



Position paper on EECMA proposal

Comments on the Commission proposal for a regulation of the European Parliament and the Council establishing the European Electronic Communications Market Authority. Com(2007) 699 PDF(EN) – 2007/0249/COD, responsible ITRE (Del Castillo Vera Pilar)

As supporters for a freedom in information infrastructures the proposal for a regulatory institution is dear to our heart. We are sceptical of the need for a new institution but deem it important that the current European telecommunication regulation regime is overcome and more coherence between national regulatory institutions is established. The core concern on the markets, the reduction of legal ambushes for ICT services and the establishment of a single point of regulation is unfortunately beyond the proposed tasks of the EECMA. However, we suggest a focus on pan-European interconnectivity and interoperability using proactive regulatory measures complementary to the activities of competition authorities.

1. **Interconnectivity and interoperability:** the core requirements to enable competition in pan-European electronic communications are given no priority. EECMA could complement the competition authorities here.
2. **Conflict of interests** is institutionalised via financing through spectrum monopoly fees and sharing of them with national regulators. EECMA enjoys budgetary independence. The financing creates institutional incentives to expand a monopoly licensing regime and compromises regulatory tasks.
3. **Industry takeover:** the institution risks to be taken over by the telecom industry and stifle emerging competitors. The proposal explicitly creates yet more advisory boards run by industry representatives.
4. **Insufficient parliamentary control:** EECMA is shielded against political influence without a good reason.
5. **Resistance to market change:** EECMA is not equipped to manage the transition of communication markets towards Free Information Infrastructures such as the Internet where open standards and open source predominate.
6. **ENISA merger:** ENISA lacks deliverables in ICT security. It sounds good to merge the placebo institution into EECMA after 2009.
7. **Review process of the EECMA:** the period should be reduced from five to three years given the market dynamics.
8. **Naming:** EECMA sounds similar to the infamous *ECMA International*. It should be changed.

Interconnectivity and interoperability

Today most regulation risks in emerging fields of ICT networks result from national case law of courts and are worsened by forum shopping. National legislators fail to correct premature decision making of the judicative which prejudices their interpretation of the legislative frontier. Only the legislator, not a regulator as EECMA can contribute here to market confidence.

However, soft intervention and more coherence is especially needed in the field of interconnectivity and interoperability promotion with the view to enable pan-European competition. Here the EECMA



needs to get more competences. The provisions of Article 3 i), Article 4 n) are too weak.

This is especially true as competition authorities have been shown to be ineffective in the field of interoperability promotion. They respond only ex post to market lock-ins with their inflexible instruments and setting into force of their decisions may take years.¹ Therefore complementary soft measures are needed in the forefront of abusive exercise of dominant market positions. A new regulatory institution can provide more pre-emptive instruments of competition policy for a market where monopolistic abuse has strong implications for the protection of fundamental rights: electronic communications.

Dynamic market change may lead to a situation where traditional telecommunication providers will seek to abuse the regulatory institution to prevent Schumpeterian competition. In our French shoot in the cradle of emerging competitors. To enable “canibalization“ of markets is of great importance given the ongoing convergence of telecommunication markets towards free information infrastructures as the Internet. Interoperability is the key technical aspect of competition in electronic communication markets. They are increasingly driven by open standards.

Conflict of interests

The budgetary model creates a parafiscus for the authority. It is (almost) budgetary independent. The authority has income sources of its own from spectrum licenses which are shared with the national bodies that are supposed to exercise certain degrees of political control and collaboration.

In the European Patent Office Administrative Council representatives of national patent offices (which share fees with the EPO) control the institution. Both layers are shielded from parliamentary influence. Currently political influence can not stop the illegitimate software patent granting practice of the EPO with respect to European Patent Convention Article 52 and and the quality deterioration due to intra-institutional financial incentives.

A similar institutional governance problem can be found here. The EECMA shares with National Regulatory Institutions spectrum fees. Both NRA and EECMA are independent from parliament, loosely aligned with the governments or the Commission. Industry stakeholders would exercise more control than Members of Parliament.

Financing by fees creates incentives for the institution to invent more areas for monopoly licenses and makes it politically very difficult to shift to a free licensing model. There are indications that ongoing market developments will lead to free spectrum use which might be detrimental to the interests of traditional telecommunication providers. The question whether rights of use shall be assigned for a fee is open to debate. If the European Parliament would for instance decide to licence certain spectra for educational purposes for free it would face commercial resistance from the regulatory authorities.

Because the institution is a direct beneficiary of the fees it cannot perform meaningful regulatory action. Traditionally the licensing of spectrum was justified by interference problems, and did not follow a fiscal objective. With a large budget for the EECMA arising from fees it is feared that

¹ Cmp. Nelly Kroes' notion of a "bittersweet“ victory, http://www.economist.com/business/displaystory.cfm?story_id=9823880



neither the Commission nor Parliament can control the organisation. Rather, like in patent policy, the institution would lobby the European Institutions. Article 10.4 explicitly provides a political channel for an expansive approach towards spectrum monopolies. We also propose to review Article 17.

Industry takeover risks

When regulators are not sufficiently independent from telecom providers they fail the three objectives to promote competition mentioned in the Commission's proposal. The imminent danger is here so-called *vendor capture*. The regulatory institution needs safeguards which prevent undue influence in accordance with the WTO plurilateral agreement on Technical Barriers to Trade (TBT) and the Government Procurement Agreement (GPA), Article VI, analogue: "*Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.*"

The regulatory institution needs to be independent from market players as subjects of the regulation, not parliament. The European legislator may also draw inspiration from the competition law concept of adversary-freedom as established for trade unions in some member states.

