

# **Generalist judges, specialised tribunals, sector-specific regulators and competition authorities: close encounters of the third kind**

Ioannis Lianos

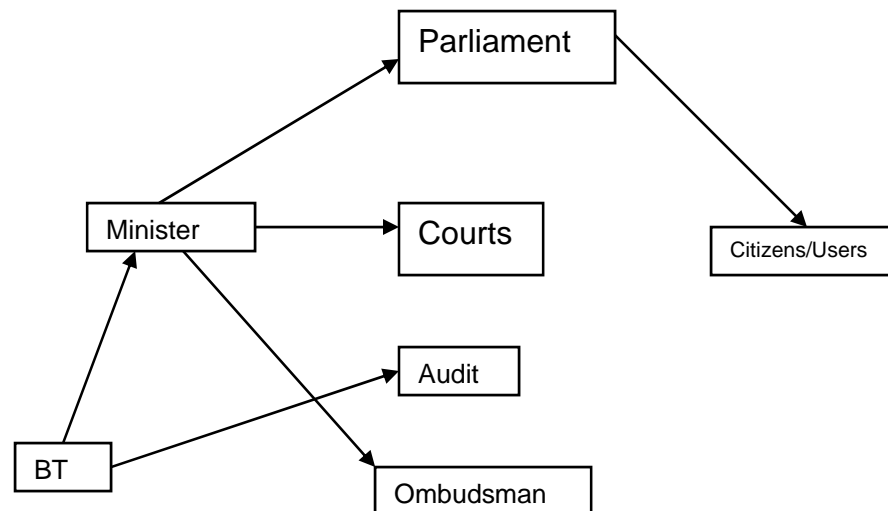
Javier Tapia

Faculty of Laws – Centre for Law & Economics

UCL

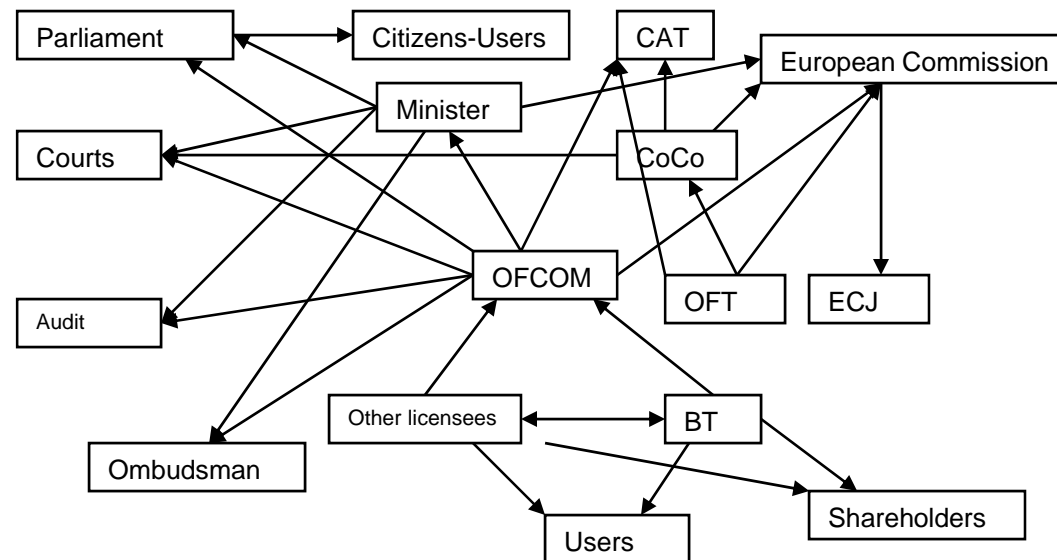
# Regulatory web before liberalization (UK Telecoms)

Accountability before deregulation/privatisation  
(UK Telecoms)



# Regulatory web after liberalization

## UK Telecoms



## Structure of the presentation

- I. Trust, distrust and regulatory independence:  
Vertical Deference versus Vertical Interference
- II. The expertise claim: courts versus regulators
- III. Closed encounters of a third kind

