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Have EU regulatory frameworks replaced or only obscured the national positive state?

1. Introduction

A key condition for the rise of the regulatory state and its replacement of the positive state was privatisation of state interest in economic actors (Majone: 1994: 80; Lodge 2008:281-282). The positive state was defined by Majone as one in which the state was a producer of goods and services and used that position to pursue a wide range of goals (Majone: 1994:79-80). We would agree that the separation of the state from ownership of the means of production potentially creates the circumstances in which the central state can withdraw from attempting to determine individual sectoral economic outcomes. However, we note that in fact privatisation in the EU has not been that extensive (Bortolotti and Faccio (2004); CEEP (2000); Cliften et al (2006)) . In other words, the major explanatory variable for the rise of the regulatory state at the national level turns out to be far weaker than has sometimes been assumed. This in turn has consequences for the creation of the regulatory state at European level where Member States are co-legislators in designing single market initiatives. The interests of Member States are not then reducible, as Majone suggested, to empowering the Commission to ensure implementation in order to overcome commitment problems and deliver a single market (Majone:1994:90). Our view is that when Member States with ownership interests participate in the construction of EU regulatory frameworks that they seek to create frameworks which reflect the existence of those ownership interests. Member States in this situation are likely to pursue an institutional structure which gives them scope to shelter sectors from Commission activism rather than ones which necessarily permit a one-way route to Commission domination of regulatory outcomes and the effective prosecution of single market objectives. The literature sometimes suggests that it is a common feature of EU regulatory frameworks that they require the creation of national regulatory authorities (“NRAs”) which are independent of ministries (Eberlein and Grande: 2005: 96; Levi-Faur:2004: 8; Majone: 2001:111; Thatcher: 2007:5) and that they could possibly even be seen as agents of the Commission (Coen and Thatcher:2008:50). In fact, NRA independence from ministries has not yet in fact been a requirement in a Directive; despite attempts by both stakeholders (including the collective bodies representing national regulators) and the Commission to promote amendments to Directives which would have this effect. In our view, such a statutory protection on its own is unlikely to be a sufficient guarantor of independence from national administrations given continuing powers of ministerial appointment. Such independence is more likely to be delivered where national regulators become part of a genuinely europeanised regulatory decision-making structure.

2. Our argument

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(i) By conducting a survey of all state ownership in the EU for this paper, we have been able to identify the sectors in which there is continuing state ownership in the EU. These sectors with concentrations of state ownership also include all those sectors in which EU regulatory frameworks require some degree of functional separation between ownership and administration within national governments. Such a finding might appear fatal for our argument were it not for the further finding of fact: none of these frameworks has actually require “independence” from national governments in any meaningful sense. In other words, these are sectors where there is a conflict of interest, the legislation identifies the conflict and then proceeds to fail to deal with it adequately. The latest proposals from the Commission in electricity, gas and telecom do all attempt to go further (see Annex 1). However, one of the issues that has been debated during the legislative process concerns the wording around independence in draft articles. The Commission and the European Parliament have been seeking legal protections for independence and the Council has been seeking to maintain room for ministerial engagement vis-à-vis the national regulators. .

Our first hypothesis is that the greater the number of countries with state ownership in a sector, the less likely it is that EU legislation will prohibit ministries from giving instructions to national regulators.

(ii) If it were the case that regardless of the content of EU legislation that regulators were made independent at the national level then an EU legal requirement for independence would not be so significant; national regulators empowered to behave independently could then be the prosecutors of an EU regime and they might seek to do so through informal issue networks (Eberlein and Grande:2005:99)² Consequently, we devote a section in this paper to examining existing analysis of the extent to which national regulators are in fact independent.

(iii) We select 5 sectors with high levels of state ownership and where possible correlate the level of state ownership over time with changes in the design of EU regulatory frameworks in order to assess whether the Commission is granted greater levels of involvement in implementation as levels of ownership change. We also compare this with institutional arrangements in pharmaceuticals where there are very low levels of state ownership and the Commission is empowered with respect to implementation.

Our second hypothesis is that the greater the number of countries with state ownership in a sector, the less likely it is that EU regulatory framework will empower the Commission to direct implementation.

(iv) Finally, we correlate third party assessments in two sectors of the effectiveness of the national implementation of regulatory frameworks with “independent” NRAs with the existence or not of state ownership. A systematic correlation between poor implementation of regulation and state ownership would permit the inference that the

² We have discussed elsewhere why state ownership and lack of independence have the effect of preventing the issue networks from delivering europeanisation. (Tarrant and Kelemen: 2007:10). Eberlein and Grande have also identified that distributional issues may prevent informal networks from delivering functional europeanisation. However, they have identified telecoms, a sector with substantial state ownership, as a sector in which informal networks are bypassing political resistance to harmonisation (Eberlein and Grande: 2005:101).

state in many cases was not acting neutrally and that the existence of a European framework was not the same thing as a European regulatory state.

Our third hypothesis is that in countries where the principal regulated entity is state owned that regulation will be relatively poorly implemented.

2. Majone's argument

Giandacome Majone's seminal 1994 article described the rise of the regulatory state. The regulatory state distinguished itself from its positive counterpart in that "...the role of the state changes from a producer of goods and services to that of an umpire whose function is to ensure that economic actors play by the agreed rules of the game". (Majone: 1994: 80). The new objectives of the game are solely focussed on achieving sectoral economic efficiency rather than the wider and often conflicting goals pursued under ownership (Majone: 1994: 79). Privatization is identified as a causal mechanism which creates the space for the rise of the regulatory state which is delivered via independent agencies (Majone: 1994:80). The European Commission is identified as an independent promoter of the regulatory state, motivated to pursue this form of power, due to its lack of command and control or spending powers (Majone:1994: 89). Member States agree to transfer regulatory powers to the EU because of the low implementation credibility of traditional inter-state agreements but seek to limit the discretion of the Commission by making it dependent on the information and knowledge provided by national bureaucrats (Majone: 1994: 90) However, the Commission escapes these constraints by coopting the relevant national officials and a wider group of socio-economic actors in issue networks (Majone: 1994: 90)³.

3. Why have Member States privatised and what does this suggest about their incentives to act neutrally?

We define privatisation as the removal of any state ownership interest in an individual company. Privatisation could alternatively be defined as the sale of any interest in a state owned enterprise (Bellini: 2000: 32). Prima facie, either could be an appropriate measure; however, from the perspective of seeking to appreciate the extent to which the state has a conflict of interest which is likely to impede its transition to "the regulatory state" or to its ability to cooperate in a wider EU regulatory state then our measure will more accurately track the impediment. Previous research has tended to focus on the sale of any interest because this is the measure which is available from sources such as Privatisation Barometer⁴. Cliften et al point out the dangers of relying on sales statistics but are forced back on such material in their analysis of the rhythm of privatisation due to the absence of disaggregated information on any other basis (Cliften et al: 2006: 740). An exception to the privatisation sales approach is the paper of Bortolotti and Faccio which examines a sample of privatised firms for direct and indirect state ownership and golden shares in order to measure all forms of state control and then to test that against market valuations so as to test the proposition "political interference" leads to lower market valuations. They find that political interference in fact leads to higher valuations and that it is due to the higher levels of

³ Majone nonetheless recognised in the concluding section of his article that regulatory institutions could be designed to fail (Majone:1994:97)

⁴ <http://www.privatizationbarometer.net>

state aid which state controlled firms are able to access. (Bortolotti and Faccio:2004:3; see also Hanousek and Kocenda's 2008 study of state owned entities in the Czech Republic for an analysis of continued government control post "privatisation").

