Parliament's Right of Scrutiny over Commission Implementing Acts: A Real Parliamentary Control?' (EIPASCOPE 2005/1, 2005)
Locke J, *Second Treatise of Government* (first published 1690, Early Modern Texts 2010)
Lodge M, 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in J Jordana and D Levi-Faur (eds), *Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing 2004)
—— 'Regulation, the Regulatory State and European Politics' (2008) 31 *West European Politics* 280
Lodge M and Stirton L, 'Regulating in the Interest of the Citizen: Towards a Single Model of Regulatory Transparency?' (2001) 50 *Social and Economic Studies* 103-38
—— 'Accountability in the Regulatory State' in Baldwin R, Cave M and Lodge M (eds), *The Oxford Handbook of Regulation* (OUP 2010)
Lord C, *A Democratic Audit of the European Union* (Palgrave Macmillan 2004)

— — and Beetham D, 'Legitimizing the EU: Is there a "Post-Parliamentary Basis" for its Legitimation' (2001) 39 JCMS 443
Lowi T, *The End of Liberalism: Ideology, Policy and the Crisis of Public Authority* (WW Norton & Co 1969)
Lyon TP and Maxwell JW, 'Voluntary Approaches to Environmental Regulation' in M Franzini and A Nicita (eds), *Economic Institutions and Environmental Policy* (Ashgate 2001)
Mac Amhlaigh C, 'On the "Strange Combination of Kelsen and Schmitt": The Necessity of a Pure Theory of European Law' (Integration through Law workshop, Edinburgh, April 2009)
— — 'Revolt by Referendum? In Search of a European Constitutional Narrative' (2009) 15 ELJ 552
MacCormick N, 'Beyond the Sovereign State' (1993) 56 MLR 1
— — 'The Concept of Law and "The Concept of Law"' (1994) 14 OJLS 1
— — 'Democracy and Constitutional Culture in the Union of Europe' in R Bellamy and V Bufacchi (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995)
— — 'Liberalism, Nationalism and the Post-sovereign State' (1996) XLIV *Political Studies* 553
— — 'Democracy, Subsidiarity, and Citizenship in the "European Commonwealth"' (1997) 16 *Law and Philosophy* 331
Maduro MP, 'Where to Look for Legitimacy?' (Debate Nacional o Futuro da Europa, Lisbon, October 2002)
Magnette P, 'European Governance and Civic Participation: Can the European Union be Politicised?' <http://www.jeanmonnetprogram/org/papers/01/010601.html>
Majone G, 'The Rise of the Regulatory State in Europe' (1994) *West European Politics* 77
— — 'The Rise of the Regulatory State in Europe' in W Müller and V Wright (eds), *The State in Western Europe, Retreat or Redefinition?* (Frank Cass 1994)
— — *Regulating Europe* (Routledge 1996)
— — *The Rise of the Regulatory State in Europe* (Routledge 1996)
— — 'Temporal Consistency and Policy Credibility: Why Democracies Need Non-majoritarian Institutions' (1996) European University Institute /Robert Schuman Centre Working Paper 96/57
— — 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' (1997) 3 EIPASCOPE 1.
