

The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion?

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I. Introduction

Within the framework of the debate on good governance in the European Union (hereafter, the “EU”), the promotion of swift, efficient and predictable regulatory mechanisms should unequivocally occupy a prominent position. In the field of network industries, the advent of National Regulatory Authorities (hereafter, the “NRAs”) in the 1990s' and their subsequent improvements has, to a large extent, contributed to the achievement of these regulatory standards. Yet, a closer look at the current situation tends to suggest that the “proliferation” of NRAs alongside competition authorities (i.e. the European Commission and the National Competition Authorities) could paradoxically compromise the attainment of this goal. Indeed, as will be seen below, the proliferation of NRAs with increased powers may generate a risk of jurisdictional conflicts with existing competition authorities as well as regulatory inconsistencies and therefore potentially run against the tide of 'better governance' pursued by the EU.¹

A snapshot approach would lead to the bold conclusion that, for a variety of reasons, the risks of overlaps between the missions of NRAs and competition authorities are limited. First, it could be argued that NRAs and competition authorities are formally entrusted with the implementation of two distinct sets of rules that apply in distinct situations (the former's mandate is the application of national sector specific legislation while the latter's mandate is the application of competition rules). Second, it could also be considered that overlaps between NRAs and competition authorities are limited because the former generally intervene on an *ex ante* basis through the imposition of detailed and adjustable remedies (or the adoption of guidelines), while the latter essentially carry out *ex post* enforcement duties to eliminate actual abuses of market power through the adoption of prohibition decisions, as well as fines.² Finally, it could be advanced that

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¹ The paper will place an emphasis on the telecommunications sector, because it provides numerous illustrations of these problems. See Aurore Laget-Annamayer, *La régulation des services publics en réseaux*, (2002), LGDJ-Bruylant, Bruxelles, at p.302. Note, also that Potential situations of conflicts could additionally arise with national courts which are also competent to apply competition rules.

² See Alexandre de Streel, Robert Queck and Philippe Vernet, “Le nouveau cadre réglementaire européen des réseaux et services de communications électroniques” (2002) 3-4 *Cahiers de Droit Européen*, 243 at p.294. For instance, under sector specific regulation, the fact that an operator enjoys a dominant position on a market already triggers the imposition of remedies by a NRA on the basis on the anticipation of potential future anticompetitive behaviour by the undertaking. In contrast, under competition law, the existence of a dominant position cannot lead to a remedial action by a competition authority unless an actual abuse of this dominant position can be proven.

competition authorities enjoy an exclusive jurisdiction over certain matters which are hence left out of the reach of NRAs.³

These distinctions are, however, over-simplistic because they do not reflect the true face of reality. On the contrary, the differences between NRAs and competition authorities become increasingly blurred under the influence of several factors.⁴ First, the growing convergence between competition law and sector specific regulation leads to substantial overlaps between the NRAs' and the competition authorities' respective mandates. On the one hand, the progressive opening of markets and the elimination of bottlenecks accelerates the transition of network industries towards competitive markets. To follow and complete this evolution, EC legislative reforms are bringing sector specific regulation closer to competition law standards (e.g. in the telecommunications sector, the central concept of significant market power is identical to the notion of dominance under competition law). On the other hand, the extensive interpretation of the competition rules of the EC Treaty (e.g. the emphasis put on "access-based" competition) and the development of "quasi regulatory" enforcement policies by competition authorities extends the reach of classic antitrust rules to situations that are already subject to sector specific regulation.⁵ Second, in parallel to this substantive evolution, NRAs are increasingly entrusted with powers that resemble the powers enjoyed by competition authorities. The growing importance of the NRAs' dispute settlement missions creates, for instance, a new procedural avenue for complainants.

The overlaps that have just been exposed may become a critical issue in the coming years, especially when conjugated with a third factor. The proliferation of NRAs across all network industries sectors through the impetus of EC liberalisation directives and the increased decentralisation of competition rules towards national competition authorities (hereafter, the "NCAs") and national courts could have a multiplier effect in terms of jurisdictional conflicts.⁶

³ Such as, for instance, the control of concentrations between undertakings or the control of State aids by the European Commission.

⁴ See, on this, Damien Geradin and Greg J. Sidak, "European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications", forthcoming in the *Handbook of Telecommunications Economics*, 2nd Vol.

⁵ Competition authorities tend to increasingly rely on their exclusive competences in the field of merger to achieve regulatory objectives through the imposition of commitments to operators. See, in the energy sector, Michele Piergiovanni, "EC Merger Control Regulation and the Energy Sector: An Analysis of the European Commission's Decisional Practice on Remedies", (2003) 3 *Journal of Network Industries*, 227.

⁶ First, in most network industries sectors (telecommunications, electricity, gas, rail, and post), NRAs have been or are being created and have been entrusted with substantial market regulation powers. In the telecommunications sector, most MS have set up NRAs and these authorities have been active for a rather long time. The Framework Directive requires all MS to have a NRA. See Directive 2002/21 of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, hereafter, the "Framework Directive", OJ L 108 of 24 April 2002 pp.33-50. In the field of energy, most MS have created sector-specific agencies or have entrusted the regulatory duties deriving from EC directives to economy-wide competition authorities pursuant to the single obligation imposed by the first-generation directives. As far as the postal sector is concerned, Directive 97/67 required MS to set up NRAs. See Directive 97/67 of the European Parliament and the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15 of 21 January 1998, pp.14-

The discussion below is organised as follows. Following this introduction, Part II examines the increasing overlaps between the NRAs and the competition authorities' mandates as well as the risks they entail. Part III deals with the mechanisms that have been adopted for limiting the risks of regulatory inconsistencies and conflicts of jurisdiction. Part IV identifies the remaining hypothesis where NRAs and competition authorities can both claim jurisdiction. Part V suggests alternative approaches to deal with the risks of cumulative jurisdiction. Part VI proposes some conclusive remarks.

II. The Increasing Overlap between the NRAs and the Competition Authorities Mandate

The evolving nature of sector specific regulation and competition rules increases the number of situations that can potentially fall within the scope of both sets of rules and trigger the concurrent jurisdiction of NRAs and competition authorities (1). In addition to this, the growing similarities of the missions entrusted to NRAs and competition authorities leads to overlaps in terms of jurisdiction (2). This creates a risk of regulatory inconsistency as well as a risk of jurisdictional confusion (3).

1. Increasing Substantial Overlaps between Sector Specific Regulation and Competition Rules

25. At the time being, most MS have done so and where MS have not, proceedings have been commenced before the European Court of Justice (hereafter, the "ECJ"). Finally, as far as the rail transport sector is concerned, requirements of setting up regulatory institutions can be identified in Directive 2001/14. First, this Directive requires that the capacity allocation processes (the allocation of train paths) shall be performed by an allocation body that is independent in its legal form, organisation and decision-making from any railway undertaking. Second, the Directive requires that MS establish a regulatory body. See Directive 2001/14 of 26 February 2001 on the Allocation of Railway Infrastructure Capacity and the Levying of Charges for the Use of Railway Infrastructure and Safety Certification, OJ L 75/29 of 15 March 2001. In parallel to this, the modernisation of EC competition law under new Regulation 1/2003 leads to substantial transfers of powers from the European Commission (hereafter, the "Commission") to National Competition Authorities and national courts. See Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4 January 2003, pp.1-25. There have been numerous comments on the decentralization of the implementation of competition rules and the creation of a network of competition authorities: See Damien Geradin, "Competition Between Rules and Rules of Competition: a Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law", (2002) 1 *Columbia Journal of European Law*, 1; Hans Gilliams, "Modernisation: from policy to practice", (2003) 28 *European Law Review*, 451; Jacques Bourgeois and Christophe Humpe, "The Commission's Draft 'New Regulation 17'", (2002) 2 *European Competition Law Review*, 43; Claus-Dieter Ehlermann and Isabela Atanasiu, "The Modernisation of E.C. Antitrust Law: Consequences for the Future Role and Function of the EC Courts", (2002) 2 *European Competition Law Review*, 72; James S. Venit, "Brave new world: The Modernization and decentralization of enforcement under Articles 81 and 82 of the EC Treaty", (2003) 40 *Common Market Law Review*, 545; Robert Kovar, "Le règlement du Conseil du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux articles 81 et 82 du traité", (2003) 7 *Dalloz Chroniques*, 478; Laurence Idot, "Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE (règlement 1/2003 et projets de textes d'application)", *Cahiers de Droit Européen*, Vol. 2003, No. 3-4, 2003, pp.283-371.; Emil Paulis et Céline Gauer, "La réforme des règles d'application des articles 81 et 82 du Traité", (2003) 97 *JT Droit Européen*, 65.