While in some sectors and in some Member States, Member States may have sought to privatise in order to implement the regulatory state identified by Majone, this is far from a universal policy stance throughout the EU. The body representing public enterprises at EU-level, the European Centre of Employers and Enterprises providing Public Services (CEEP), characterised the opening of capital in public enterprises as being conducted in some states "...with the sole aim of drastically reducing national debt." (CEEP:2000:2). Cliften et al note "...there is little evidence...of a monolithic common decision across the EU to emulate a radical privatisation programme UK-style" (Cliften et al: 2006:743-44). Public enterprises continued to employ approximately 6 million workers and were responsible for 8.5% of added value at the end of the 1990s in the EU-15(CEP 2000: 6). This can appear surprising in the context of the very large scale sell offs of capital in state enterprises that took place in the 1980s and 1990s. The explanation is that in many cases while the state substantially reduced its proportion of the entities capital it nonetheless often remained the largest single shareholder and thus retained its influence on the company. Bortolotti and Faccio surveyed entities that had been privatised by 2000 and found evidence for what they called the phenomenon of "reluctant privatization", defined as the transfer of ownership rights in State-owned enterprises without a corresponding transfer of control rights. They found that in 2000, governments were the largest shareholder or used special control powers ("golden shares") to retain voting control of 62.4% of a sample of privatised firms (Bortolotti and Faccio:2004:1).

The Commission, backed by the European Court of Justice, has pursued a vigorous campaign in the 2000s against "golden shares" (definable as "...all legal structures applying to individual corporations for the purpose of preserving the influence of a public authority on the shareholder structure or the management of the corporation beyond the extent to which such influence would be afforded under general corporate and securities law. (Adolff:2002: 4)). The Commission and Court have viewed golden shares as a restriction on the free movement of capital – both directly and indirectly; since they prevent a market in the control of companies with a further likely consequent impact on the value potentially realisable by passive investors in the context of a change of control (Ibid). Golden shares have been accepted as proportionate restrictions justified by public interest requirements but only where the control retained by the state is restricted in its scope to dealing with a precisely defined risk to the public interest⁵. Most golden share controls have been designed to be entirely discretionary and are therefore potentially illegal.

The Commission and Court cannot however require Member States to draw down state ownership. Article 295 of the Treaty⁶ makes it clear, in the Commission's words, that the Member States have "sole competence" in respect of deciding the forms of property ownership in any sector (Commission: 2006).

⁵ ECJ Case C-503/99 Commission v Belgium

⁶ Article 295 states: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."

Nonetheless, some authors have claimed that the EU is a key explanation in the logic of privatisation at national level. Cliften et al examine three potential explanations for privatization in the EU: (i) to emulate the UK; driven by a distrust of the state and belief in efficiency gains; (ii) motivations are so diverse that there is no common explanation; and, (iii) developments in the EU have acted as catalysts or filters (Cliften et al: 2006). To test these explanations, Cliften et al put forward the timing of common privatization efforts across more than one country which coincide with EU market opening measures as evidence that the EU acted to a degree as either a cause or a filter and to reject the first two hypotheses. It is no doubt correct that EU Member States often responded to EU market opening measures by privatising at least to some extent. The authors give the example of small Member States selling ownership in telecoms companies in order to obtain capital injections and know-how from extra-European telecoms companies in order to compete with potential cross-border European competitors (Ibid: 745). However, information on sales does not explain the extent to which there was a reduction in state ownership in any individual case. For example, as the authors identify, Belgium and Denmark both engaged in sales of shares in their incumbents prior to full liberalisation of telecoms in 1998, but the Belgium government retained a 51% ownership in Belgacom and the Danish government retained no ownership stake in Teledenmark at all. Deploying our definition of privatization, we would argue that Teledenmark was privatised but that Belgacom was not. As a consequence, we would expect that the incentives of the Belgian and Danish governments in deploying effective regulation to vary⁷.

4. State ownership

Our research starts with an analysis of what states continue to own rather than what has been privatised⁸. There is no current centralised detailed database of state ownership maintained by any private or public institution, including CEEP⁹, the EU, IMF, OECD and World Bank. The source of our data is the individual records of Member States to December 31st 2009¹⁰. Member States generally record not only the number of shares which they hold in each individual company but also the percentage of the share capital of the companies that this represents.

We find that Member States continue to have a greater than 1% shareholding in 834 companies in those EU Member States which provided data or make it available on web-sites¹¹. A table showing each sector in which a Member State has ownership in at

⁷ In ECTA's 2008 survey of effective telecommunications regulation, Belgium ranked 14 out of 18 EU Member States that were reviewed whereas Denmark ranked third. ECTA is a trade association representing new entrant telecommunications companies in Brussels.

⁸ Our findings are available on the web-site of the economic consultancy www.spcnetwork.eu. We invite readers of this article to review the list of companies for their Member State and to contact us at the web-site. Where amendments are suggested we will approach Member States and ask them to comment. We will also be directly contacting national organisations within Member States that we believe will have an interest in reviewing these lists.

⁹ CEEP surveys only record aggregate country data in terms of the percentage of workers in public enterprises with respect to the total of non-agricultural wage earners; the proportion of non-agricultural gross domestic product generated by public enterprises; and the contribution to non-agricultural gross domestic investment. Its surveys are conducted intermittently.

¹⁰ Despite a number of requests, we have not yet been able to obtain information from the Latvian, Lithuanian, Maltese, Spanish and Slovakian authorities.

¹¹ We applied a filter of 1% and in Romania's case an additional filter of 100 million LEI (approximately £21 million pounds). In the absence of these filters, holdings in the Czech, Republic,

least one company can be found in Annex 2 on page 24. Although there is a great deal of variation across the individual Member States, we can see that there appear to be peaks in the distribution of state ownership in the following sectors: airlines, airports, broadcasting, electricity, finance, gas, oil, posts, rail, telecommunications and water. These are all sectors where 10 or more Member States from our population of 22 have ownership stakes.