# Trust, distrust and regulatory independence: Vertical Deference versus Vertical Interference

Domain	UK	France	Germany	Spain	Italy	Belgium	Netherlands
Competition Law	Competition Commission / Office of Fair Trading	Autorité de la Concurrence	Bundeskartellamt, / Monopolkommission,	Comisión Nacional de la Competencia, [Tribunal de Defensa de la Competencia, ___]	Autorità Garante della Concorrenza e del Mercato,	Conseil de la Concurrence, ___	Nederlandse mededingingsautoriteit (NMa), ___
Telecoms	Office of Communications (Ofcom),	Autorité de Régulation de Communications Électroniques et des Postes (ARCEP), / Autorité de Régulation des Télécommunications (ART),	Regulierungsbehörde für Telekommunikation und Post (RegTP),	Comisión del Mercado de las Telecomunicaciones,	Autorità per le Garanzie nelle Comunicazioni (AGCOM),	Institut belge des services postaux et des télécommunications (IBPT), ___	Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA), ___
Energy	Office of Gas and Electricity Markets (Ofgem),	Autorité de Régulation de l'Énergie, [Commission de Régulation de l'Électricité (CRE)]	Government	Comisión Nacional de Energía	Autorità per l'energia elettrica ed il gas	Commission de régulation de l'électricité et du gaz (CREG), ___	<a href="#">Directie Toezicht Energie</a> (DTe), ___
Water	Office of Water Services (Ofwat)	----			----		
Railways	Office of Rail Regulation (ORR)	Government (*)	Government (**)				Vervoerkamer, ___
Postal Services	Postal Services Commission	Autorité de Régulation de Communications Électroniques et des Postes (ARCEP)		Regulierungsbehörde für Telekommunikation und Post (RegTP)		Institut belge des services postaux et des télécommunications (IBPT), ___	Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA), ___

## Cont.

- The Liberalization Process
  - Legislation centred on competition issues (i.e. access, unbundling) and interaction with other objectives (transparency, universal service, security of supply)
- First communitarian efforts to liberalise
  - *Energy*: Commission report on the 'Internal Market for Energy' (1988)
  - *Post*: Commission's Green Paper on The Development of the Single Market for Postal Services (June 1991) / Commission's Guidelines for the Development of Community Postal Services (1993)
- Legislation:
  - *Electricity*: 3 Directives (Council Directive 90/377/ECC OJ [1990] L 185/16, establishing a procedure to improve the transparency of prices; Council Directive 90/547/ECC OJ [1990] L 313/30, to take steps to ensure the possibility of transit of electricity between Member States; Council Directive 96/92/EC OJ [1997] L 27/20, establishing common rules for the internal market in electricity).
  - *Gas*: 3 Directives (Council Directive 90/377/ECC OJ [1990] L 185/16, establishing a procedure to improve the transparency of prices; Council Directive 91/296/ECC OJ [1991] L 147/37, as amended by Council Directive 95/49/EC, OJ [1995] L 233/86, to take steps to ensure the possibility of transit of gas between Member States; Council Directive 98/30/EC OJ [1998] L 204/1, as amended by Corrigendum OJ [1998] L 245/43, establishing common rules for the storage, transmission and distribution of natural gas).
  - *Post*: 1 Directive (Directive 97/67/EC OJ [1998] L 15/14, Common rules for the Development of the Internal Market of Community Postal Services and the Improvement of Quality of Service); 1 Commission Notice (OJ [1998] C39/2, [1998] 5 CMLR 108, on the Application of the Competition Rules to the Postal Sector).

## Cont.

### Case-law centred on competition issues

- Post: *Courbeau* (ECJ [1993], universal service in the postal sector)
- Electricity: *Scottish Nuclear, Nuclear Energy Agreement* (Commission [1991], stating that the criteria of Art. 81(3) were satisfied); *IJsselcentrale* (Commission [1991], agreement infringing Art. 81(1)); *REN/Turbogás* and *ISAB Energy* (Commission [1996], approving long-term agreements for the supply of electricity).
- Gas: *Transgás/Turbogás* (Commission [1996], approving a long-term take-or-pay agreement for the supply of natural gas from Algeria to Portugal); *BG Network Code* (Commission [1996], approving arrangements for the use of the gas transport network in the UK).
- Access issues relevant: *Sealink* (Commission [1992], Welsh port); *Port of Rodby* (Commission [1994], \_\_\_\_)
- First attempt to use the 'competition menace': *Atlas* (Commission [1996], granting an exception under Art. 81(3) to a joint venture between Deutsche Telekom and France Telecom, but 'persuading' Germany and France to open infrastructure to competition)
- No substantial revisions of the regulatory regime at retail level. E.g.: *BG* (CC [1997]):
- 'Price cap regulation provides a strong incentive on a company to reduce its costs to achieve, or exceed, the rate of return expected at the time a charging formula is set. It may, however, expose the company to risks given the unavoidable uncertainty relating to projections of volume and many aspects of operating expenditure and capital investment. It has also been criticized by some commentators for giving rise to excess profitability at the expense of consumers. [...] In our view the RPI-X approach provides a strong incentive to improve efficiency. We have seen no convincing evidence that any alternative system would better protect the public interest in the present circumstances of this industry. [...]'