— — 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 JPP 139
— — 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 ELJ 5
— — 'The Regulatory State and Its Legitimacy Problems' (1999) 22 West European Politics 1
— — *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP 2009)
Malamud C, *Exploring the Internet: A Technical Travelogue* (Prentice Hall 1992)
Mancini GF, 'The Making of a Constitution for Europe' (1989) 26 CMLR 595
— — 'Europe: The Case for Statehood' (1998) 4 ELJ 29
Mandelkern Group on Better Regulation, Final Report (November 2001) <http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf>

Marcus JS, 'Is the US Dancing to a Different Drummer?' (2005) 60/4 *Communications & Strategies* 39
Marks G, Hooghe L and Blank K, 'European Integration from the 1980s: State-Centric v Multi-level Governance' (1996) 34 JCMS 341
Maslow AH, *The Psychology of Science: A Renaissance* (Maurice Bassett 1966)
Mattli W and Slaughter A-M, 'Law and Politics in the European Union: A Reply to Garrett' (1995) 49 *International Organization* 183
May PJ, 'Social Regulation' in LM Salamon (ed), *The Tools of Government: A Guide To the New Governance Handbook* (OUP 2002)
—— 'Regulatory Regimes and Accountability' (2007) 1 *Regulation & Governance* 8
McGarity TO, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (CUP 1991)
McGowan F and Wallace H, 'Towards a European Regulatory State' (1996) 3 JEPP 560
McGowan L and Wilks S, 'The First Supranational Policy in the European Commission: Competition Policy' (1995) 28 *European Journal of Political Research* 141
McKinney RJ, 'Federal Administrative Law: A Brief Overview' (Presentation to LLSDC Librarians, June 2010)
Menon A and Weatherill S, 'Legitimacy, Accountability, and Delegation in the European Union' in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2003)
Mény Y, '*De la démocratie en Europe*: Old Concepts and New Challenges' (2002) 41 JCMS 1
Merry SE, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869
Metcalfe L, 'Reforming the Commission: Will Organizational Efficiency Produce Effective Governance?' (2000) 38 JCMS 817
Meuwese ACM, 'Impact Assessment in EU Lawmaking' (PhD thesis, University of Leiden, 2008)
Meyer C, 'Political Legitimacy and the Invisibility of Politics: Exploring the European Union's Communication Deficit' (1999) 37 JCMS 617
Menz G, *Varieties of Capitalism and Europeanization: National Response Strategies to the Single European Market* (OUP 2005).
Michael JR (ed), *Working on the System: A Comprehensive Manual for Citizen Access to Federal Agencies* (Basic Books 1974)
Mikdashi Z, 'The OPEC Process' (1975) 104 *Daedalus* 203
Mitnick BM, *The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms* (Columbia UP 1980)
Möllers C, 'European Governance: Meaning and Value of a Concept' (2006) 43 CMLR 313
Monti M, 'A New Strategy for the Single Market at the Service of Europe's Economy and Society: Report to the President of the European Commission, José Manuel Barroso' (9 May 2010)
Moore SF, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719
Moravcsik A, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473
—— 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 JCMS 603

— — ‘Is there a “Democratic Deficit” in World Politics? A Framework for Analysis’ (2004) 39 *Government and Opposition* 336
— — and Schimmelfenning F, ‘Liberal Intergovernmentalism’ in A Wiener and T Diez (eds), *European Integration Theory* (OUP 2009)
Morgenstern RD, ‘The Legal and Institutional Setting for Economic Analyses at EPA’ in RD Morgenstern (ed), *Economic Analyses at EPA: Assessing Regulatory Impact (*RFF Press 1997)
Mörth U, ‘The Market Turn in EU Governance: The Emergence of Public–Private Collaboration’ (2009) 22 Governance 99
de Muyter L, ‘Does Europe Need a Single European Telecom Regulator?’ (2008) 4 *European Competition Journal* 561