Our records to date will under record the phenomena of state ownership for a number of reasons:

(i) The information is largely derived from what Member States have defined and disclosed as enterprises in which they have ownership. However, it could be the case that activities that have been corporatised in most Member States are still conducted by a government department funded from general taxation in another and as such are omitted in the latter from ownership registers. Alternatively, the records which Ministries of Economics provide may fail to record all state owned companies. Verification via web-research has found in a number of cases that Member States have not disclosed all state ownership. Our analysis may as a consequence therefore under record the extent of continued state sectoral economic activity.

(ii) We have not investigated the ownerships of state owned financial institutions. Substantial holdings on their part in other national companies could potentially make the state sensitive to attempts to adopt EU regulation that might affect such indirect holdings.

(iii) The information is derived from central state records of ownership. However, local and regional governments also retain significant ownerships. This is particularly true in federal Member States such as Austria and Germany. We would hope to obtain this information and incorporate it into the database and use the findings to make any appropriate amendments to a future iteration of this paper. We note that CEEP suggest that the ownerships of regional authorities in federal states tend to be high and they calculate that overall 20% of ownership stakes are held at a lower tier: CEEP suggests that the countries in which these are highest are Germany, Belgium, Spain and Denmark (CEEP:2000:7).]

Our findings, show that the Member States continue to be economic actors in many sectors. The information we have collected to date is likely to under record the extent to which the state continues to be involved and has not retreated to the position of umpire. This under recording of our independent variable reduces the accuracy of predictions. However, if we find that a relationship with our dependent variables is established with a weaker independent variable than is actually the case in reality, this will tend to suggest that the relationship is even stronger than we find. A survey was made of public enterprises by the IMF in 1984 (Floyd, Gray and Short: 1984). If we compare our finding as to the sectors in which the state was present in 1984, prior to the period of privatisations in any Member State, we would conclude that the key difference is that Member States have (or had prior to the credit crunch) largely retreated from the manufacturing sector in the 25 years between the two surveys (Ibid:

Poland and Romania would have been recorded as much higher. Romania has ownership in over 420 companies, but many of these are very small enterprises.

125). In most of the other sectors where the state was present in 1984, it remains present today.

5. Have EU regulatory frameworks required independent national regulatory authorities?

The literature sometimes suggests that it is a common feature of EU regulatory frameworks that they require the creation of NRAs which are independent of ministries (Levi-Faur: 2004: 8; Majone: 2001:111; Thatcher: 2007:5)¹². This is not in fact the case. While it is not uncommon for directives to require that institutions or persons empowered by EU legislation to carry out regulatory tasks be independent of regulatees, it is usually entirely within the Member States' discretion as to the domestic administrative arrangements and the selection of the competent body to conduct implementation¹³. This is the standard operating procedure for implementation (Weatherill and Beaumont: 1995:137). It is only within an extremely restricted set of Directives that EU legislation interferes with national governance structures and requires effective separation within national administrations between ownership and regulatory functions.

The set of frameworks requiring effective separation is more limited than an objective assessment of obvious conflicts between ownership and regulation might suggest. Although, we could perhaps in theory expect express separation requirements wherever there is a requirement for regulation and state ownership is also prevalent, the need would seem particularly acute where the owned entity is vertically integrated and controls monopoly physical assets. This is because access to these assets is required on an equal basis by entrants to the market in order for a market to exist. The incumbent vertically integrated entity controls access physically and has a natural incentive to refuse that access (Beard, Kaserman and Mayo (2001); Cave and Valetti:2000; Pelkmans (2001); Salop and Scheffman (1983)). These are sectors in other words where regulation entirely determines the existence of a market or not. The sectors in the EU in which there are vertically integrated companies competing in retail markets and which own bottleneck monopoly access infrastructures to which competitors need access in order to compete are electricity, gas, posts, rail and telecoms. These are also sectors in which we have found there to be a substantial concentration of state ownership in the EU. A requirement for functional separation within the national administration has to date only been incorporated in the postal, telecoms and (ambiguously¹⁴) rail frameworks (see Annex 1 at page 21 for a list of all the "independence" requirements in Eu Directives)¹⁵. It should be noted that such a requirement for structural separation is not likely in itself to remove government influence over the regulation of access, since the split administrative function may

¹² Although, the same authors have also published other analyses that that have suggested that Ministries may in fact be able to influence NRAs, see Jordana, Faur, and Puig: 2006: 448; ;Majone:2000: 284 ; Thatcher :2005:364)

¹³ For an example see Article 126b of Directive 2001/87/EC of 6 November 2001 on the Community Code relating to medicinal products for human use. This requires that "In order to guarantee independence and transparency, the Member States shall ensure that members of staff of the competent authority responsible for granting authorisations, rapporteurs and experts concerned with the authorisation and surveillance of medicinal products have no financial or other interests in the pharmaceutical industry which could affect their impartiality. These persons shall make an annual declaration of their financial interests."

¹⁴ See page 8.

¹⁵ And in 2009, in the airport charges sector, although this is not an industry with vertical integration.

either still be under the same Ministry, albeit with some chinese walls, or alternatively, be subject to direction by ministries which are nonetheless part of the same political administration.

The weakness of the directives hampers the Commission's ability to use legal processes to push for independence of the NRAs. It is the case that the Commission has used competition law powers on one occasion (the SNELPD case; Commission 2002) and infringement procedures frequently under the Directives to pursue lack of independence of regulators (see for example Commission: 2008, with respect to rail). The competition law case was based on the special duties required of the state in the situation where a company has a *de jure* monopoly (special or exclusive right) to which competitors need access. The Commission found that France was in breach of its obligations under the Treaty because the Ministry which was entrusted with monitoring La Poste was also responsible for ownership issues and there was no system for chinese walls (and in actual fact very little monitoring of La Poste in practice) and this would be required for delivering effective competition in a *de jure* monopoly situation. There have been no further cases deploying this principle. This will partly be due to the lifting of most *de jure* monopolies¹⁶. The other factor may be that once there is formally a system of chinese walls within the Ministry or a separation of activities between ministries that it would be virtually impossible for the Commission to obtain any proof that there was illegitimate influence occurring. With respect to enforcement of the provisions of the Directives, it is not clear to an external observer what the Commission is targeting in terms of conflict of interest as so far these procedures have been settled informally. However, statements in Commission press releases indicate that they are limited by the terms of the Directives. For example, an infringement procedure against Slovakia for locating ownership and regulatory functions for telecommunications in the Ministry for Transport, Ports and Telecoms was dropped. The Commission's press release stating "...the issue has more recently been resolved, since the Ministry's shareholding in the incumbent was moved to the Ministry of the Economy thus ensuring the separation of regulatory and management functions. (Commission (2008b). Interviews in 2008 with officials in the rail sector recorded similar difficulties. In 2008 the Commission launched 24 cases for failure to implement the first railway package and most of these are apparently intended to try and force Member States to set up more independent NRAs (Commission: 2008a; interviews 2008). However, the legislation specifically says that the regulator can be within the Railway Ministry (an amendment to the Directive adopted after the Commission began pursuing SNELPD in the postal sector). Officials from the rail sector observed that most of the Member States were responding to the infringement processes by modifying arrangements within the Ministry and not by following the example of those countries which had set up more autonomous entities (interviews 2008).