A substantial number of issues that are at the core of sector specific regulation can be translated under competition law terms and dealt with on the basis of competition rules.⁷ The best illustration of this can be found in the field of “access regulation”. Most sector specific frameworks contain provisions requiring incumbent operators to grant effective access to their networks and setting out conditions for access. In the field of telecommunications, for instance, Articles 9, 10 and 13 of the Directive 2002/19 (hereafter, the “Access Directive”) impose a variety of transparency, non discrimination, and pricing requirements on operators enjoying a Significant Market Power (hereafter, “SMP”).⁸ In the field of energy, similar network access conditions are laid down under the so-called Third Party Access regime (hereafter, the “TPA”), which allows third parties (e.g. gas producers and suppliers that do not control the grid) to use the existing gas pipelines so as to reach gas consumers.⁹

In parallel to this, the emergence of the “essential facilities” doctrine in the field of competition law has been a powerful instrument for competition authorities to equate the control of an infrastructure with the concept of dominance and to impose on incumbents a general obligation to satisfy access demands pursuant to Article 82 EC.¹⁰ In addition, Article 82 EC has occasionally been used to define the conditions under which (timeliness, quality etc.) an undertaking controlling an essential facility should give access to its infrastructure.¹¹ For instance, infrastructure owners giving access can be

⁷ See on this, Pierre Larouche, *Competition Law and Regulation in European Telecommunications*, (2000) Hart Publishing at pp.296-298.

⁸ See Directive 2002/19 of the European Parliament and the Council on access to, and interconnection of, electronic communications networks and associated facilities of 7 mars 2002 OJ L 108 of 24 April 2002, pp.7-20. These obligations apply to operators enjoying a Significant Market Power. This concept can be equated to the concept of dominance under Article 82 EC.

⁹ See Article 20(3) of the Directive 2003/54 of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92, OJ L 176 of 15 July 2003 pp.37-56.

¹⁰ See on this, Antonio F. Bavasso, “Essential facilities in EC law: the rise of an 'epithet' and the consolidation of a doctrine in the communications sector”, (2002) 21 *Yearbook of European Law*, 63; John Temple Lang, “The Principle of Essential Facilities in European Community Competition Law – The Position Since Bronner”, (2000) 1 *Journal of Network Industries*, 375; Sylvain Martin et Fabienne Levilain, “L'application de la théorie des ‘facilités’ essentielles dans le secteur des télécoms, de l'électricité et du gaz”, (2002) 5 *Gazette du Palais*, Rec. Bimestriel, 1512. The case law has helped clarify the conditions under which an undertaking controlling an essential facility is under a duty to give access to its infrastructure. In *Bronner*, the European Court of Justice held that, for a refusal to give access to be an abuse of a dominant position, it must be shown that (i) the refusal to grant access is likely to eliminate all competition in the downstream market and cannot be objectively justified and (ii) the good, service of infrastructure in question is absolutely indispensable for the carrying out the economic activity (i.e. there is no alternative to this). See ECJ, 26 November 1998, Oscar Brönnner v. Mediaprint, C-7/97, [1998] ECR I-7791. The Commission recently made use of the essential facilities doctrine in the rail sector. See Commission Decision of 27 August 2003, GVG/FS, (especially at § 120) OJ L 11 of 16 January 2004, pp.17-40 and Oliver Stehmann, “Applying Essential Facility Reasoning to Passenger Rail Services in the EU - the Commission Decision in the Case GVG”, Vol. 25 n.7, *European Competition Law Review*, July 2004, pp.290-394.

¹¹ See Leigh Hancher, “Competition, State Monopolies and the Internal Energy Market” in *State Entrepreneurship, National Monopolies and European Community Law*, Jules Stuyck and Ellen Vossestein Eds. (1993) Kluwer at p.31.

required under Article 82 EC to disclose technical information on their network.¹² Finally, access pricing could potentially be regulated through Article 82 EC, especially in situations where excessive prices would be charged for access to the network.¹³ Access matters may hence be analyzed through the spectrum of both sets of rules.

Besides the issue of access regulation, a larger range of classic regulatory issues can be examined through the lenses of competition rules. This is, for instance, the case of the sector specific provisions that seek to ensure accounting separation and structural separation with a view to avoid the financing of competitive activities through monopoly rents.¹⁴ Similar requirements are being imposed under Article 82 EC (and Article 81 EC) in cases involving cross-subsidisation practices by dominant undertakings.¹⁵ Another example is the requirements, under sector specific regulation, that vertically integrated undertakings do not discriminate between their subsidiaries and third parties.¹⁶ These situations can equally be analysed under competition rules. In the postal sector, for instance, the *SNEPLD* decision illustrates the possible application of Article 82 EC to discriminatory practices implemented by a postal incumbent when granting access to services of the postal monopoly to third parties.¹⁷ Furthermore, in several MS, the question of access to subscribers' lists is subject to regulation under national sector specific frameworks.¹⁸ In parallel, the Commission's *ITT Promedia/Belgacom* decision made clear that the refusal to provide, on reasonable terms, data about customers of telephone services to a new entrant could amount to an abuse of a dominant position in the meaning of Article 82 EC.¹⁹

Yet, new areas of overlap between the two bodies of norms have recently been brought to light. In addition to classic market regulation, sector specific frameworks tend to

¹² See European Commission, XVIth Report on Competition Policy, (1984) at §§94-95, Undertakings offered by IBM.

¹³ See Competition and Regulation in Telecommunications, OECD, DAFPE/COMP(2002)6 at p.8. This hypothesis is, however, subject to discussion given the difficult practicability of the test for excessive pricing and the Commission's reluctance to embark upon difficult pricing analysis. Nevertheless, according to some observers, it is probable that a competition authority would be entitled to act on the basis of Article 82 provided the test laid down by the ECJ in *United Brands* is met and prices are clearly excessive. See, on this, Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition*, (1999) Oxford University Press at p.189.

¹⁴ See, for instance, Article 13 of Directive 2002/21 on a common regulatory framework for electronic communications networks and services (hereafter, the "Framework Directive") of 7 March 2002, OJ L 108 of 24 April 2002, pp.33-50. See also Article 14 of Directive 97/67, supra note [_____] in the postal sector. See Article 19 of Directive 2003/54, supra note [_____] in the electricity sector.

¹⁵ See Notice on the application of the competition rules to the postal sector at § 8. See, with regards to Article 81, *Atlas and Phoenix* [1996] OJ L239/57 and *Unisource* [1997] OJ L 381/1.

¹⁶ In the energy sector, this is guaranteed through the unbundling of the transmission and distribution functions from the other functions of a vertically integrated undertaking. See Articles 10 and 15 and 20(1) of Directive 2003/54, supra note [_____] .

¹⁷ See Commission Decision of 23 October 2001, on the lack of exhaustive and independent scrutiny of the scales of charges and technical conditions applied by La Poste to mail preparation firms for access to its reserved services, OJ L 120 of 7 May 2002, pp.19-37.

¹⁸ See, for instance, in France the Ordonnance of 25 July 2001 portant adaptation au droit communautaire du Code de la Propriété Intellectuelle et du Code des Postes et Télécommunications.

¹⁹ See Commission Press Release IP/97/292 of 11 April 1997, "Settlement reached with Belgacom on the publication of telephone directories - ITT withdraws complaint".

increasingly take into account additional considerations such as, for instance, the protection of environment or public health. To meet these standards, the telecommunications regulatory framework contains provisions on facilities and property sharing between operators.²⁰ Under these provisions, NRAs may encourage or require operators to share network elements (e.g. masts, antennae, support cabinets, power supplies etc.).²¹ In parallel to this, infrastructure sharing strategies are often implemented through agreements between operators which thus fall within the scope of Article 81 of the EC Treaty. Often, the purpose of these strategies is to reduce the initial fixed costs of rolling out the network while ensuring maximal geographical coverage. Recently, two network infrastructure sharing agreements were notified to the Commission. The network sharing provisions were deemed not to fall within the scope of Article 81(1) EC because it concerned only limited part of the infrastructure.²² However, the two cases provide very detailed guidelines on the conditions for implementing co-location and site sharing arrangements.²³ Overlaps between the two bodies of norms may thus, in the near future, continue to increase.²⁴

²⁰ See Article 12(2) of the “Framework Directive”, supra note [] which provides that : “where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health, public security or to meet town and country planning objectives, Member States may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network or take measures to facilitate the coordination of public works only after an appropriate period [...]”.