Nazzini R, ‘Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective’ (2012) 49 CMLR 971
Nic Shuibhne N (ed), *Regulating the Internal Market* (Edward Elgar Publishing 2006)
Nikolinakos NT, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors* (Kluwer Law International 2006)
Norris P, ‘Representation and the Democratic Deficit’ (1997) 32 *European Journal of Political Research* 273
Nucciarelli A and Sadowski BM, ‘The Italian Way to Functional Separation: An Assessment of Background and Criticalities’ (2010) 34 *Telecommunications Policy* 384
OECD, *Product Market Regulation Database*
— — *Regulatory Impact Analysis: Best Practices in OECD Countries* (OECD Publications 1997)
— — *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (OECD Publications 2002)
— — ‘Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest’ (9 November 2011) http://www.oecd.org/document/6/0,3746,en_2649_37405_49018758_1_1_1_37405,00.html
Ofcom, ‘Final Statements on the Strategic Review of Telecommunications and Undertakings in Lieu of a Reference under the Enterprise Act 2002’ (Ofcom 2005)
— — ‘What is Local Loop Unbundling’ (Factsheet)
Offe C, ‘Demokratie und Wolhlfahrtsstaat: Eine europäische Regimeform unter dem Stress der europäischen Integration’ in W Streeck (ed), *Internationale Wirtschaft und nationale Demokratie: Herausforderungen für die Demodratietheorie* (Campus 1998)
Ogus A, ‘Better Regulation - Better Enforcement’ in Weatherill S (ed), *Better Regulation* (OUP 2007)
Oum TH and Zhang Y, ‘Competition and Allocative Efficiency: The Case of the US Telephone Industry’ (2001) *Review of Economics and Statistics* 82
Palast G, Oppenheim J and MacGregor T, *Democracy and Regulation: How the Public Can Govern Essential Services* (Pluto Press 2003)
Papadopouls Y, ‘Problems of Democractic Accountability in Network and Multilevel Governance’ (2007) 13 ELJ 469
Pelkmans J, *Market Integration in the European Community* (Martinus Nijhoff 1984)

— — ‘Mutual Recognition Rationale, Logic and Application in the EU Internal Goods Market’ (XIIth Travemuender Symposium, March 2010)
Perez C, *Technological Revolutions and Financial Capital: The Dynamics of Bubbles and Golden Ages* (Edward Elgar Publishing 2002)
Pernice I and Pistor K, ‘Institutional Settlements for an Enlarged European Union’ in GA Bermann and K Pistor (eds), *Law and Governance in an Enlarged European Union: Essays in European Law* (Hart Publishing 2004)
Peters A, ‘Sectoral Constitutionalization in International Law’ (Europe’s constitutional mosaic within a global constitutional order seminar, Edinburgh, April 2009)
Peters BG and Pierre J, ‘Governance Without Government?: Rethinking Public Administration’ (1998) 2 *Journal of Public Administration Research and Theory* 223
Piris J-C, ‘Does the European Union Have a Constitution?: Does it Need One?’ (2000) Harvard Jean Monnet Working Paper 5/00
— — *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010)
Pisani-Ferry J, ‘Speeding up European Reform: A Master Plan for the Lisbon Process - What’s Wrong with Lisbon’ (2005) 6 *CESifo Forum* 21
Pistor K and Xu C, ‘Incomplete Law’ (2003) 35 *New York University Journal of International Law and Politics* 930
Pollack M, ‘Creeping Competence: The Expanding Agenda of the European Community’ (1994) 14 JPP 95
— — ‘The End of Creeping Competence?: EU Policy-Making since Maastricht’ (2000) 38 JCMS 519
— — *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (OUP 2002)
Porte C de la, ‘Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?’ (2002) 8 ELJ 38
Potoski M and Prakash A, ‘The Regulation Dilemma: Cooperation and Conflict in Environmental Governance’ (2004) 64 *Public Administration Review* 152
President’s Advisory Council on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* [Ash Council Report] (Government Printing Office [Washington DC] 1971)
Prodi R, ‘2000-2005: Shaping the New Europe’ (European Parliament, Strasbourg, February 2000)