¹⁶ It would be a novel interpretation to argue that competition law required effective sectoral regulators in a sector where *de jure* monopolies had been lifted and so competition law now applied. Although a policy reason for the existence of sectoral specific economic regulation is the inadequacy of competition law to deal *ex ante*, this is not necessarily accepted by DG Competition, partly from a logic of institutional self-preservation (interviews 2008). It would therefore seem highly unlikely that they would take a case, even if the evidential and legal burden could be met, to use competition law to attack ineffective sectoral regulatory institutions. Certainly in recent price-squeeze cases, they have preferred to sanction the operators even though the latter were applying prices which had been approved by the national regulators.

Although the Treaty contains protections for the independent Central Banks¹⁷, Member States have until recently deliberately rejected attempts to import identical protective provisions into sector specific directives. For example, during the 1999 review of the telecommunications regulatory framework, the Commission proposed additional text on independence which read, “Member States shall ensure that national regulatory authorities are able to act freely, without further authorization or control from any other agency or body.” (Presidency:2001). Although generally coy at admitting ministerial interference on an individual basis, the informal collective of telecommunications regulators (the Independent Regulators’ Group) advocated stronger wording: “Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently. Governments shall be prevented from giving instructions to a national regulatory authority regarding a regulatory decision (including a dispute resolution) arising from a Directive.” (IRG:2000: Annex A). These proposals were rejected by the Council.

Our first hypothesis is that the greater the number of countries with state ownership in a sector, the less likely it is that EU legislation will prohibit ministries from giving instructions to national regulators. There is insufficient data for any statistical analysis, but the data in Table 1 below would indicate that where ownership levels reduce in sectors with vertically integrated state owned companies that the Member States tend to be more prepared to agree to a legal requirement for no ministerial interference.

For these tables we have measured the independent variable in our first hypothesis (state ownership) against a 25% threshold. We have done so on the basis that this represents the level where a shareholder is normally considered to have a material influence over a company¹⁸. We assume that if the State considers that the economic actor is of special value to it in achieving a “wide range of goals” (Majone:1994:79) then it will seek to retain such influence¹⁹. State ownership of a non-vertically integrated infrastructure entities in these sectors is not considered to give rise to issues of potential regulatory bias as in these monopoly bottleneck industries, a non integrated entity will have no incentive to discriminate against downstream players and by definition, it will have no competitors in its own space. Through web searches, we have obtained the ownerships of the entities in these specific sectors which we were unable to obtain from the five Member States whose data we did not have for the table in Annex 2 (page 24), so the calculation of the number of entities and from that calculations of voting weights and voting proportions in the Council is based on the full population of entities.

In sector-specific legislative proposals since 2000, the Commission and European Parliament have pushed for a requirement for no ministerial instructions in sectors with vertically integrated state-owned entities²⁰. They have been unsuccessful so far.

¹⁷ Articles 108, 237 (d) EC and Article 35.6 of the Statute of the ECB. See Ziloli and Selmayr (2000:627)

¹⁸ See for example the UK Office of Fair Trading merger guidelines (OFT:2003:9)

¹⁹ Our figures may under record ownership in some instances if Member States have divested ownership but put in place golden shares. The extent to which golden shares continue to exist is further data which we will be seeking from national organizations and other respondents. We understand that golden shares have remained in place in a number of telecommunications companies, although this needs to be verified.

²⁰ Neither the Commission nor the European Parliament, nor any stakeholders pushed for such a clause in pharmaceutical legislation. Stakeholders are generally unconcerned regarding the relationship

However, in the latest electricity and gas legislation, the Council has apparently acceded to such a requirement. Conversely, they have resisted this in contemporaneous telecommunications legislation and the text under discussion is apparently an ambiguous compromise which would allow continued ministerial instruction. As can be seen from the tables below, in most sectors, the aggregated weighting of countries with more than 25% ownership of a vertically integrated entity is above the threshold for a blocking minority except with respect to gas legislation in 2009. Electricity and gas directives were negotiated in tandem. It would appear in this instance that the absence of a blocking minority in gas was more significant than the potential blocking minority in electricity. (The blocking minorities were EU-12: 23, EU-15:26, EU-25:37, EU-27: 90 (Wiberg:2005:4).

Table 1: Vertically integrated state owned companies and prohibitions on ministerial instructions

	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Requirement for no Ministerial instructions in Directives
Electricity				
1996	Tbc – but higher than 2003	tbc	tbc	No
2003	Tbc	tbc	tbc	No
2009	10	158	46%	Yes

	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Requirement for no Ministerial instructions in Directives
Gas				
1998	Tbc –but higher than 2003	tbc	tbc	No
2003	tbc	tbc	tbc	No
2009	9	86	25%	Yes

	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Requirement for no Ministerial instructions in Directives
Post				
1996	14	84	94%	No
2003	14	84	94%	No
2008	26	329	95%	No

between the regulators and ministries with respect to pharmaceuticals authorisations (interviews 2009) which is very different from the sectors we explore with concentrations of state ownership (interviews 2008).

	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Requirement for no Ministerial instructions in Directives
Rail				
1991	12	76	100%	No
1995	12	72	81%	No
2001	9	57	64%	No
2004	9	57	64%	No

	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Requirement for no Ministerial instructions in Directives
Telecoms				
1995	14	79	89%	No
1998	12	69	78%	No
2002	9	54	61%	No
2009	13	149	43%	Ambiguous

	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Requirement for no Ministerial instructions in Directives
Pharmaceutical				
1996	<8 % of ind	V. low	V. low	No
2003	<8 % of ind	V. low	V. low	No

6. Have EU regulatory frameworks empowered the Commission?

Similarly, in sectors where ownership levels in vertically integrated companies reduce, the Member States also appear to be more willing to grant the Commission implementation powers and to empower EU agencies, for example in gas and electricity (See Table 2 below). This parallels their willingness to do so in a sector such as pharmaceuticals authorizations where state ownership has not been an issue. Conversely in posts, where ownership levels have remained constant and high, the Council has not been willing to do so. However, we should note that in gas and electricity that the Commission and the new agency have only been given competence

with respect to cross-border infrastructure. This means that the Commission and the agency will not be able to make decisions that effect the implementation of regulation with respect to domestic competition within Member States. This represents a very cautious extension of Commission powers since while the freeing up of cross-border capacity will itself potentially impacts positively on the extent to which energy can be made available on a cross-border basis, it will not determine the conditions under which it can be supplied on the domestic markets. The apparent formal acceptance of some Commission powers and the creation of agency in telecoms is yet more limited. It is still under discussion in conciliation, but it appears that the powers are likely to be subject to so many procedural hurdles and exclusions that it is unlikely to be very relevant. Rail appears to be an outlier in that with a comfortable blocking minority, Member States appeared to give the Commission (subject to comitology) the ability to overrule national regulatory decisions on a fast track basis. However, Member States may have felt comfortable that because most of them had vertically integrated state-owned companies and that this was so unlikely to change (indeed would rise after accession) that there was little risk of the Commission actually forcing any implementation policies that countries in this category did not favour. If that was their assumption, it was correct; the Commission has never even attempted to use this power (Interview 2008). In addition, at the point that this power was agreed, most of the rail sector (certain freight services, certain international passenger services and all national passenger services) was excluded from coverage of the access related directive. Our second hypothesis: that the greater the number of countries with state ownership in a sector, the less likely it is that an EU regulatory framework will empower the Commission to direct implementation would appear to hold.