## Cont.

- Legislation:
  - *Electricity*: 1 Directive (Council Directive 2003/54, OJ [2003] L 176/37, provides for full liberalisation of electricity markets); Third Energy Package
  - *Gas*: 1 Directive (Council Directive 2003/55/EC OJ [2003] L 176/57, establishing common rules for the internal market in gas); Third Energy Package
  - *Post*: 1 Directive (Directive 2002/39/EC OJ [2002] L 176/21, amending Directive 97/67/EC)
- See, IMEDIPA Conference (Istanbul, 2008)  
<https://www.ucl.ac.uk/laws/regulated-industries/secure/>



## Cont.

- *Deutsche Telekom*
- In the context of the special responsibility of an undertaking in a dominant position, that undertaking is obliged to submit applications for adjustment of its charges at a time when those charges have the effect of impairing genuine undistorted competition on the common market.
- That conclusion is not affected by the fact that the national regulatory authority for telecommunications checks the compatibility of its charges with Article 82 EC beforehand. Even though, like all organs of the State, that authority is obliged to respect the provisions of the Treaty, it is responsible for regulating the telecommunications sector, and is not the competition authority of the Member State concerned. However, the national regulatory authorities operate under national law which may, as regards telecommunications policy, have objectives which differ from those of Community competition policy. In any event, even on the assumption that the regulatory authority is obliged to consider whether charges proposed by a dominant undertaking are compatible with Article 82 EC, the Commission would not thereby be precluded from finding that the undertaking is responsible for an infringement; the Commission cannot be bound by a decision taken by a national body pursuant to Article 82 EC.
- (see paras 107-108, 113, 120-122)

## Cont.

- Finally, even if the national regulatory authority for telecommunications had infringed a Community rule and even if the Commission could have initiated proceedings against that Member State for failure to fulfil obligations, such possibilities cannot affect the lawfulness of the Commission's decision, which is not vitiated by any misuse of powers. By confining itself to finding an infringement of Article 82 EC, a provision which concerns only economic operators, not the Member States, that decision refers only to the dominant undertaking's pricing practices and not to the decisions of the authorities of the Member State.
- (see paras 263, 267-269, 271)

## The expertise claim: courts versus regulators

- *Linkline*
- “Institutional concerns also counsel against recognition of such claims (margin squeeze claims). We have repeatedly emphasized the importance of clear rules in antitrust law. Courts are ill suited to act as central planners, identifying the proper price, quantity, and other terms of dealing. No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency... Antitrust courts normally avoid direct price administration, relying on rules and remedies... that are easier to administer”

## Cont.

More concern about restrictions of competition in utilities, leading to a 'mix' of competition and regulatory approach (regulatory antitrust).

- Investigations into of long-term contracts: *Distrigas* (Commission [2007], accepting commitments to reduce the length of gas supply agreements); investigations into *Electrabel* and *EDF* [2007].
- [\* compare American approach: *Snohomish* (2008); and Commission approach pre-2000]
- Access issues highly relevant: *GVG/FS* (Commission [2004], Italian rail networks); *Gaz de France/Ruhrigas* (Commission [2004], gas pipelines); *RWE* (Commission [2007], German gas infrastructure); *ENI* (Commission [2007], Italian gas infrastructure)
- [\* most of the cases brought under Art. 82 (the 'misguided' EFD)]
- Stronger use of the 'competition menace': *Gazprom-ENI* (2003); *E.On* ([2008], 'forced' unbundling)
- Case-law has embarked upon (ex ante) regulatory issues without major hesitation, to supplement or correct regulation ('Regulatory Antitrust')
- [\* Particularly in margin squeeze cases: *Albion* (CAT [2008]); *Deutsche Telekom* (Commission & ECJ [2007]); *Telefonica* (ECJ [2006]); *Telecom Italia* [2004]].

## Cont.

- Greater interference of specialised courts in the economic assessment of the regulators (the argument of lacking expertise falls down if one has specialised courts)
- 3 examples
  - (Clear) Rejection of the ECPR as an applicable pricing rule to determine margins and any alleged squeeze:
  - [...] *it cannot be assumed that Dwr Cymru's upstream price is reasonable [...] The margin squeeze in question cannot be justified on the basis of an ECPR approach which is itself unsound*'.
  - Albion, CAT main judgement, para. 873.
  - - With the rejection of ECPR as a practical access pricing rule, the two main theoretical solutions to tackle this issue (the other being the Ramsey pricing rule) have been discarded as workable rules.
  - - But the issue not yet resolved. There is a need for further research to identify less complex and informational-demanding access rules.