Prosser T, *Law and the Regulators* (OUP 1997)
— — *The Regulatory Enterprise: Government, Regulation and Legitimacy* (OUP 2010)
Radaelli C, ‘Diffusion of Regulatory Impact Assessment – Best Practice or Lesson-Drawing’ (2004) 43 *European Journal of Political Research* 723
— — ‘Diffusion without Convergence: How Political Context Shapes the Adoption of Regulatory Impact Assessment’ (2005) 12 JEPP 924
— — ‘Better Regulation and the Lisbon Agenda’ (European Evaluation Society Conference, London, October 2006)
— — ‘Whither Better Regulation for the Lisbon Agenda?’ (2007) 14 JEPP 190
— — ‘Desperately Seeking Regulatory Impact Assessments: Diary of a Reflective Researcher’ (2009) 15 *Evaluation* 31
— — ‘Regulating Rule-making via Impact Assessment’ (2010) 23Governance 89

Radaelli C and de Francesco F, 'Better Regulation and the Lisbon Agenda' in C Radaelli and F de Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes* (Manchester UP 2007)
Radaelli C and Meuwese ACM, 'Better Regulation in Europe: Between Public Management and Regulatory Reform' (2009) 87 *Public Administration* 639
—— 'Better Regulation in the European Union: The Political Economy of Impact Assessment' http://centres.exeter.ac.uk/ceg/research/riacp/documents/The Political Economy of Impact Assessment.pdf
—— 'Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU' (2010) 33 *West European Politics* 136
Ramjee R, La Porta T, Salgarelli L, Thuel S, and Varadhan K, 'IP-Based Access Network Infrastructure for Next Generation Wireless Data Networks'(2000) 7 *IEEE Personal Communications* 34
Randall E, 'Not that Soft or Informal: A Response to Eberlein and Grande's Account of Regulatory Governance in the EU with Special Reference to the European Food Safety Authority (EFSA)' (2006) 13 JEPP 402
Rasmussen H, *On Law and Policy at the European Court of Justice* (Martinus Nijhoff 1986)
Raustiala K, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 Virginia JIL 1
Reding V, 'The Review 2006 of EU Telecom Rules: Strengthening Competition and Completing the Internal Market' (Annual Meeting of BITKOM, Brussels, June 2006)
—— 'From Service Competition to Infrastructure Competition: The Policy Options Now on the Table' (ECTA Conference, Brussels, November 2006)
Regent S, 'The Open Method of Coordination: A New Supranational Form of Governance?' (2003) 9 ELJ 190
Regulation – Less is More Reducing Burdens Improving Outcomes: A BRTF Report to the Prime Minister (March 2005) <http://www.bis.gov.uk/files/file22967.pdf>
Renda A, *Impact Assessment in the EU-The State of the Art and the Art of the State* (CEPS 2006)
Rhinard M, 'The Democratic Legitimacy of the European Union Committee System' (2002) 15 Governance 185
Rhodes M, 'The Social Dimension of the Single European Market: National versus Transnational Regulation' (1991) 19 *European Journal of Political Research* 245
Richmond C, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law' (1997) 16 *Law and Philosophy* 377
Rittberger B and Wonka A, 'Introduction: Agency Governance in the European Union' (2011) 18 JEPP 780
Rosenau JN, 'Toward an Ontology for Global Governance' in M Hewson and T Sinclair (eds), *Approaches to Global Governance Theory* (SUNY Press 1999)
Sandholtz W and Stone Sweet A, 'Neo-functionalism and Supranational Governance' in *The Oxford Handbook of the European Union* (OUP 2012)
Sandholtz W and Zysman J, '1992: Recasting the European Bargain' (1989) 42 *World Politics* 95
Sapir A, 'An Agenda for a Growing Europe: Making the EU Economic System Deliver' (Report of an Independent High-Level Study Group Established on the Initiative of the President of the European Commission 2003)

Sauter W, *Competition Law and Industrial Policy in the EU* (OUP 1997)
Schapiro RA, 'Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World' (2007) 57 Emory LJ 115
Scharpf F, 'Balancing Positive and Negative Integration: The Regulatory Options for Europe' (MPIfG Working Paper 97/8, November 1997)