Table 2: Vertically integrated state owned companies and empowerment of the Commission/Agency

	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Commission implementation powers	Empowered EU Agency	Regulators' Network Examines Access Regulation in detail
Electricity	Tbc – but higher than 2003	tbc	tbc	No	No	No
1996	Tbc	tbc	tbc	Yes (partial)	No	Yes (partial)
2003	10	158	46%	Yes (partial)	Yes (partial)	Yes (partial)

	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Commission implementation powers	Empowered EU Agency	Regulators' Network Examines Access Regulation in detail
Gas	Tbc –but higher than 2003	tbc	tbc	No	No	No
1998	Tbc	tbc	tbc	Yes (partial)	No	Yes (partial)
2003						

2009	9	86	25%	Yes (partial)	Yes (partial)	Yes (partial)
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Post	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Commission implementation powers	Empowered EU Agency	Regulators' Network Examines Access Regulation in detail
1996	14	84	94%	No	No	No
2003	14	84	94%	No	No	No
2008	26	329	95%	No	No	No

Rail	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Commission implementation powers	Empowered EU Agency	Regulators' Network Examines Access Regulation in detail
1991	12	76	100%	No	No	No
1995	12	72	81%	No	No	No
2001	9	57	64%	Yes	No	No
2004	9	57	64%	Yes	No	No

Telecoms	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Commission implementation powers	Empowered EU Agency	Regulators' Network Examines Access Regulation
1995	14	79	89%	No	No	No
1998	12	69	78%	No	No	No
2002	9	54	61%	No (but powers of veto as to triggering factors for application of regulation)	No	No
2009	13	149	43%	Formally (but constrained)	No	Yes

Pharmaceutical	No of VI incumbents with state ownership > 25%	Weights in European Council by Countries with State Ownership	Proportion of Total Votes in Council	Commission implementation powers	Empowered EU Agency	Regulators' Network Examines Access Regulation
1996	<8 % of ind	V. low	V. low	Yes	Yes	Yes
2003	<8 % of ind	V. low	V. low	Yes	Yes	Yes

7. Regardless of EU rules, are national regulatory authorities independent?

Our interpretation that Member States resistance to a requirement for any rule at EU-level prohibiting ministerial instruction was derived from a reluctance to deliver NRA independence would be undermined if that had already been granted at national level.

All Member States do claim that they have created independent regulators. For example, in interviews conducted by Coen et al, a representative of the German Economics Ministry stated that “RegTP [the regulator] was fully independent and claim[ed] that there is no political influence on the decision-making of RegTP” (Coen, Heritier, and Boelhoff 2002:8). Whereas the same authors note that amongst those complaining about political interference in interviews were the staff of the regulator itself.

Attempts have been made to assess the independence of regulatory authorities by assessing the degree of statutory protection from ministerial instruction or influence with which these institutions have been endowed. There is an extensive literature on the design of independent institutions, although it largely relates to the design of central banks. The OECD study of 2000 on “Telecommunications regulations: institutional structures and responsibilities”, for example, follows in this tradition and states:

“Whilst the degree of independence is also influenced by factors such a political traditions and the personality of the head of the regulatory body, the single most significant factor is the institutional structure of the regulator. In fact, the degree of independence varies from country to country according to the institutional arrangements put in place by law and regulation.” OECD(2000:14)

However, the OECD report provides no evidence to support this conclusion. It engages in no comparative analysis and simply provides a list of the different institutional arrangements in different countries and suggests why these arrangements would enhance independence. Many of these particular institutional arrangements were then adopted by Gilardi and 21 of them grouped in 5 categories (agency head status, management board members’ status, the formal relationship with government and parliament, financial and organisational autonomy, and , extent to which regulatory competences are shared) and scored in order to provide an index against which agency independence could be measured (Gilardi 2002). However, the risk of this approach, as Forder has pointed out with respect to such lists relating to the statutory independence of central banks, is that if we concentrate only on the rules contained in statutes, which are ostensibly there to safeguard regulatory independence, then we end up with a measure of the number of controls designed to structure independence/dependence but not of actual independence itself (Forder:1996 and 1997). Forder argues that in the context of central banks that statutory independence may not tell us about informal rules and who actually sets policy. He points out that detecting these informal rules will be problematic if governments have incentives for third parties to believe that there is independence. Furthermore, even if the institution is the decision-taker, it may be under the implicit or explicit threat of legislation or other sanctions if it does not comply with the government’s wishes.

An attempt has been made to assess the independence of telecommunications regulators using the statutory independence approach (Edwards and Waverman 2005). Edwards and Waverman score NRAs against 12 institutional elements including whether the NRA is appointed by the legislative or the executive and whether the regulator has a fixed term or not. As a consequence of finding the UK amongst the least independent on this basis, they admit there is a methodological problem²¹, but otherwise ignore this difficulty. They also find that the German regulator is the most independent, a finding which would have equally surprised most industry observers²². The latter finding is probably partly a consequence of comparing only institutional characteristics that all NRAs have in common which means that idiosyncratic controls are not measured²³.

A further attempt by Tenbuecken and Schneider suggests that independence could be measured along three variables: formal, material and de facto independence (Tenbuecken and Schneider 2004:254). Formal independence is defined as the nominal claims made about the relationship between the regulator and other institutions. Material independence relates to the status of an NRA according to the legal acts establishing the authority. De facto independence describes the status of an NRA as it manifests itself in daily regulatory practice. They opt not to attempt to measure the latter. Tenbuecken and Schneider state that an NRA could be independent on the first two measures but not on the third. They analyse telecoms regulators in 23 OECD countries and find that there is no variance in formal independence but significant variation in material independence. They conclude that the US, Germany and Ireland are the most independent on the basis of the variables they examine. However, even on material grounds alone, it would be questionable whether this is an appropriate finding. It may well be the case that on many institutional aspects that the structures in these countries score well, however the model does not seem designed to cope with situations where a country scores vary badly on one institutional element but well on all others. It would not seem appropriate in these circumstances to score highly for independence, for this to be correct, there would need to be an explicit assumption that principals require multiple levers rather than just one. It is hard to see why this should necessarily be so. Some quick points could be made about controls that apply to the specific regulators which they score most highly: independence of the FCC is arguably contingent on lack of single party dominance of the legislative and the executive²⁴. The Irish government is empowered to give binding instructions to the Irish telecommunications regulator²⁵. The German regulator, *inter alia*, is

²¹ "Independence is, however, much more than a set of formal institutional rules...It therefore must be stressed that the EUR-I index, while capturing independence de jure, does not necessarily capture independence de facto. For example, the UK scores only moderately on the EURI-I index, yet most industry experts regard the UK as the benchmark in independent telecommunications regulation in the EU." (Ibid:23-24)

²² The ECTA studies on regulatory effectiveness have tended to find the German regulator among the least effective in the EU.