## Cont.

- notional business
  - The application of the AEC (As Efficient Competitor) test leads to consider a ‘notional business’ –i.e., a theoretical (downstream) retail arm of the incumbent.
  - *‘The failure to consider the costs of a notional retail arm of [the incumbent] was in the [CAT]’s view an important omission. [...] a central weakness in the [authority’s] decision was that the service sought by Albion was essentially a transportation service, but no attempt had been made to identify separately the costs of providing that service [...]’.*
  - *Albion*, CoA judgement, para. 44
  - *Deutsche Telecom*, para. 140.
  - - Then, the costs are allocated to that business, including an appropriate amount for profits. If this retail arm can trade profitably at the upstream price charged to the competitors, there is no squeeze.

## Cont.

- The notion of ‘avoided costs’ as part of the prize squeeze test.
  - The application of the AEC test has led to the rejection of the notion of “avoided costs”.
  - *‘An “avoided cost” approach in our view would not be a satisfactory basis for a margin squeeze test, because it takes no account of the incumbent’s fixed costs, takes no account of the entrant’s total costs, and requires the entrant to be more efficient than the incumbent [...]. In addition, there are problems of determining “avoided” costs. [...]’*
  - *Albion*, CAT main judgement, paras. 910
  - *‘The conclusion we reach in the light of the guidance and the case-law is that transformative activity, displacement and avoided costs are not necessary features of the margin squeeze test’* [emphasis in the original].
  - *Albion* CoA judgement, para. 103
  - - According to the case-law, if that were the case it would implied the competitor should be ‘more efficient’ than the incumbent.
  - - Nonetheless, the notion of “avoided costs” may be used as an objective justification (alongside displacement, amongst others), and analysed in that context.

# Closed encounters of a third kind

## The 'Third Package'

### FIVE PIECES OF INTER-RELATED LEGISLATION

#### Electricity Directive Amendments

Unbundling; powers/duties of NRAs;  
regulatory co-operation; transparency

#### Gas Directive Amendments

Unbundling; powers/duties of NRAs;  
exemptions; regulatory co-operation;  
transparency

#### ACER Regulation

Establishment/organisation of ACER; tasks as regards TSOs and NRAs  
(and, implicitly, the role of the Commission)

#### Electricity Regulation Amendments

Establishment of EU TSOs; scope of EU  
rules/investment plans; ACER monitoring;  
regional TSO co-operation; new  
interconnectors; guidelines; Network Codes

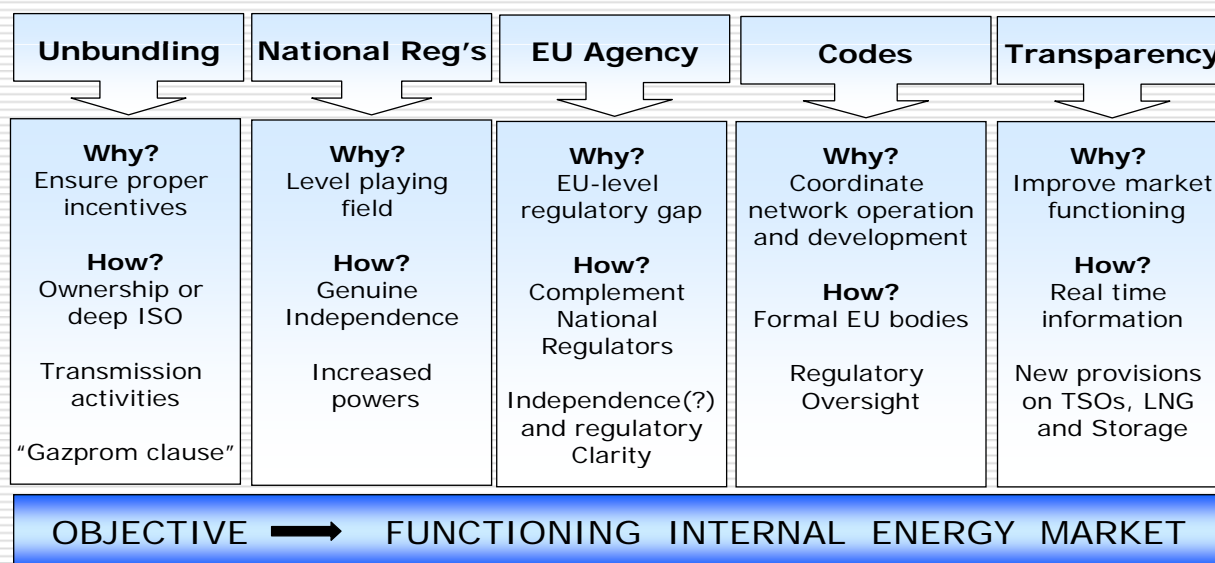
#### Gas Regulation Amendments

Establishment of EU TSOs; scope of EU  
rules/investment plans; monitoring of  
ACER; TSO regional co-operation; LNG  
storage; transparency; Network Codes