²¹ Several MS have adopted sector specific rules to deal with this issue. In the UK, OfTel published a position in May 2001, ‘3G Mobile Infrastructure Sharing. Note for information’, available at <http://www.oftel.gov.uk/publications/mobile/infrashare0501.htm>. In Germany, the RegTP issued its in a document entitled ‘Interpretation of the UMTS Award Conditions in the light of more recent technological advance’, RegTP (6 June 2001), available at www.regtp.de. In France the ART adopted guidelines on 10 December 2001. See “Position de l’Autorité de régulation des télécommunications sur le partage d’infrastructures dans les réseaux mobiles de troisième génération” available at <http://www.art-telecom.fr>.

²² See Nicolas Petit, “The Commission’s Contribution to the Emergence of 3G Mobile Telephony: An Analysis of some Decisions in the Field of Competition Law”, Vol. 25 n.7, *European Competition Law Review*, July 2004, pp.429-438.

²³ See Commission Decision, COMP/38.370, *O2 UK Ltd./T-Mobile UK Ltd.*, of 30 April 2003, OJ L200 of 7 August 2003, pp.59-84 and Commission Decision, COMP/38.369, *T-Mobile Deutschland/VIAG Interkom* of 16 July 2003. See also Commission Press Release IP/03/1026 of 16 July 2003.

²⁴ It seems that, in the near future, a further variety of issues could potentially be brought under the two umbrellas of sector specific regulation and competition rules. This is, for instance, the case of agreements between mobile communications operators (hereafter, the “MOs”) and Mobile Virtual Network Operators (hereafter, the “MVNOs”). MVNOs are operators that have their own mobile network code and their own range of mobile numbers but that do not have a licence to operate wireless frequencies nor own any substantial network infrastructure (e.g. only own some limited network elements). The form of MVNO is interesting for operators that cannot afford to incur the high fixed costs and sunk investments of acquiring licences and rolling out networks. Their cost base and risk are by definition much lower than those of network operators as they do not have significant investments in network equipment. MVNOs enter into agreements with MOs in order to offer competing services. Depending on the business model followed, a MVNO can be considered as a service provider or, in case it owns some network elements, as an operator willing to conclude national roaming arrangements and thus asking for interconnection. In that respect, MVNOs could potentially fall within the telecommunications framework, and benefit, for instance, from the provisions on access and interconnection. These agreements could potentially fall within the scope of Article 81 and/or 82 EC. Given that the business model of these operators is, however, unclear it is too early to assess whether the risk of overlap will raise problems.

2. Increasing Jurisdictional Overlaps between NRAs and Competition Authorities

Besides the large and growing area of overlap between sector specific regulation and competition rules, NRAs and competition authorities tend to offer increasingly substitutable remedial avenues for operators. Traditionally, competition authorities provide a natural venue for settling disputes arising between several operators or for acting on consumers' requests. Because a substantial number of sector specific regulation issues can potentially fall within the scope of Article 81 (provided that an agreement was concluded) or Article 82 (in case of refusal of access or of abusive conditions), competition authorities may deal of disputes between parties or of consumers complaints.²⁵ An example of this can be found in field of energy. In the *Marathon* case, Thyssengas GmbH, the German gas company had refused to grant TPA to its gas pipelines to Marathon, a Norwegian gas producer. Marathon lodged a complaint before the Commission on the basis of Article 82 EC. The latter brought the two companies to a commercial settlement.²⁶

In parallel to this, the growing importance of the NRA's dispute settlement functions creates a new jurisdictional route for complainants.²⁷ In the field of telecommunications, NRAs were already entrusted with a dispute settlement function by the first generation directive.²⁸ These functions were, however, reinforced by the new regulatory framework which provides that:

²⁵ It shall be noted that competition authorities may also initiate proceedings on their own motion.

²⁶ See Commission Press Release IP/01/1641 of 23 November 2001, "Commission settles Marathon case with Thyssengas". Also, national courts may be called to rule on contractual disputes arising from access conventions on the basis of competition rules. This is especially true in light of the modernisation of EC Competition law, which will presumably increase the volume of litigation before courts on the basis of Article 81 and 82. Let us, however, recall that the competence of the national courts to apply the EC competition provisions is not a new thing. However, the Commission seeks to increase the involvement of national courts in the implementation of competition law and the decentralisation of Article 81(3) might contribute to this.

²⁷ Since 2002, the ART (the French telecommunications regulator) and the CRE (the French energy regulator) have adopted respectively 16 and 14 decisions in the context of disputes between operators. There is a clear increase in the number of decisions adopted between 2002 and 2003. In addition, this was already true in the field of classic NRAs' regulatory functions, such as the prior approval of tariffs or the adoption of guidelines. The finding of the NRAs could subsequently be dealt with by a competition authority. Also, complainants should be understood in a broad meaning. See Article 9(4) b of the Framework Directive, supra note [_____]: "The national regulatory authorities shall promote the interests of the citizens of the European Union by *inter alia*: [...] ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved". In the energy sector, procedures must be open to any customer that wishes to introduce a complaint. See Article 20(5) and Article 3(5) of Directive 2003/54, supra note [_____]. This option was followed in some MS which have set up additional conciliation mechanisms. A large number of customers can benefit from a conciliation procedure before the NRA. See Christophe Lemaire, *Energie et concurrence: Recherches sur les mutations juridiques induites par la libéralisation des secteurs de l'électricité et du gaz*, (2003) Presse Universitaires d'Aix-Marseille at p.355.

²⁸ See Article 9(5) of Directive 97/33 of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ L 199 of 26 July 1997, pp.32-52.

“In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully”.²⁹

Some elements suggest, however, that the scope of the dispute settlement functions may be larger than disputes between operators on interconnection issues. The preamble of the Framework Directive implies that interconnection and access issues are only an example of possible disputes falling under the dispute settlement procedure.³⁰ This is confirmed at the national level, where some MS have included, within the scope of the dispute settlement procedure, a wide range of issues that go beyond access matters. In France, for instance, the ART can act as a dispute settlement body on interconnection issues, but also with regards to site sharing agreements, financial and technical conditions for transfers of subscribers list, cable related issues, etc.³¹

Similar dispute settlement procedures were established in other sectors.³² In the field of energy, for instance, Article 20(3) of Directive 96/62 required that MS designate a competent authority (not necessarily the NRA) to settle disputes relating to the contracts and negotiations over access issues (TPA) and refusals to purchase.³³ The dispute settlement procedure was strengthened in Directive 2003/54 which provides that these missions should be entrusted to NRAs and imposes time limits for the settlement procedures.³⁴ In a fashion similar to that of the telecommunications sector, the concept of

²⁹ See Article 20 of the Framework Directive, supra note [____].

³⁰ See Recital 32 of the Framework Directive, supra note [____]: “In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute.”

³¹ See A. Laget-Annamayer, supra note [____] at p.361. It is of note that in Spain, the dispute settlement function of the NRA is considered as the main function of the regulator.

³² See, for instance, Article 21(6) of Directive 2001/14, supra note [____]: “in case of disputes relating to the allocation of infrastructure capacity, a dispute resolution system shall be made available in order to resolve such disputes promptly. If this system is applied, a decision shall be reached within a time limit of 10 working days.

³³ See Article 20(3) of Directive 96/92 of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 027 of 30 January 1997 pp.20-29.

³⁴ See Article 20(5) of Directive 2003/54: “Any party having a complaint against a transmission or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 4 may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authority. This period may be further extended with the agreement of the complainant. Such a decision shall have binding effect unless and until overruled on appeal. Where a complaint concerns connection tariffs for major new generation facilities, the two-month period may be extended by the regulatory authority”. MS such as the UK and Italy will thus have to entrust their NRAs with a dispute settlement competence.

conditions of access was given a very broad meaning in some MS. In France, for instance, it includes the interpretation and implementation of the conventions, as well as contractual liability claims.³⁵

A further element that brings the NRAs closer to competition authorities is that several MS have entrusted the former with sanctioning powers (e.g. the imposition of fines or the revocation of authorisations). NRAs can thus impose sanctions on operators that fail to comply with the requirements of the regulatory framework or that do not implement its decisions. In Germany, France and Spain, the telecommunications regulators (and, for the latter, the minister) enjoy a sanctioning power.³⁶ This constitutes an additional judicial remedy for victims of an infringement of the sector specific legislation. As would be the case before a competition authority, complainants can lodge a complaint before the NRAs in order to deter the operator from infringing the rules through the imposition of a sanction.