²³ For example, they did not measure rules that exist in a small minority of countries which expressly allow the Ministry to give instructions to the regulator – for example in Germany (Doehler:2003:110)

²⁴ Para 9a of the Telecommunications Act. An amendment adopted by the incoming CDU-SPD coalition in response to threats made by Deutsche Telekom to lay off employees, announced during the electoral campaign.

²⁵ Section 13 Communications Regulatory Act 2002. The Minister is empowered to "...give such policy direction to [Comreg] as he or she considers appropriate". Section 13 Communications Regulatory Act 2002.

subject to legislative override²⁶. Curiously, Tenbrueck and Schneider also conclude that "...the global reform process in telecoms has brought about a clear trend towards policy convergence" (Ibid: 263). Even if it were valid, the conclusion of their research into "material" independence of regulators does not provide sufficient evidence for this wider conclusion.

The single most effective control over national regulators is probably the power of appointment. There is no separation of powers in most European countries between the legislature and executive, so even in those countries where nomination requires the assent of more than just the head of the executive, it is usually members of the same party, ultimately reporting to the head of the executive who provide additional consent. (Elgie and McMenamin in their attempt to score the independence of French authorities, give higher scores for those where appointments require consent of more than one elected official without controlling for instances where all of the officials come from the same party. (Elgie and McMenamin (2005)). Research of US appointments indicates that appointment is a key variable in effecting regulatory outcomes. This can be tested in the US as implementation of public utilities in the US is in part conducted by state level public utility commissions and in some states these commissioners are appointed by politicians and in others they are directly elected. (Regulators and regulatory commissions are not directly elected anywhere in the EU). Besley and Coates examined mean electricity prices for a panel of 40 states that did not change their regulatory regime between 1960 and 1997. They found that residential prices were significantly lower in states that elected their regulators. The theoretical explanation they give is that when regulators are appointed, regulatory policy becomes bundled with other policy issues for which the appointing politicians are responsible. Because voters only have one vote to cast and regulatory issues are not salient for most voters, there are electoral reasons to respond to stakeholder interests. If regulators are elected, on the other hand, their stance on regulation is the only salient interest so the electoral incentive is to run a pro-consumer candidate. (Besley and Coate: 2000).

Another model has been suggested by Thatcher for testing independence by observing the relationship between politicians and regulators (Thatcher 2005). The five indicators that he used for testing the use of control by elected politicians over regulators were party politicization of appointment; departures (dismissals and resignations) of IRA²⁷ members before the end of their term; the length of tenure of IRA members: the longer their tenure, the greater their likely independence from elected politicians; the financial and staffing resources of IRAs; and, the use of powers to overturn the decisions of IRAs by elected politicians".

This would in principle seem a superior approach to the simple "statutory" approach, since it has the merit of examining some important relationships between elected politicians and regulators, which may be dependent on "rules" other than those which are incorporated in statute. Thatcher's conclusion is that on the whole these powers, with the exception of limiting IRA's resources, were not used to control the regulatory authorities (Ibid:1).

²⁶ See page 17 below.

²⁷ IRA stands for independent regulatory authority.

However, while overt use of the controls was rare, use is not unknown. Certainly, they have been deployed in the period 1998-2009 with respect to the specific telecommunications regulatory authorities. If we take France, Germany and Spain for example, we should note that in France, until 2004, the Ministry shared regulatory duties with the regulator and is known to have ignored the regulator's views on setting retail tariffs²⁸. In Germany in 2006, the coalition government passed legislation providing for a regulatory "holiday" for Deutsche Telekom's fibre network, a development against which the European Commission has opened infringement proceedings. In Spain in 2004, the Government was unhappy about access rules which the regulator was developing to allow rivals to Telefonica to access its networks to provide IPTV. It consequently transferred responsibility for this issue back to a Ministry. The regulator challenged the government's ability to do this legally, but, a national court found that the regulator had no constitutional protection and that the EU Directives did not protect it from reorganisation²⁹.

Similarly, in rail, it is believed among rail regulators that overly pro-competitive regulators have had the staffing levels of their institutions decimated (Portugal) or the regulator has been fired (interviews). A former rail regulator sent an email to all of the other rail NRAs in the EU with the following wording:

"The new minority government today has decided to abolish the [X] Rail Office by decree. The decision will be effective from 1 July 2008. My presidential appointment, which is a fix-term appointment from 1 January 2006 - 31 December 2011 was also terminated by the Decree. Although the decision is not constitutional, this is not the first example for such an act ..., since the energy regulators experienced a similar act in 2003 which was only reversed by the Constitutional Court in 2007.

The ongoing procedures will be taken over by the National Transport Authority, which is a safety authority that also deals with vehicle registration. This means that my visit to the Regulatory Bodies Working Group will be a farewell visit in Bruxelles.

The past six and half years will have some lasting effect in [X] As a Commissioner for Rail Regulation it was my responsibility to transpose the market liberalization acts of the Directives into a new [X] law that will remain under this minority government untouched. Our licensing and market regulatory decisions, and the court cases, all together a few hundred openly available documents will outline the precedents of an evolving market. I am very grateful for those [X] civil servants who were working on this with me, and I would also like to thank all advice, professional help and co-operation from my foreign colleagues who worked with us over the years. My private address is above: ... Regulation [sic] a state-owned, failing monopoly is a difficult task, I am not the first regulator who becomes inconvenient for a government and I am afraid that not the last either ."

While our findings are illustrative, they are not comprehensive. In his article, Thatcher concludes that the absence of data he could find did not necessarily mean that IRAs are independent from elected politicians, rather that if the latter do control regulators, they do so through more informal means which are much more difficult to observe (Ibid:364). This seems particularly likely since as he also finds, the transaction costs of principals applying controls was potentially very low in EU countries (Ibid:355) Awareness of how low they are is generally likely to be clear to

²⁸ See for example, complaints by INTUG, representatives of industry users of telecommunications (INTUG:2004)

²⁹ Case 598/2004 of 4 October 2006 Sentencia Audiencia Nacional (sala de lo Contencioso-Administrativo. Seccion 3).

principal and agent. Consequently, we find ourselves in the position described by Weingast and Moran, where lack of use of the controls may be evidence that the requirements of the principal have been internalised by the agent (Weingast and Moran: 1983). If we cannot observe the true relationship between the regulator and the elected politicians, then other potential indicators may be superior. Assuming outcomes are the logical consequence of the intention of principals, the extent to which different types of regulatory regime actually implement effective regulation would seem to be such a test.