—— 'Economic Integration, Democracy and the Welfare State' (1997) 4 JEPP 18
—— *Governing in Europe: Effective and Democratic?* (OUP 1999)
—— 'Democratic Legitimacy under Conditions of Regulatory Competition: Why Europe Differs from the United States' (Estudio Working Paper 2000/145, 2000)
—— 'Legitimacy in the Multilevel European Polity' (MPIfG Working Paper 09/1, 2009)
Schermers HG, 'Comment on Weiler's *The Transformation of Europe'* (1991) 100 Yale LJ 2525
Schilling T, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 Harvard ILJ 389
Schmidt VA, 'The Decline of Traditional State *Dirigisme* in France: The Transformation of Political Economic Policies and Policymaking Processes' (1996) 9 Governance 371
—— 'Democracy and Discourse in an Integrating Europe and a Globalising World' (2000) ELJ 277
Schutze R, 'Dual Federalism Constitutionalised: The Emergence of Exclusive Competences in the EC Legal Order' (2007) EL Rev 3
Scott A, 'The Role of Concordats in the New Governance in Britain: Taking Subsidiarity Seriously?'(2001) 5 ELR 21
—— 'The Lisbon Process: Policy Coordination and EU Multi-Level Governance' (European Union Studies Association conference, Montreal, May 2007)
Scott C, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38
—— 'The Governance of the European Union: The Potential for Multi-Level Control' (2002) 8 ELJ 59
—— 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' (National Europe Centre Paper No 100, Australian National University, June 2003)
—— 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing 2004)
Scott J, 'Law, Legitimacy and EC Governance: Prospects for "Partnership"' (1998) 36 JCMS 175
—— and Trubek D, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 ELJ 1
Shapiro M, 'Comparative Law and Comparative Politics' (1979-80) 53 Southern California LR 537
Shaw J, 'Postnational Constitutionalism in the European Union' (1999) 6 JEPP 579
—— 'Process and Constitutional Discourse in the European Union' (2000) 27 *Journal of Law and Society* 4
Shearing C and Wood J, 'Nodal Governance and the New "Denizens"' (2003) 30 *Journal of Law and Society* 400

Sims J and Herman D, 'The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation' (1996-1997) *Antitrust Law Journal* 865
Singh S, *The Code Book: The Secret History of Codes and Code-Breaking* (Fourth Estate 2000)
Skogstad G, 'Legitimacy and/or Policy Effectiveness?: Network Governance and GMO Regulation' (2003) 10 JEPP 321
Slaughter A-M, 'The Accountability of Government Networks' (2001) 8 *Indiana Journal of Global Legal Studies* 347
Smismans S (ed), *Civil Society and Legitimate European Governance* (Edward Elgar Publishing 2006)
Snyder F, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 MLR 19
Spiller P and Cardilli C, 'The Frontier of Telecommunications Regulation: Small Countries Leading the Pack' (1997) 11/7 *Journal of Economic Perspectives* 127
Spulber DF and Yoo CS, 'Rethinking Broadband and Internet Access' (2008) 22 *Harvard Journal of Law & Technology* 1
Stacey J and Rittberger B, 'Dynamics of Formal and Informal Institutional Change in the EU' (2003) JEPP 858
Stein E, 'International Integration and Democracy: No Love at First Sight' (2001) 95 AJIL 489
Steunenberg B and Schmidtchen D, 'The Comitology Game: European Policy-Making with Parliamentary Involvement' (University of Saarland Economic Series 9, 2000)
Stein E, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 AJIL 1
—— 'International Integration and Democracy: No Love at First Sight' (2001) 95 AJIL 489
Stern J, 'What Makes an Independent Regulator Independent?' (1997) 8/2 *Business Strategy Review* 67
—— and Cubbin J, 'Regulatory Effectiveness: The Impact of Regulation and Regulatory Governance Arrangements on Electricity Industry Outcomes' (2005) World Bank Working Paper 3536