3. The Potential for Regulatory Inconsistencies and Jurisdictional Confusion between NRAs and Competition Authorities

The existence of several jurisdictional routes for complainants creates two series of problems. First, on material grounds, although the similarities between sector specific regulation and competition rules limit the risk of conflicts (both sets of rules pursue related and complementary objectives), there is nonetheless a possibility that the decisions adopted under each body of rules differ in the medium run and lead to regulatory inconsistencies.³⁷ Indeed, the approach under sector specific regulation may differ from the approach under competition rules.³⁸ In the field of access regulation, for instance, NRAs and competition authorities may reach different decisions on whether to require an incumbent to grant access to a new entrant. On the one hand, provided that the requirements for applying Article 12 of the Access Directive are met (i.e. the relevant market is not effectively competitive and the operator enjoys a significant market power), the NRA can require the incumbent to satisfy all reasonable requests for access, “where the denial of access would hinder the emergence of a sustainable competitive market at the retail level or would not be in the end-user’s interest”.

³⁵ See C. Lemaire, supra note [_____] at p.356.

³⁶ In France for instance, the ART can impose fines of up to 3% of the total sales of the offender. In the energy sector, NRA (UK, Spanish, Dutch etc.) have also been entrusted with administrative and financial sanction powers.

³⁷ Several observers consider that the rules laid down in sector specific frameworks go further than competition rules and lead to the imposition of more stringent conditions on incumbents than those required under competition law. See A. de Streel, R. Queck and P. Vernet, supra note [_____] at p.294. For this reason, the risk of conflict is likely to be limited. While this is generally true, NRAs and competition authorities follow different approaches which could, in the long run, lead to substantial divergences.

³⁸ Even the authors that consider competition law and sector specific regulation as a common set of rules do not rule out the risk of divergences. See for instance, Paul Nihoul and Peter Rodford, *EU Electronic Communications Law*, Oxford University Press, London, 2004 at 4.370 who argue that while sector specific regulation should be seen as a “part of general competition law” [...], “It cannot be excluded that discrepancies may appear in specific circumstances”.

On the other hand, competition authorities will apply Article 82 EC in line with the twofold test set out by the ECJ in *Bronner*.³⁹ Competition authorities will only require the incumbent to grant access if (i) the refusal to grant access is likely to “eliminate all competition in the downstream market” and cannot be objectively justified and (ii) the good, service of infrastructure in question is “absolutely indispensable” for the carrying out the economic activity. The conditions to be met for obtaining access are more stringent under competition law.⁴⁰ Thus, there is a possibility that NRAs and competition authorities reach different outcomes in similar cases (i.e. most likely the NRA requiring the incumbent to grant access while the competition authority would refuse to condemn the refusal to grant access by the incumbent).⁴¹

Also, with regard to the regulation of access conditions, sector specific frameworks often take into account the investments incurred by the owner of the infrastructure, the existence of intellectual property rights or the necessity to preserve competition in the long run.⁴² In contrast, competition rules are less concerned with these objectives.⁴³ The “essential facilities” doctrine does not mention the conditions under which access should be given. Competition authorities are primarily concerned with the elimination of actual restrictions of competition. Hence, they generally give little importance to the necessity that access conditions ensure sufficient rates of return on investments and do not undercut incentives for innovation etc.⁴⁴ Therefore, NRAs may legitimate access conditions that a competition authority would on the contrary consider as incompatible with Article 82 EC.

Conversely, while infrastructure sharing is encouraged under sector specific frameworks for environmental or public health reasons, these considerations may be less relevant for an assessment under competition rules. Site sharing arrangements might thus, in the medium run, receive a less positive assessment under competition law. The issuance of diverging decisions under both sets of rules may lead to regulatory inconsistencies which

³⁹ See ECJ, *Oscar Brönnner v. Mediaprint*, supra note [_____].

⁴⁰ See Damien Geradin and Gregory Sidak, “European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications”, forthcoming in the *Handbook of Telecommunications Economics*.

⁴¹ This should not, however, be too problematic because there would be no conflict between norms. In that case, Article 82 EC would be held to be inapplicable. Sector specific legislation would apply solely.

⁴² See Article 12(2) of the Access Directive, supra note [_____].

⁴³ This is illustrated by the controversial debates surrounding the adoption of the recent *IMS Health* case or of the *Microsoft* decision. Claims by Microsoft that a generous access policy might run counter to its incentives to innovate have been rebutted by the European Commission. See Commission Decision of 24 March 2004, Case COMP/C-3/37.792 Microsoft, C(2004)900 final, especially at § 709. In addition, in the *IMS* case, the Court made clear that access to an input protected by an intellectual property right should only be granted provided it would prevent the marketing of a new product on the downstream market. See ECJ C-418/01, 29 April 2004, *IMS Health GmbH & Co. OHG vs. NDC Health GmbH & Co. KG*, not yet published. There is, however, a considerable room for debate with respect to the degree of novelty that has to be proven.

⁴⁴ A topical illustration of this can be found in the application of the “essential facilities” doctrine to intellectual property rights. The *IMS Health* decision, for instance, shows that the Commission’s main concern are very short sighted and that arguments linked with the protection of innovation and investments incentives are not taken into account under Article 82 EC.

can limit the effectiveness of regulatory reforms.⁴⁵ In addition, confused regulatory signals to the industry could prove potentially harmful for investments.⁴⁶ Finally, the existence of regulatory divergences between NRAs and competition authorities creates a risk of forum shopping for complainants.⁴⁷

Overview of Potential Divergences between NRAs and Competition Authorities Approaches

	NRA	Competition Authorities (Commission and NCAs)	Conflict of Rules/ Decisions?
Grant of Access by Incumbent	Not Favourable to Incumbent - Large Access for New Entrants - Article 12 of Access Directive	More Favourable to Incumbent - More difficult for New Entrants - Strict Conditions in <i>Bronner</i>	No - Granting Access cannot be an Infringement of Article 82 - Article 82 does not apply
Conditions of Access	Potentially Favourable to Incumbent - Return on Investments etc.	Less Favourable to Incumbents - Not Concerned by Returns on Investments etc.	Potential - Excessive Access Pricing can be an Infringement of Article 82
Infrastructure Sharing	Favourable - Environment, Public Health	Less Favourable - Less Concerned	Potential - Agreements containing Restrictions of Competition

Second, on the jurisdictional ground, the existence of a variety of remedial routes for complainants is not coordinated by a rule of case allocation. On the contrary, the first generation Directives (i.e. the first sets of Directives that were adopted at the beginning of the liberalisation process) provide that the regulatory frameworks are “without prejudice of the application of competition rules”.⁴⁸ A possibility thus exists that a similar case be simultaneously or successively analysed by NRAs and competition authorities. In addition, EC sector specific frameworks also provide that the initiation of a dispute settlement procedure before NRAs does not preclude parties (i) from bringing an action before the courts and (ii) from their rights of appeal under national and EC law.⁴⁹ The reference to appeal under EC law is all the more curious. The Treaty of Rome does not provide any avenue for appealing decisions adopted at the national level. This provision is arguably a reference to the possibility to lodge a complaint before the Commission.

⁴⁵ It shall be mentioned that the risk of inconsistencies between NRAs and NCAs is further aggravated by the fact that the approaches may vary from one MS to another.

⁴⁶ An empirical study showed a clear relationship between regulatory effectiveness and industrial investment. Regulatory confusion might lead to inefficiency and lack of effectiveness and indirectly impact investment. See Regulatory Scorecard Report, Jones Day, 12 November 2002, available at <http://www1.jonesday.com/news/detail.asp?language=English&newsid=264>.

⁴⁷ Id.

⁴⁸ See Recital 26 of Directive 97/33 supra note [____]; See Recital 3 of Directive 96/92, supra note [____]; See Recital 6 of Directive 98/30 of the European Parliament and of the Council of 22 June 1998 concerning Common Rules for the Internal Market in Natural Gas, OJ L 245 of 4 September 1998, pp.1-12: “Whereas the provisions of this Directive should not affect the full application of the Treaty, in particular the provisions concerning [...] the rules on competition”. See Recital 41 of See Directive 97/67, supra note [____]: “Whereas this Directive does not affect the application of the rules of the Treaty, and in particular its rules on competition and the freedom to provide services”.

⁴⁹ See Article 20(5) of the Framework Directive, supra note [____]; See also Article 23(11) of Directive 2003/54, supra note [____]: “Complaints referred to in paragraphs 5 and 6 shall be without prejudice to the exercise of rights of appeal under Community and national law”.

Thus, a complainant is entitled to bring a similar action before several institutions, i.e. the NRAs, the NCAs, the Commission and national courts.⁵⁰ Also, there is a possibility that distinct complainants each bring closely related cases (e.g. several interconnection conventions with a same incumbent operator) before distinct authorities or courts. The absence of rules of exclusivity, *litis pendentia* and joining of claims creates a risk of duplication of proceedings. Besides potential abuses of predatory litigation,⁵¹ this situation is unsatisfactory because it may in turn generate delays, higher transaction costs and increased legal uncertainty for operators. From a public policy standpoint, it is also costly because it creates a risk of duplication of investigative resources.