8. Is there evidence of national regulatory bias towards state owned companies?

We have sought to establish whether there is any evidence of governments showing bias towards state owned enterprises through less effective regulation. We have taken regulatory scores produced by third parties for the rail (IBM 2007) and telecoms sector (ECTA 2009)³⁰. In both cases, the authors assign a score to each country based on a range criteria which the authors regard as important in ensuring an effective regulatory regime. More such analyses would be necessary to arrive at any strong conclusions. However, insufficient cross-border competition in electricity and gas to date has meant that there are no pan-European new entrant operators nor trade associations which represent them at European level and as a consequence no sector-wide analyses have been produced.

We took the mean scores for the two samples of the countries investigated in each report in their respective sectors. In the case of rail we divided the countries into those which have a vertically integrated railway and those with vertical separation. In the latter case, a state owned infrastructure operator is not likely to have any incentive to discriminate against or in favour of any particular independent transport company. In the case of telecoms we separated the sample into those countries with any degree of state ownership and those without (as all the former monopolists are still vertically integrated). State ownership is not a dividing point in rail as all countries have state owned infrastructures. We then tested the difference in the mean scores to determine if the difference is significantly different from zero.

In the case of rail we find that the mean scores are 733 out of 1000 where there is no vertical integration and 641 where there is vertical integration. The difference between the means is significantly different from zero at 2%³¹. For telecoms the mean scores were 306 out of 485 (no state ownership) and 268 (some state ownership³²). The difference is significant at 8%. The tables can be found at Annex 3.

³⁰ We are unaware of any published critique of the IBM report. A critique of the ECTA report sponsored by ETNO (the incumbents' European representative body) can be found at www.etno.be/Portals/34/Publications/other/Indepen%20Study_June%202006.pdf. Similarly, an ECTA response to the ETNO comment can also be found at www.ectaportal.com.

³¹ We conducted a one-tailed z test of differences between the means. For rail the z statistic was 2.13 against a critical value of 1.64, giving a P value of 0.017. For telecommunications the z-statistic was 1.42 against a critical value of 1.64 giving a P value of 0.078.

³² We applied the latter rather than a 25% threshold in telecoms as we believe that golden shares have been retained with all the continuing less than 25% ownerships. We are not aware of any golden shares being retained in separated rail transport companies. These interpretations both need verification.

This analysis gives an indication that there could be weaker regulation of the incumbent where the state retains any level of ownership or where the state owned enterprise is vertically integrated.

Such a finding would be consistent with other analyses. Bauer found that regulated interconnection prices in 2000 varied between Member States, depending on the ownership status of the incumbent (Bauer 2003:40). Bortolotti and Faccio also found that contrary to expected theory, greater government control over privatized firms did not negatively affect market evaluation. According to their research, this reflected more frequent financial aid accruing to privatized firms that remain under government control (Bortolotti and Faccio:2004:1)

9. European agencies as a solution and Member State resistance to them

Although Member States have been reluctant to allow a requirement for independence from ministries to be incorporated into framework directives, we would still note that it would not necessarily grant de facto independence. It could only be operationalised through a judicial challenge against an intervening ministry. In other words, it would be another statutory protection, albeit potentially stronger than some national variants, due to the difficulty in repeal at EU level, but its actual credibility as a deterrent would vary widely between different national regimes. It would do nothing to protect regulatory independence from ministerial power of appointment.

It would seem more likely that independence from individual national ministries would be secured where European agencies with review powers over national decisions were set up, with Commission adoption of decisions based on the opinions of the collective NRAs, assembled in the agency³³. This would make it difficult for an individual national ministry to lean on a national regulator to make regulatory decisions for reasons other than those relating to the delivery of the objectives agreed in the Community legislation. An individual regulator would be able to defend itself against such an instruction by responding that there would be little point in it pursuing a policy that would not be recognised as legitimate by its peers, since ultimately the latter would rule on it. The peers could not operate a live and let live policy since they would risk veto by the Commission. (However, such an institutional construction could of course also be designed to fail if in a particular sector blocking minority thresholds were set at a level where “leaned-on” NRAs could credibly form such a minority). If we refer back to Tables 1 and 2, the data suggests that Member States will collectively accept creating an agency of NRAs only in the same circumstances as they will accept a prohibition on ministerial instruction and will empower the Commission ie where levels of state ownership decline.

10. Conclusions

³³ The legal jurisprudence of the ECJ, based on the Meroni decision (Case 9/56 Meroni v High Authority) requires that the Commission take executive decisions. However, the Commission can be required in a Directive to take utmost account of the agency, which means it must give reasons for taking a decision different from that advised by the agency. If the Commission moves away from the view of the agency then that could be a legal basis for reviewing the proportionality of its decision (Case T-326/99 Nancy Fern Olivieri v Commission and EMEA). There would not only be a risk of legal challenge since the Commission decision would almost certainly be subject to comitology.

State ownership continues to be a widespread phenomenon in Europe and is widespread in most of the sectors in which it was prevalent prior to the waves of “privatization”. While some central and eastern European have large numbers of state owned entities, there are nonetheless substantial holdings in all Member States. No EU regulatory framework has yet required that national regulators be made independent of instruction from national ministries. In sectors which exhibit similar issues of economic regulation and conflicts of interest, the willingness or reluctance to europeanise implementation by giving powers to the Commission and or the Commission and an agency appears to vary depending on the degree of ownership. There is non systematic evidence of ministerial intervention with respect to individual regulators. More comprehensively, however, but only for two sectors which are subject to EU regulatory frameworks, there is some evidence that levels of regulatory implementation in countries can vary depending on whether or not the regulated entity is state owned. Behind the façade of some of the most prominent EU regulatory frameworks, the positive state would appear to be alive and kicking.