Respective changes may be applied to Article 1 and a deletion of Recital 41 is advised. We believe that the creation of a permanent stakeholder group with participation of regulated subjects would undermine the independence of the institution and blur the competences of the competent institutions for diverse representation of the public and commercial interests such as the European Economic and Social Council (EESC) and the European Parliament.

Otherwise the institution risks becoming the "best friend" of the telecommunication industry that will :

- i) water down its exercise of regulatory powers
- ii) capture the institution with its interests
- ii) use it as a European lobby platform financed by public funds and "customer fees".

Strengthening parliamentary control

"The Committee procedures ensures independence of the Commission from Parliament in regulatory matters which delegates power to new regulatory authorities. " - Commission justification of Article 2 (6), COM(2007) 698 // 2007/248(COD)

The newly established EECMA is targeted as a replacement for the current regulatory coordination for telecommunication providers and respective national regulatory agencies. Some national regulators feel uncomfortable with that.

A central question from our perspective is the exercise of parliamentary control. Only parliament can guarantee the reflection of the widest range of diverse political and societal forces and is superior to any specialised technocratic decision making process in terms of representation and accountability. We believe that democratic control is of utmost importance. The existing regulatory institutions are shielded against parliamentary influence. A new institution with more powers should improve the democratic control.



The traditional reason for independence of national regulatory institutions in the field of communications is the interest merger of governments as owners of national telecommunication companies and the traditional strong influence of dominant national telecommunication providers. On the European level the existing European Institutions can balance interests far better than committee driven specialised institutions.

Services by the new authority should be accessible to all European institutions. The European Parliament shall exercise sufficient democratic control and influence.

Towards Free Information Infrastructures

The main regulatory task in the field of telecommunications is to manage the transition of traditional telecommunication markets towards the more flexible free information infrastructures as the Internet. Voice-over-IP, meaning telephone services using the internet protocols, for instance faces strong regulatory risks, both by traditional telecommunication providers and because of patent ambushes. Free Information Infrastructures are mostly driven by software with a special importance of open source solutions for the service infrastructure and open standards as the main enabling factor for competition. The inevitable move towards free information infrastructures requires a smooth and fast transition. It would lead to a more competitive, more diverse telecommunication infrastructure that would create new markets. Being first to market is here very important. Europe lost certain emerging key markets to US-competitors because it did not embrace change in a timely manner. If Europe failed to create open markets first, it will face all second move disadvantages.

Electronic communication markets have strong external effects beyond the network infrastructure as such. We were pleased to hear from MEP Berend (EPP-EP) (in his plenary speech 9. April 08) that his group is committed to the importance of free information infrastructures for the European creative sector. Communication networks are about infrastructure as an enabling environment for markets and society. The EECMA institutional mission should take that into due account.

ENISA – getting rid of the placebo

The proposal from the Commission is to merge the Commission's agency ENISA into the newly established authority. It is a surprise from us that the mandate of the European IT security institution was prolonged recently. So far ENISA's contributions to IT security lack deliverables and are disproportionate to its budget. Praise from some market players is due to the fact that a placebo institution prohibits real regulatory action and can be used as a platform to lobby the European institutions.

The contributions of ENISA as outreach to an imaginative end user audience with trivial position papers written by non-European scholars and *ad nauseam* multi-stakeholder consultations, mostly with a dominant participation of non-European large industry lobby representatives, show the footprint of an ineffective institution. Instead of being a knowledge hub for European Institutions representatives of the agency claim they lacked knowledge and needed to consult multiple stakeholders. Organisations invented by consultants tend to adopt lobbying practices with a tendency to limit their actions to "awareness raising" rather than providing the necessary technical assistance. On the other hand security agencies drawn from practical administrative needs of the government as the German *Bundesamt für Sicherheit in der Informationstechnik* (BSI) provide useful deliverables to the market at large and build widely respected ICT security expertise.



The fact that Recital 10 endorses the failed institution shows that meaningful political control is a problem. Recital 11 gives good reasons why ENISA has to be restructured: "a number of problems were identified, including in particular issues relating to its organisational structure, the skills mix and the size of its operational staff, and logistical difficulties. ". Therefore we support the migration of ENISA into a new organisation. A merger into the new regulatory institution can only improve the situation but bears the risk that institutional malpractice gets carried over by the newly established authority.

Additionally we recommend that the EECMA should contribute to the security review of source code for key elements of ICT informations infrastructures. Provider from all relevant market solutions offer source code, either as open source solutions or shared source under a non-disclosure agreement. No existing institution currently fully provides these essential public services for the improvement of communication infrastructure security.

Review – in five years?

It is important that a review regarding institutional incentives, democratic control and respect for fundamental rights will be carried out as early as possible. A review after 5 years is unacceptable in the light of market dynamics (cmp. Art 55). We recommend reducing the review cycle to three years.

Naming issues: EECMA

The suggested name of the institution reminds us of the infamous *ECMA International*, an NGO which provides privileged access for industry players to ISO standardisation, a practice which is currently under EU investigation regarding the ECMA fast-track of Microsoft OOXML, an format for office productivity software.

We agree with the suggestion from parliament to change the name of the new EECMA institution.