III. The Mechanisms for Limiting the Risks of Concurrent Jurisdiction of NRAs and Competition Authorities

To address the risk of regulatory inconsistencies and of jurisdictional conflicts, a variety of rules and principles have been established. First, a general duty of observance of EC competition rules has been placed on the NRAs through the case law of the European Court of Justice (hereafter, the “ECJ”) and sector specific frameworks (1). Second, several specific mechanisms have been adopted at the EC and MS levels in order to prevent the risks of conflicts (2).

1. The NRAs’ General Duty to Observe Competition Rules

EC legislation in the field of network industries merely specifies that the mandate of the NRAs is the application of the regulatory tasks assigned in the specific directives through the application of the national rules of transposition.⁵² As a result of this, NRAs have generally no jurisdiction to apply competition law.⁵³ However, this is not to say that NRAs are under no obligation to pay attention to the competition rules of the EC Treaty. On the contrary, the case law of the ECJ has made it clear that NRAs fall under a general duty of observance of EC competition rules when dealing with matters within their jurisdiction. In the landmark *GB-Inno-BM/ATAB* case the ECJ held that pursuant to Article 10 EC:

⁵⁰ The possibility to bring an action before national courts will not be analysed in the present paper. It is, however, a potential source of conflicts. See on this, C. Lemaire, *supra* note [____] at pp.374-375.

⁵¹ See on this CFI, T-111/96, *ITT Promedia v. Commission*, ECR [1998], II-2937.

⁵² See Article 2(g) of Framework Directive, *supra* note [____]. See Commission’s Decision setting up the European Regulators’ Group in the field of telecommunications, electricity and gas also recall that the common mission to all NRAs Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, JOCE L 200 of 30 July 2002, pp.38-40 at §3. See also Commission Decision of 11 November 2003 establishing the European Regulators Group for Electricity and Gas Official Journal L 296 of 14 November 2003, pp.34-35 at §3.

⁵³ This is, however, subject to several exceptions. First, in the UK, Ofcom and Ofgem have, for instance, jurisdiction to enforce the national competition legislation. Second, in Greece, the NRA in charge of the telecommunications sector has the power to enforce competition legislation with respect to telecommunications markets. Third, in the postal sector, the EC framework recognizes the possibility that in addition to the compliance with the obligations arising from the Directive, the NRA “may also be charged with ensuring compliance with competition rules in the postal sector”. See Article 22 of Directive 97/67, *supra* note [____].

“While it is true that Article 86 (now 82) is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which would deprive that provision of its effectiveness”.⁵⁴

In addition to this, the ECJ considered that Article 86 EC implied that:

“In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary *inter alia* to the rules provided for in Articles 85 (now 81) to 94 (now 90). Likewise Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 85 (now 81) to 94 (now 90).”⁵⁵

These principles were confirmed and clarified by subsequent case law. In *Ahmed Saeed*, the ECJ evoked the interface between sector specific legislation on the one hand, and the competition rules of the Treaty, on the other hand. The ruling provides interesting indications on the duties of sector specific authorities. The ECJ held that where EC secondary legislation exists in a sector and leaves MS authorities free to encourage mutual consultations between operators:

“the Treaty nevertheless strictly prohibits them from giving encouragement, in any form whatsoever, to the adoption of agreements or concerted practices with regard to tariffs contrary to Article 85(1) or Article 86, as the case may be.”⁵⁶

A more recent case made it clear that such obligations rested on all sorts of public administrative authorities and entailed the duty to leave unapplied national legislation running counter to EC law. In the *Italian Matches* case the court held:

“[...] In accordance with settled case-law the primacy of Community law requires any provision of national law which contravenes a Community rule to be disappplied, regardless of whether it was adopted before or after that rule. The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities. [...], which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied [...].”⁵⁷

The EC legislator discretely transposed these principles into sector specific frameworks through the insertion of subtle references requiring NRAs to ensure the promotion of competition in general, as well as the protection against restriction of competition in their

⁵⁴ See ECJ, 16 November 1977, SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB), Case 13-77, ECR [1977]-2115 at §31.

⁵⁵ See *Id.* at §§32-33.

⁵⁶ See, for instance, ECJ, 11 April 1989, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, Case 66/86, ECR [1989]-803 at §§48 and 52. A significant analogy could be drawn here with the Framework’s Directive provisions on site sharing which leads to encourage the conclusion of agreements between undertakings, *supra* note [_____].

⁵⁷ See, ECJ 9 September 2003, *Conorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato*, Case C-198/01 at §§48-49.

respective sectors.⁵⁸ In the field of telecommunications, for instance, the Framework Directive provides that NRAs shall:

“promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services, by [inter alia], ensuring that there is no distortion or restriction of competition in the electronic communications sector”.⁵⁹

Similarly, in the electricity and gas sectors, NRAs shall monitor the level of competition and are responsible for ensuring “effective competition”.⁶⁰ The ECJ case law, combined with these references clearly requires that NRAs shall not, for matters falling within their jurisdiction, frustrate the “*effet utile*” of EC competition rules. This does not, however, entail an obligation for NRAs to actively apply competition rules.⁶¹

2. Specific Mechanisms of Conflict Avoidance

The duty for NRAs to observe the provisions of the EC Treaty certainly limits the risks of regulatory inconsistencies in terms of decision-making. However, it does not eradicate the possibility that a complainant brings a similar case before a NRA on the one hand, and a competition authority on the other hand (the Commission or a NCA).⁶² To avoid this, the Commission clarified its position with the adoption of the Access Notice in the field of telecommunications. This document contains a number of principles for avoiding duplication of proceedings that can, given the similarities of issues, be transposed to other sectors such as, for instance, the energy sector (2.1).⁶³ In parallel to this, EC second generation directives (i.e. the sets of Directives replacing the first generation Directives

⁵⁸ It shall be noted, in that respect, that the new sets of Directives in the telecommunications but also in the energy sector no longer contain the explicit reference to the fact that sector specific regulation is without prejudice to the application of competition rules. Arguably, the EC legislator seems to have tried to mitigate the concern over the cumulative application of the two bodies of rules by omitting to explicitly reproduce this provision. The goal of the Directives is probably to promote a more integrated approach between the two bodies of rules, in that sector specific regulation should increasingly internalize competition concerns so that the risk of conflict is limited. The various references, within the NRAs’ mandates, to the protection and promotion of competition support this view. This shall not, however, imply that competition rules are not applicable to regulated sectors.

⁵⁹ See Article 8(2) b of the Framework Directive, supra note [____]. This Directive also contains several references to the duty to “safeguard competition”. Similar references were already made in the first generation directives. See, for instance, Article 9(5) of Directive 97/33, supra note [____] that provides that one of the NRAs’ missions is the promotion of competition.

⁶⁰ See Article 23 of Directive 2003/54, supra note [____] and Article 25 of Directive 2003/55 of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30, JO L 176 of 15 July 2003, pp.57-78.

⁶¹ See P. Larouche, supra note [____] at p.300. A noticeable exception to this can nonetheless be found in the postal sector where NRAs may be charged with ensuring compliance with the competition rules. See Article 22 of Directive 97/67, supra note [____]. This is, however, purely optional.

⁶² Also, actions could be initiated before national courts. See J. Faull and A. Nikpay, supra note [____] at 11.48.

⁶³ See Michael Albers, “Competition Law Issues Arising from the Liberalisation Process”, (2000) 3 *Journal of Network Industries*, 269, at p.284.

with a view to push market liberalisation a step further) and MS have tried to strengthen cooperation between NRAs and competition authorities at the national level (2.2).

2.1 The Commission's Approach for Avoiding conflicts with NRAs

The Commission's doctrine regarding its relationship with NRAs was clearly set out in the Access Notice.⁶⁴ One of the main purpose underlying the adoption of this document was to avoid the risk of duplication of proceedings or of investigative efforts by the Commission and by NRAs.⁶⁵ To this end, the Commission considers that a "*lex specialis*" principle should prevail. It will therefore not act on a complaint if parallel procedures are running before the NRA (or a national court or the NCA) unless (i) the matter is not solved within a reasonable period of time (6 months) or (ii) adequate interim relief is not available to the complainant in national proceedings.⁶⁶ Furthermore, it is of note that the Commission considers that it retains the possibility to take action, in exceptional circumstances where the case involves substantial Community interests.⁶⁷

Arguably, a similar *lex specialis* approach has been implemented in other network industries. In the field of energy, for instance, the *HFC Bank plc/British Gas Trading Ltd* case provides an illustration of this principle.⁶⁸ In 1997, HFC Bank and British Gas Trading entered into a Joint Venture agreement for the launch of the so-called Goldfish card in the United Kingdom (hereafter, the "UK"). The Commission identified a risk of tying and wrote to Ofgas (the UK gas regulator), asking for its view on the agreement. Ofgas replied that it was already investigating the case. The Commission then decided to stay proceedings and to await Ofgas final decision. Following the finding by Ofgas that the risk of tying was unlikely, the Commission decided to close the case. This case provides a clear illustration that the Commission gives priority to the specialized authority and stays proceedings when a NRA is already investigating a case. It also shows that the Access Notice's doctrine can be transposed in the field of energy.