Stewart RB, 'The Reformation of American Administrative Law' (1975) 88 Harvard LR 1669
—— 'Administrative Law in the Twenty-First Century' (2003) 78 *New York University Law Review* 437
—— 'US Administrative Law: A Model for Global Administrative Law?' (2005) 68 *Law and Contemporary Problems* 63
Stirton L and Lodge M, 'Transparency Mechanisms: Building Publicness into Public Services' (2001) 28 *Journal of Law and Society* 471
Stratulat C and Molino E, 'Implementing Lisbon: What's New in Comitology?' (2011) European Policy Centre Policy Brief April
Streel A de, 'Current and Future European Regulation of Electronic Communications: A Critical Assessment' (2008) 32 *Telecommunications Policy* 722
Stone Sweet A, *The Judicial Construction of Europe* (OUP 2004)

— — and Caporaso J, 'From Free Trade to Supranational Polity: The European Court and Integration' in W Sandholtz and A Stone Sweet (eds), *European Integration and Supranational Governance* (OUP 1998)
Sunstein CR, 'Paradoxes of the Regulatory State' (1990) 57 *University of Chicago Law Review* 407
Tamanaha B, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 *Journal of Law and Society* 296
— — 'A Concise Guide to the Rule of Law' (St John's University School of Law Legal Studies Research Paper 07-0082, 2007)
— — 'Understanding Legal Pluralism: Past to Present, Local to Global' (St John's University School of Law Legal Studies Research Paper 07-0080, 2008)
Tapscott D and Carston A, *Paradigm Shift: The New Promise of Information Technology* (McGraw-Hill 1992)
Tenner E, *Why Things Bite Back: Technology and the Revenge of Unintended Consequences* (Vintage Books 1997).
Thatcher M, 'The Creation of European Regulatory Agencies and its Limits: A Comparative Analysis of European Delegation' (2011) 18 JEPP 790
— — and Stone Sweet A, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1
Tomkins A, 'In Defence of the Political Constitution' (2002) 22 OJLS 157
Torriri J, 'Impact Assessment in the EU: A Tool for Better Regulation, Less Regulation, or Less Bad Regulation?' (2007) *Journal of Risk Research* 239
Trachtman JP, 'L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity' (1992) 33 Harvard ILJ 459
Trieb O, 'Implementing and Complying with EU Governance Outputs' (2008) 3 *Living Reviews in European Governance* 5
Turner C, *Trans-European Telecommunications Networks: the Challenge for European Industrial Policy* (Routledge 1997)
Turner J, *The Chemical Feast* (Grossman 1970)
Ungerer H, 'EC Competition Law in the Telecommunications, Media, and Information Technology Sectors' (1995-1996) 19 Fordham IJL 1111
Vauchez A, 'Integration-through-Law: Contribution to a Socio-history of EU Political Commonsense' (2008) EUI Working Papers RSCAS 2008/10
— — 'The Transnational Politics of Judicialization: *Van Gend en Loos* and the Making of EU Polity' (2010) 16 ELJ 1
Veljanovski C, 'Cable Television: Agency Franchising and Economics' in R Baldwin and McCrudden C, *Regulation and Public Law* (Weidenfeld and Nicholson 1987)
— — 'The Regulation Game' in Veljanovski C (ed), *Regulators and the Market* (Institute of Economic Affairs 1991)
— — 'Economic Approaches for Regulation' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010)
Verbruggen P, 'Does Co-Regulation Strengthen EU Legitimacy?' (2009) 15 ELJ 425
Versluis E, 'Compliance Problems in the European Union: A Potential Role for Agencies in Securing Compliance?' (2007) 8 *Administratie si Management Public* 162
Verweij M and Josling TE (eds), 'Special Issue: Deliberately Democratizing Multilateral Organization' (2003) 16 Governance 1
Vesterdorf B, 'Transparency – Not Just a Vogue Word' (1998) 22 Fordham I LJ 902

Voermans W, 'Delegation is a Matter of Confidence: The New EU Delegation System under the Treaty of Lisbon' (2011) 17 *European Public Law* 313
Waelbrock D and Fosselard D, 'Should the Decision-Making Power in EC Antitrust Procedures be Left to an Independent Judge? - The Impact of the European Convention on Human Rights on EC Antitrust procedures' (1994) YEL 111