Annex 1

Exhaustive chronology of requirements for “independent” NRAs in Directives

1995 telecoms – “national regulatory authority” means the body or bodies in each Member State, legally distinct and functionally independent of the

telecommunications organizations, entrusted by that Member State, inter alia, with the regulatory functions. Article 2(2) Directive 95/82/EC, OJL 321, 30.12.1995

1996 Electricity “Member States shall designate a competent authority independent of the parties, to settle disputes relating to the contracts in question. In particular, this authority must settle disputes concerning contracts, negotiations and refusal of access or refusal to purchase”. Article 20(3) Directive 96/92/EC, OJL 027, 30.1.1997

1997a posts – “Each Member State shall designate one or more NRAs for the postal sector that are legally separate from and operationally independent of the postal operators. Member States that retain ownership or control of postal service providers shall ensure effective structural separation of the regulatory functions from activities associated with ownership and control.” Article 22 Directive 97/67, OJ L 15 21.1.1998

1997b telecoms-“In order to guarantee the independence of national regulatory authorities: - national regulatory authorities shall be legally distinct from and functionally independent of all organizations providing telecommunications networks, equipment or services, -Member States that retain ownership or a significant degree of control of organizations providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.” Article 5a Directive 97/51 of 6 October 1997

1998 gas-Electricity “Member States shall designate a competent authority independent of the parties, to settle disputes relating to the contracts in question. In particular, this authority must settle disputes concerning negotiations and refusal of access within the scope of this Directive” Article 21 Directive 98/30 OJL 204 21.7.1998

2001a Posts - Commission SNELPD competition law decision. Decision of 23 October 2001, OJ L 120, 7.5.2002

2001b Rail – “Member States shall establish a regulatory body. This body, which can be the Ministry responsible for transport matters or any other body, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant.” Article 30 of Directive 2001/14, OJ L 75 15.3.2001

2002a Posts – no change. Article 22, Directive 2002/39, OJ L 176, 5.7. 2002

2002b Telecoms – no change. Article 3, Directive 2002/21, OJ L 108, 24.4.2002

2003a Electricity – regulatory authorities must be “wholly independent from the interests of the electricity industry” but decisions can be required to be submitted to review and for formal decisions to other bodies, not subject to such a requirement for independence”. Article 23, Directive 2003/54, OJ L 176, 15.07.2003

2003b Gas – regulatory authorities must be “wholly independent from the interests of the gas industry” but decisions can be required to be submitted to review and for formal decisions to other bodies, not subject to such a requirement for independence”. Article 25, Directive 2003/55, OJ L 176, 15.07.2003

2006 Posts No change. Article 22, Directive 2008/6, OJ L 52, 27.2.2008

2007a Telecoms: “Member States shall ensure that national regulatory authorities exercise their powers independently, impartially and transparently. National regulatory authorities shall not seek or take instructions from any other body in relation to the day-to-day performance of the tasks assigned to them under national law implementing Community law. Only appeal bodies set up in accordance with Article 4 or national courts shall have the power to suspend or overturn decisions by the national regulatory authorities.

Member States shall ensure that the head of a national regulatory authority or his/her replacement may be dismissed only if he no longer fulfils the conditions required for the performance of his duties laid down in advance in national law, or if he has been guilty of serious misconduct. The decision to dismiss the head of the national regulatory authority shall contain a statement of reasons and be made public at the time of dismissal.

Member States shall ensure that national regulatory authorities have adequate financial and human resources to carry out the tasks assigned to them and that they have separate annual budgets. The budgets shall be made public.’

Commission proposal COM (2007) 697 Final. Apparently rejected, currently in conciliation.

2007b Gas: Commission proposal “1. Each Member State shall designate a single national regulatory authority. 2. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member State shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive, the regulatory authority is legally distinct and functionally independent from any other public or private entity, and that its staff and the persons responsible for its management act independently from any market interest and shall not seek or take instructions from any government or other public or private entity. 3. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

(a) the regulatory authority has legal personality, budgetary autonomy, and adequate human and financial resources to carry out its duties;

(b) its management is appointed for a non renewable fixed term of at least five years, and may only be relieved from office during its term if it no longer fulfills the conditions set out in this Article or it has been guilty of serious misconduct. (Article 24a) COM (2007)529 Final.

Likely to be accepted, see Article 38 para 4 (b) (ii) Council common position 1450/08.

2007c Electricity Commission proposal “1. Each Member State shall designate a single national regulatory authority. 2. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member State shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive, the regulatory authority is legally distinct and functionally independent from any other public or private entity, and that its staff and the persons responsible for its management act independently from any market interest and shall not seek or take instructions from any government or other public or private entity.

3. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

(a) the regulatory authority has legal personality, budgetary autonomy, and adequate human and financial resources to carry out its duties;

(b) its management is appointed for a non renewable fixed term of at least five years, and may only be relieved from office during its term if it no longer fulfills the conditions set out in this Article or it has been guilty of serious misconduct. (Article 22a). Com (2007) 528 final.

Likely to be accepted Article 34 para 4 (b) (ii) Council Common position 14539/08

2007d Audiovisual media services “Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2.2a and 3 hereof, notably through their competent independent regulatory bodies.” Article 23b, Directive 2007/65/EC, OJ L 332, 18.12.2007

2009 Airport charges: “Member States shall guarantee the independence of the independent supervisory authority by ensuring that it is legally distinct from and functionally independent of any airport managing body and air carrier. Member States that retain ownership of airports, airport managing bodies or air carriers or control of airport managing bodies or air carriers shall ensure that the functions relating to such ownership or control are not vested in the independent supervisory authority. Member States shall ensure that the independent supervisory authority exercises its powers impartially and transparently.” Article 11(3) Directive 2009/12, OJ L 14.3.2009.

Annex 2: Intensity of state ownership by sector

Sector	AT	BE	BU	CZ	CY	DK	EE	FI	FR	DE	EL	HU	IE	IT	LU	NL	PO	PT	RO	SI	SE	UK	TOTAL	
Water																							22	
Broadcasting																								21
Post																								21
Railway																								21
Electricity																								17
Finance																								16
Airline																								15
Property																								14
Telecom																								14
Airport																								13
Oil																								12
Gas																								10
Port																								9
Nuclear																								8
Engineering																								7
Defence																								6
Forestry																								4
Manufacturing																								4
Mining																								4
Research																								4

Red shading means that the state has share ownership of greater than 1% in the sector

Annex 3: Data used for analysis of regulatory bias

Rail

Country	Access Score (IBM 2007)e	No Vertical Integration
Sweden	817	1
Germany	807	0
Netherlands	795	1
UK	791	1
Austria	781	0
Denmark	780	1
Poland	728	0
Czech Republic	713	0
Estonia	680	0
Portugal	676	1
Slovenia	675	0
Slovakia	662	1
Lithuania	650	0
Latvia	642	0
Belgiun	626	0
Hungary	613	0
Finland	612	1
Spain	610	0
France	568	0
Greece	544	0
Ireland	338	0

Telecom

Country	Score (ECTA 2009)	State Ownership
UK	373	0.00%
Netherlands	362	0.00%
Denmark	344	0.00%
France	322	26.69%
Ireland	302	0.00%
Italy	302	0.00%
Finland	300	13.70%
Portugal	286	8.44%
Hungary	282	1.00%
Austria	282	27.37%
Germany	280	31.70%
Spain	266	0.00%
Sweden	265	37.30%
Belgium	254	53.50%
Slovenia	251	74.00%
Greece	247	28.00%
Czech	190	0.00%
Poland	180	4.00%

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