A further illustration of the Commission's tendency to promote a *lex specialis* principle can be found in the *Synergen* case. In the course of the year 2000, several joint venture agreements between ESB (the Irish dominant electricity producer) and Statoil (a Norwegian gas company) were notified to the Commission. To address the competition concerns raised by the Commission under Article 81(1), the parties offered various commitments. The interest of the case lies in the fact that the Commission relied on the

⁶⁴ See Commission Notice on the Application of Competition Rules to Access Agreements in the Telecommunications Sector OJ C 265 of 22 August 1998, at §§13, 18 and 22. The Commission's document does not, in any case, modify the state of the law. In line with the ECJ's case law, the Commission's notice recalls the importance that NRAs do not approve any practice or agreement contrary to the competition rules. Also, it confirms that competition rules and sector specific regulation apply cumulatively and that compliance with one does not ensure compliance with the other. These questions had already been evoked in the Guidelines on the application of the competition rules to the telecommunications sector in 1991.

⁶⁵ Id. at §§ 28 and 150.

⁶⁶ Id. at §§30 and 33.

⁶⁷ Id. at §31.

⁶⁸ See European Commission, XXVIIth Report on the Application of Competition Rules in the European Union, 1997, at p.108.

Irish electricity regulator (the Commission for Electricity Regulation) for carrying out the settlement negotiations and for ensuring the monitoring of the remedies.⁶⁹

The development of a *lex specialis* doctrine between the Commission and NRAs across different network industries is to be welcomed for a variety of reasons. First, the priority given to the specialized authority in case of parallel procedures lessens the risks of duplication of proceedings. Second, regulatory matters and in particular access regulation often involve pricing issues (and more generally access conditions issues) which NRAs are better placed to deal with than competition authorities.⁷⁰ Third, access regulation may require regular adjustments that NRAs are better placed to ensure through their continuing oversight of a specific industry. Fourth, NRAs are generally required to take decisions within tight timeframes (e.g. four months in the field of telecommunications in a case of dispute, two months in the field of energy, ten days in the field of rail) whereas a competition authority is not due to respect time limits when investigating complaints.⁷¹

In spite of the development of a *lex specialis* relationship between the Commission and NRAs, three points remain, however, unclear. First, the Commission's practice offers no guidance on the question of the relations between NCAs and NRAs (whether a similar principle should apply in case of parallel proceedings before national authorities).⁷² Second, the Commission gives no clarification about the concept of "exceptional circumstances". Third, the Commission does not explain how it will act if the NRAs intervention leaves competition concerns.

2.2 Mechanisms to Avoid the Duplication of Proceedings at the National Level

Because it is not clear whether a similar *lex specialis* principle applies at the MS level, the risk of multiple proceedings before NRAs and NCAs remains high. To address this issue, most MS have, however, spontaneously designed cooperation procedures at the national level. These cooperation mechanisms either take the form of law, and/or take the

⁶⁹ See Commission Press Release IP/O2/792 of 31 May 2002, "Commission clears Synergen Venture between ESB and Statoil following strict commitments". A similar approach has been followed in the Newcorp/Telepiu merger where a number of commitments were placed under the monitoring and enforcement of the Italian media authorities, i.e. the Ministry of Communications of the Republic of Italy and the Autorità per le Garanzie nelle Comunicazioni. See infra note [____].

⁷⁰ NRAs are better placed to decide over access pricing and access conditions because of their expert knowledge of the industry, the important volume of data they handle and the large amount of resources they can dedicate to these issues. See OECD, Relationship between Regulators and Competition Authorities, DAFNE/CLP(99)8 at p.8., available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>. Also, access pricing issues involve a number of policy making elements (investment incentives etc.) which go beyond the mission of a competition authority. For a sceptical view of competition authorities taking decisions in terms of pricing, see Richard Whish, *Competition Law*, 4th Ed., (2001) Butterworths, at p.480. See also P. Larouche, supra note [____] at pp.259 and 319.

⁷¹ See Article 20 of Framework Directive, supra note [____]; Article 23(5) of Directive 2003/54, supra note [____]; Article 23(5) of Directive 2003/55, supra note [____]; Article 21(5) of Directive 2001/14, supra note [____] on scheduling disputes before the infrastructure manager. See also, A. Laget-Annamayer, supra note [____] at p.362, who underlines that a main advantage of the dispute settlement systems before NRAs is the short time limits within which a settlement must be reached.

⁷² This issue will become increasingly problematic in light of the modernisation of competition law.

form of “agreement”, “protocols” or “memorandum of understandings” between NCAs and NRAs.⁷³

A first mechanism that exists in most MS requires NRA to inform and/or seize the competition authority when the former has knowledge of anticompetitive practices in the sector they regulate.⁷⁴ For instance, in 2000, the ART (the French telecommunications regulator) examined the tariffs charged by France Telecom for a number of fixed line services. The ART informed the Competition Council (the French NCA) that the commercial offer was likely to constitute an abuse of a dominant position and decided to defer the case to the latter.⁷⁵ Ultimately, the Competition Council came to the conclusion that France Telecom's behaviour could be qualified as an abuse of a dominant position and imposed provisional measures on France Telecom.

Reciprocally, a second mechanism requires NCAs to communicate with the NRA when the former are called to rule on a dispute that falls within the jurisdiction of the latter. The intensity of this collaboration is not the same in all cases. In a majority of cases, this leads to the consultation of the NRA and/or to the possibility of producing a report.⁷⁶ In other cases, the NCA will rely on the NRA for some aspects of its decisions.⁷⁷ Finally, in some circumstances, this leads to the referral of the case by the NCA to the NRA.⁷⁸

Third, even MS that opted for the option of entrusting the regulator with the enforcement of the competition rules have designed cooperation mechanisms. In the UK, a rule of priority determines which of the NRA or NCA must deal with the case and reciprocal

⁷³ In the telecommunications sector, in Spain, a number of procedures are organized through legislative measures, i.e. a Royal Decree Law 6/1996 of as replaced by Act 12/1997 of 24 April on the liberalisation of telecommunications. In Finland and in the Netherlands, these issues are dealt with under an agreement/protocol between the competition authority and the NRA.

⁷⁴ See for instance in the telecommunications sector, the requirements of the law in Italy, Spain or France. See A. Laget-Annamayer, supra note [____] at p.435. See also, in the Energy sector, the requirements of the CRE, C. Lemaire, supra note [____] p.377. Also, NRA may consult NCA when apply competition law concepts within the implementation of their regulatory missions. The regulator must obtain consent of the competition authority to take some decisions or, at least, is under the duty to consultation, in Germany, for the definition of the dominant position and the delimitation of markets. See A. Laget-Annamayer, supra note [____] at p.436.

⁷⁵ See Decision 00-MC-19 of the Conseil de la Concurrence, 5 December 2000 relative à une demande de mesures conservatoires présentée par l'Autorité de Régulation des Télécommunications. Available at <http://www.conseil-concurrence.fr/>

⁷⁶ e.g. in France, Italy, Spain. In France, the ART is regularly consulted by the NCA for advices within the context of disputes between competitors. See, for instance, Avis 03-64 of the ART of 14 January 2003 relating to anticompetitive practices by France Telecom, available at www.art-telecom.fr

⁷⁷ An example of this can be found in the field of merger control where a competition authority could entrust the monitoring of commitments to the NRA. In the recent *Newscorp/Telepiù* case, the Commission entrusted the monitoring of the commitments submitted by the parties for obtaining clearance to the Italian telecommunications regulator. See, Case COMP/M.2876 –*Newscorp/Telepiù* of 2 April 2003 C (2003) 1082 final; Cristina Caffarra and Andrea Coscelli, “Merger to Monopoly: *Newscorp/Telepiù*”, (2003) 11 *European Competition Law Review*, 265.