# Cont.

## Key Reforms



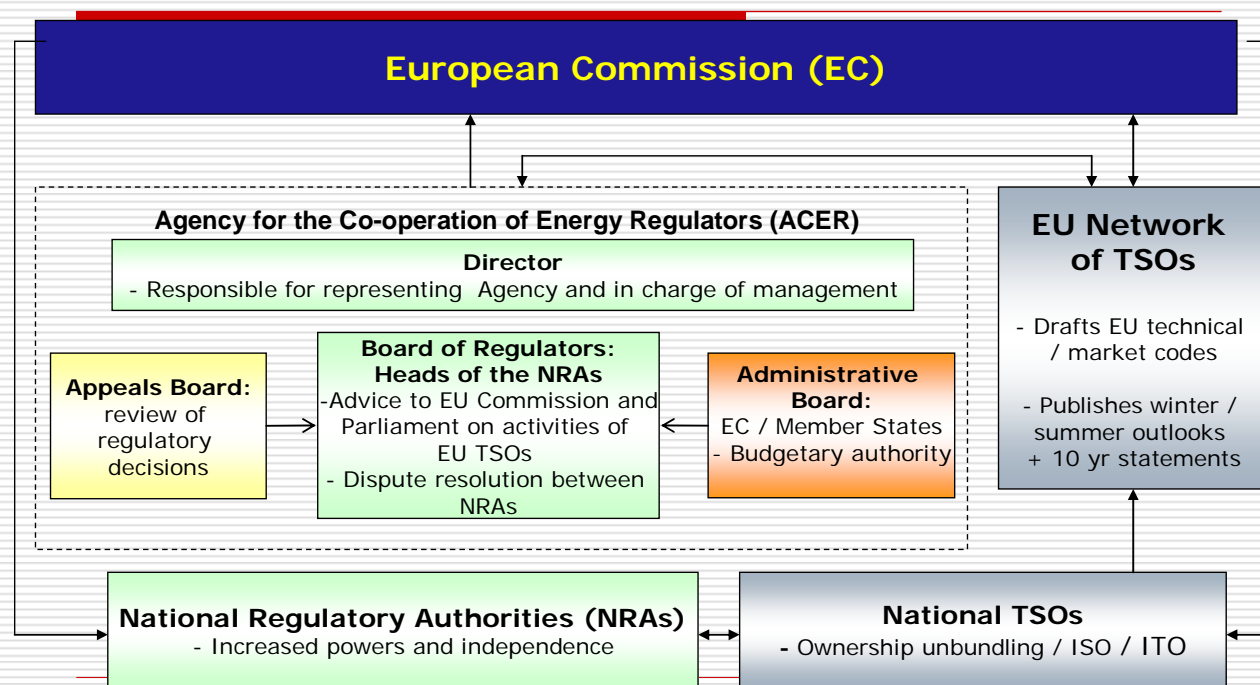
Istanbul, Sept. 2008

Lianos & Tapia - \_\_\_\_\_

11

Cont.

## The Commission's institutional model



Istanbul, Sept. 2008

Lianos & Tapia - \_\_\_\_\_

12

## But contrasting messages!

- **What a mess!**
- Heterogeneous industry configuration remains in place
- Major efforts in unbundling networks.
- Different ownership patterns
  - Complex mix of public & private ownership on different territorial levels
  - Increased public provision in water (except in the UK)
- Increased use of cooperation amongst regulators ('network of regulators') and first steps towards 'institutionalised cooperation'
  - Agency for the Cooperation of Energy Regulators (ACER)
- Much more regulatory intervention by Courts
- Maybe more space for intervention at retail level?
- But still no uniform European Regulatory model

Towards Centralisation	Towards Decentralisation
European Agency (ACER)	Greater powers for NRAs
Incentives for transmission unbundling	3 different options to member states
Common industry codes	

## Open questions

- Towards a uniform European Regulatory model?
- The 'golden oldie' (centralisation/decentralisation) still relevant
- 'Message' should be clearer
- 'Institutionalised cooperation' = centralised regulation?
- Are the courts the most "appropriate" actors to deal with these issues?  
Any kind of court (not only specialised)?
- Should we establish a European specialised court or increase the internal economic expertise/capacity of the current courts (CFI?) and/or having more recourse to court-appointed experts and assessors?