Walker N, 'The Idea of Constitutional Pluralism' in R Bellamy, V Bufacchi and D Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995)
— — 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317
— — 'Postnational Constitutionalism and the Problem of Translation' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003)
— — 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 OJLS 581
— — 'Big "C" or Small "c"?' (2006) 12 ELJ 12
— — 'Taking Constitutionalism Beyond the State' (2008) 56 Political Studies 519
Wallace H, Wallace W and Pollack M (eds), *Policy-Making in the European Union* (5th edn, OUP 2000)
Ward I, 'A Decade of Europe?: Some Reflections on an Aspiration' (2003) 30 *Journal of Law and Society* 236
Waverman L and Dasgupta K, 'Mandated Functional Separation: Act in Haste, Repent at Leisure?' (unpublished paper 2007)
Weatherill S, 'Better Competence Monitoring' (2005) European LR 23
— — 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 German LJ 827
— — (ed), *Better Regulation* (Hart Publishing 2007)
Weiler JHH, 'The Transformation of Europe' (1991) 100 Yale LJ 2403
— — 'Europe: The Case Against the Case for Statehood' (1998) ELJ 43
— — 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (2004) 26 Comparative Political Studies 510
— — 'Does Europe Need a Constitution?: Demos, Telos and the German Maastricht Decision' (1995) 1 European LJ 219
— — *The Constitution of Europe: 'Do the New Clothes Have an Emperor? And Other Essays on European Integration* (CUP 1999)
— — 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform' (Jean Monnet Working Paper 01/04, 2004)
Weiler JHH and Trachtman JP, 'European Constitutionalism and Its Discontents' (1996- 97) 17 *Northwestern Journal of International Law & Business* 354
Westerdorf B, 'Transparency - Not Just a Vogue Word' (1998) 22 Fordham ILJ 900
Whalley J and Henten A, 'Functional Separation: Experiences from Telecommunications and Other Infrastructure Based Industries' (2010) 34 *Telecommunications Policy* 366
Whitt RS and Schultze SJ, 'The New "Emergence Economics" of Innovation and Growth and What It Means for Communications Policy' (2009) 7 *Journal of Telecommunications and High Technology Law* 217
Wiener JB, 'Better Regulation in Europe' (2006) 59 Current Legal Problems 447
— — 'Better Regulation in Europe' in J Holder and D McGillivray (eds), *Taking Stock of Environmental Assessment: Law, Policy and Custom* (Routledge-Cavendish 2007)

Wilks S, ‘Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?’ (2005) 18 Governance 431
Williamson OE, *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (new edn, Macmillan 1983)
Wils WPH, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights’ (2010) 33*World Competition* 5
Wincott D, ‘Looking Forward or Harking Back?: The Commission and the Reform of Governance in the European Union’ (2001) 39 JCMS 897
— — ‘European Political Development, Regulatory Governance, and the European Social Model: The Challenge of Substantive Legitimacy’ (2006) 12 ELJ 743
Winn N, ‘Who Gets What, When, and How?: The Contested Conceptual and Disciplinary Nature of Governance and Policy-Making in the European Union’ (1998) *Politics* 119
Wolf M, *Why Globalization Works* (Yale UP 2004)
Woodman GR, ‘Ideological Combat and Social Observation: Recent Debate about Legal Pluralism’ (1998) 42 *Legal Pluralism and Unofficial Law* 21
Yee AS, ‘Cross-National Concepts in Supranational Governance: State–Society Relations and EU Policy Making’ (2004) 17 Governance 487
Zahn R, ‘Human Rights in the Plural Legal System of Nigeria’ (2009) 1 *Edinburgh Student Law Review* 66
Zeiner HH, ‘The Uses of Legitimacy: Models of EU Legitimacy Assessed in Light of the European Parliament’s Debates on BSE and the Constitutional Treaty’ (Phd thesis, European University Institute 2008)