⁷⁸ See, C. Lemaire, supra note [____] p.378. However, the author considers that there is no duty, for the NCA to stay proceedings and to refer the case to the NRA. Two proceedings can thus take place. See Laurence Idot, “Règles de concurrence et régulations sectorielles”, in *La régulation des services publics en Europe*, (1998) TEPSA.

consultation requirements are set up. In case of conflict between the two authorities, the minister determines which authority shall have jurisdiction.⁷⁹

A majority of observers consider that these procedures have worked efficiently and that NRAs and NCAs do, in practice, effectively collaborate.⁸⁰ At the EC level, awareness of the usefulness of such procedures is more recent. The second generation Directives in the field of telecommunications provide that:

“Member States shall ensure, where appropriate, consultation and cooperation [...] between those authorities [i.e. the NRAs] and national authorities entrusted with the implementation of competition law [...] on matters of common interest. Where more than one authority has competence to address such matters, Member States shall ensure that the respective tasks of each authority are published in an easily accessible form.”⁸¹

The Access Directive also contains interesting provisions. The recital’s formulation implicitly acknowledges the existence of a problem where cumulative action by NRAs and NCAs would lead to the imposition of overlapping and burdensome obligations. NRAs and NCAs are called to cooperate on issues of access regulation and shall coordinate their action to ensure that the most appropriate remedy is applied.⁸² The EC’s clutch on cooperation between NRAs and NCAs remains nonetheless limited to the telecommunications sector as well as constrained by the “institutional autonomy” principle.⁸³

In sum, the development of cooperation mechanisms at both EC and national levels certainly limits most of the risks of multiple proceedings before NRAs and competition authorities (Commission and NCAs). A recent case suggests, however, that in spite of these mechanisms, NRAs action could be subsequently superseded by a competition authority’s action on the ground that it would leave competition concerns.

IV. Remaining Hypothesis of Cumulative Jurisdiction of NRAs and Competition Authorities

The recent Commission’s decision in the *Deutsche Telekom* case provides a good illustration of the possibility of duplication of proceedings before a NRA and a

⁷⁹ See A. Laget-Annamayer, supra note [____] at p.434. Even in the UK, conflicts have been reported.

⁸⁰ See Bruno Lassere, “Competition or Regulatory Authority? European or National Level?,” in Claus Dieter Ehlermann and Louisa Gossling (Eds.) *European Competition Law Annual 1998: Regulating Communications Markets*, (1999) Hart Publishing, at p.635.

⁸¹ See Article 3(4) and Article 3(5) of the Framework Directive, supra note [____]. However, the cooperation mechanisms are not far reaching. Interaction between NRAs and NCAs is simply envisioned under the form of exchange of information. It is required that the receiving authority should ensure the same level of confidentiality than the originating authority.

⁸² See Recital 13 of the Access Directive, supra note [____].

⁸³ See on this principle, M. L. Struys, “Le droit communautaire et l’application des règles procédurales nationales”, *JTDEuropéen*, 67, Mars 2000, p.1.

competition authority (1).⁸⁴ The approach followed by the Commission in this case suffers a number of drawbacks (2).

1. The *Deutsche Telekom* Case

The *Deutsche Telekom* decision is a topical example of a situation where a NRA applies a sector specific remedy but leaves a number of competition concerns. This case concerned the prices charged by Deutsche Telekom (hereafter, “DT”) to its competitors and consumers for access to the local loop between the end of 1998 and 2002. The local loop is the physical circuit between the consumer’s premises and the telecommunications operator’s local switch. This infrastructure is generally controlled by the incumbent operator and new entrants need access on fair and non discriminatory terms to the loop in order to offer retail services to consumers and compete with the incumbent. In March 1999, several of DT’s competitors had lodged complaints before the Commission arguing that DT’s prices for access to the local loop were incompatible with Article 82 EC.⁸⁵ The prices charged by DT for competitors’ access on the wholesale local loop market were higher than the prices it charged to its own subscribers on the retail market. DT thus prevented new entrants from competing on the retail local loop market and deterred entrance on the market.⁸⁶

DT argued that its conduct could not be held as an infringement of Article 82 EC in that its tariffs had previously been approved by the German telecommunications regulator, the RegTP.⁸⁷ DT considered that the Commission was not entitled to proceed against charges which have been the subject of regulatory decisions at the national level, and that if there was a violation of EC law, the appropriate course of action was the initiation of Article 226 EC infringement proceedings against Germany in spite of a direct procedure against the undertakings’ whose charge had been approved by the regulator. These arguments were rebutted by the Commission:

“the competition rules may apply where the sector specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distort competition”.⁸⁸

In fact, the Commission observed that the charges for wholesale and retail access to the loop were regulated but that DT was still left with a commercial discretion which allowed it to restructure its tariffs in order to put an end to the margin squeeze.⁸⁹ DT could have

⁸⁴ See Commission Decision of 21 May 2003, COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom AG*, OJ L 263 of 14 October 2003, p.9. See also, Robert Klotz and Jérôme Fehrenbach, “Two Commission Decisions on Price Abuse in the Telecommunication Sector” (2003) 3 *Competition Policy Newsletter*, 8.

⁸⁵ This confirms that competing operators seek to use all procedural avenues for

⁸⁶ This is called a margin squeeze because even if competitors are as efficient as the infrastructure owner, they have to bear the costs of access.

⁸⁷ Let us recall that the RegTP is the German NRA in the telecommunications sector. Pursuant to German law, the pricing of access to the local loop must be geared towards costs and have to be approved by the government.

⁸⁸ See Commission Decision, *supra* note [_____] at §54.

⁸⁹ See Commission Decision, *supra* note [_____] at §57. This solution is in line with the ECJ case law on the restrictions of competition induced by State interventions. In short, competition rules can be enforced

avoided the price squeeze by increasing the retail charges, which DT actually did but in insufficient volumes. In addition, even when it enjoyed a limited commercial discretion, DT could have raised the prices of other non regulated charges. Thus, the Commission considered that DT's behaviour was the main source of the restriction of competition and that Article 82 EC was the appropriate course of action. DT was condemned to a € 12.6 million fine. The prior application of a regulatory remedy was not admitted as a cause of justification. It was merely taken into account as a mitigating factor for the calculation of the fine.⁹⁰

2. Drawbacks of the Commission's Approach in *Deutsche Telekom*

The DT case provides a good example of the application of a sector specific remedy by a NRA which nonetheless leaves concerns with regards to competition rules. The approach taken by the Commission is in line with the provisions of the Access Notice because the Commission let the RegTP deal with the case. However, the decision to subsequently open new proceedings against the regulated undertaking can be criticized in that it entails a series of negative consequences for regulated entities as well as for regulators.⁹¹ As far as the operators are concerned, the approval of tariffs, access conditions, or the settlement imposed by a NRA does not mean that they cannot be prosecuted a second time on similar issues, before a competition authority. In addition to high legal uncertainty, this could raise transaction costs through a multiplication of expensive litigation, increase further delays and have a disincentive effect on investments.⁹² Also, the possibility that two remedies (potentially different) be imposed on a same operator with regards to a single situation could prove disproportionate, a situation that the Commission explicitly wishes to avoid in the Access Directive.⁹³

As far as complainants are concerned (e.g. competitors in case of a settlement on access conditions which they consider advantageous to the incumbent), they are entitled to bring a new action against the regulated operator before a competition authority, provided the sector specific remedy left sufficient commercial freedom to the latter.⁹⁴ The risk of procedural abuse cannot be excluded because competitors will legitimately use all available means to obtain a more advantageous decision. Furthermore, it is questionable whether the concept of commercial freedom is appropriate because (i) it is unclear how much freedom the sector specific remedy must leave to the regulated entity and (ii) a

against undertakings as long as they keep some discretion. However, it shall be discussed whether these principles should be transposed in the field of regulation. See XXII Report on Competition Policy at §193; See also Michel Waelbroeck and Aldo Frignani, *Commentaire J. Megret, Le droit de la CE, Vol. 4 Concurrence*, 2nd Ed. (1997), at p.149.

⁹⁰ See Commission Decision, supra note [_____] at §212. This led to a 10% reduction of the fine.

⁹¹ See infra.

⁹² See Regulatory Scorecard Report, Jones Day, supra note [_____] .

⁹³ See Recital 13 of the Access Directive, supra note [_____] . Also, the operators that should be submitted to sector specific obligations are incited to ask the NRA the imposition of detailed and rigid remedies to bear no responsibility of an infringement of competition law. This is not in harmony with the approach trying to favour proportionate and flexible regulation.

⁹⁴ See A de Streel, R. Queck et P. Vernet, supra note [_____] evoking the risks of forum shopping and duplication of proceedings, p.260. It can be done so before competition authorities (Commission and NCAs) as well as national courts.

substantial number of regulatory remedies do leave some margin of manoeuvre to regulated entities.⁹⁵

With regards to NRAs, the decision can also be criticised. In *Deutsche Telekom*, the Commission refused to challenge the NRAs' decision directly, although a parallel complaint had been introduced on the basis of Article 86 EC.⁹⁶ However, one could consider that in the present case, the RegTP bears some responsibility for the existence of the price squeeze.⁹⁷ The refusal, by the Commission, to target NRAs when they bear some responsibility in the infringement of the EC competition rules is not an adequate solution. Indeed, a status of immunity is not likely to give incentives to NRAs to take due account of the competition provisions of the EC Treaty. This could result in the development, side by side, of inconsistent decision making practices which could in turn prove investment-discouraging.⁹⁸

Finally, on public policy grounds, the Commission's position is debatable. The successive intervention of different authorities on a similar matter duplicates investigative resources. In addition, it could slow the pace of implementation of regulatory reforms and inhibit the transition to increased competition.⁹⁹ Furthermore, there is some uncertainty as to whether the Commission's line of action can equally be followed by NCAs. Unfortunately, there does not seem to be any theoretical limit to the transposition of these principles in the MS, since NCAs are equally entrusted with the duty to apply Article 82 EC.

V. Alternatives Approaches to Cumulative Jurisdiction

For the reasons that have been outlined, the principle of cumulative application of sector specific regulation and competition rules by two sets of institutions intervening successively is not satisfactory. A two tier approach is suggested to neutralise the shortcomings of this principle. The first tier of the solution consists in refraining from introducing competition proceedings against operators when a sector specific remedy has been applied to them (1). The second tier is to prefer to target the NRAs' instead of the operators where the sector specific regulation remedy has been applied but leaves competition concern (2).

⁹⁵ This is particularly true if the regulatory remedy took the form of guidelines, but is probably also true when NRAs approve access conditions if NRAs, in practice, try to limit the straightjacket effects of their decisions.

⁹⁶ See Commission Decision at §2, supra note [_____]

⁹⁷ This is confirmed in the Commission Decision at §165: "Accordingly, each time DT submitted applications for the approval of adjustments to charges under the price cap system, the regulatory authority made only a rough assessment to check that the applicable index figures were respected and that the proposed charges did not manifestly breach the requirements of the Telecommunications Act. In the majority of all six tariff adjustment applications between 1998 and 2001 this was the case". This statement shows that the intensity of the RegTP control over DT's tariffs was extremely limited and could accordingly be criticized.

⁹⁸ See OECD, supra note [_____] at p.10.

⁹⁹ Id.

1. Non Enforcement of Competition Rules where a Sector Specific Remedy has been Applied

As has been said, the *Deutsche Telekom* decision places a heavy burden on regulated entities (i.e. risks of cumulative remedies, legal uncertainty and duplication of proceedings).¹⁰⁰ To avoid these risks, a suggested solution is that where a sector specific regulation remedy is available, competition rules should no longer be enforced against the operator. A solution of this kind was recently adopted by the US Supreme Court in the *Curtis v. Trinko* case (hereafter, “*Trinko*”).¹⁰¹

In short, Verizon, one of the US local incumbents, is required pursuant to sector specific legislation, to provide access to its operations support systems (OSS). OSS are interfaces which allow competitors to fill in customer’s orders. Competitors send orders for service through an electronic interface with Verizon’s ordering system, and Verizon completes certain steps in filling the order and subsequently confirms back through the same interface. Access to Verizon’s OSS is thus necessary for new entrants to provide services to customers. In late 1999, competitors complained to regulators that a number of customers’ orders were going unfilled, in violation of Verizon’s obligations to provide access to OSS. A settlement was reached pursuant to which Verizon accepted to implement a series of regulatory remedies for ensuring access to OSS functions. Shortly after the settlement, a complainant (Curtis V. Trinko) filed a class action lawsuit before a federal court claiming that Verizon’s conduct was a violation of US antitrust law (i.e. section 2 of the Sherman Act) and the case was eventually brought before the US Supreme Court.

Besides the interesting findings of the Supreme Court with regards to the *essential facilities* doctrine, the ruling states that, even where the sector specific regulation explicitly rejects immunity from antitrust law (as is the case in the EC), it nonetheless must be assessed whether an expansion of the scope of antitrust provisions should be admitted in situations where sector specific remedies can be enforced. The US Supreme Court puts emphasis on the costs of such an expansion through the existence of “false positives” (i.e. false condemnations where purely legitimate actions by an undertaking are held to be an infringement of the antitrust rules). The US Supreme Court also points out the fact that courts of law are ill equipped to deal with the day to day enforcement of the remedies they could impose on the basis of antitrust rules. Hence, the US Supreme Court comes to the conclusion that in fields where sector specific remedies can be applied, it is preferable to refrain from enforcing antitrust rules.

The *Trinko* ruling is an outstanding recognition of a “pre-emption” or “exhaustion” principle in the field of antitrust. Private claims on the basis of antitrust rules should be “exhausted” where a sector specific remedy exists. The rationale behind this is that where a regulatory remedy is available, the benefits from antitrust action are likely to be limited

¹⁰⁰ This is especially true for issues of access regulation where the overlap between competition rules and sector specific regulation is maximal.

¹⁰¹ See 540 U. S., *Verizon Communications, Inc. v. Law Offices of Curtis Trinko, LLP*, (2004) No. 02–682, US Supreme Court of January 13, 2004

and the costs are likely to be significant. In addition, the specificities of US procedural rules led to the fear that an expansion of antitrust liability to regulated sectors would trigger a flood of litigation through the initiation of numerous class action procedures combined with substantial treble damages claims.¹⁰²

The approach followed in the US is appropriate in that it solves the risks of duplication of procedures and of conflicts in terms of decision making. The ruling of the US Supreme Court implies that antitrust law should only have a subsidiary role in regulated sectors, in situations where no sector specific remedies are available.

At this stage, three remarks shall be made. First, a number of elements suggest that the Commission's approach, while apparently at odds with *Trinko*, can be partly reconciled with the Supreme Court's approach. There are some recent indications that the Commission is unlikely to initiate proceedings where sector specific remedies can be applied.¹⁰³ In the *O2/T-Mobile* decision, a notified agreement on infrastructure sharing entailed a risk of foreclosure on sites.¹⁰⁴ However, the Commission voiced no concern in light of the fact, *inter alia*, that a sector specific remedy was provided for by Article 12 of the Framework Directive and could be used by NRAs if a restriction of competition was observed.¹⁰⁵

Second, it is not sure whether the US Supreme Court approach should be roughly transposed in the EC. In some situations, a regulatory remedy may exist but the NRA fails to enforce it. In these cases, the possibility to act on the basis of competition rules could prove extremely useful. The Commission would start the procedure (by, for instance, launching a sector inquiry) in order to bring the failing NRAs' attention on a particular problem. The Commission would subsequently defer the case to the regulator. Eventually, the problem would be handled by the NRA through the application of sector specific remedies. The competition rules are thus only enforced as an "ignition" device. This approach has already been followed in the telecommunications sector with regards to the *pricing of leased lines* inquiry and the *mobile termination charges* inquiry.¹⁰⁶ In the latter case, the Commission launched an inquiry on the pricing of interconnection charges for the termination of calls. The inquiry led to the finding that several PSTN operators

¹⁰² That may, indeed, slow down the pace of regulatory reforms, reduce the efficiency of regulatory schemes, increase legal uncertainty and affect investments in the sector.

¹⁰³ To the difference of the *Deutsche Telekom* case, the following illustrations relate to cases where the Commission refrained from intervening *ex-ante* because sector-specific regulation provisions were available and could be applied.

¹⁰⁴ See supra note [____]. The agreement could have been used as a blocking tactic against competitors to slow down the pace of rolling out their networks.

¹⁰⁵ A similar approach was taken in *BT/MCI I*, where in case of a strategic alliance, the Commission concluded that no conditions or obligations were needed, in view of the national regulatory frameworks to which both parties were submitted. The Commission nonetheless reserved the application of competition rules, if regulatory action proved unsatisfactory. See Commission Decision of 27 July 1994, *BT-MCI* OJ L 223 of 27 August 1994, pp.36-55 at §57. See on this, P. Larouche, supra note [____] at p.312. This suggests, to a certain extent, that the *Deutsche Telekom* case should be read on its facts and arguably, the Commission will only follow this line of action in a narrow set of exceptional circumstances.

¹⁰⁶ See Commission Press Release IP/02/1852 of 11 December 2002, "Prices decrease of up to 40% lead Commission to close telecom leased lines inquiry".

charged mobile operators more than fixed operators for call termination. Given that the sector specific framework provided a remedy for tackling this issue the Commission decided to stay proceedings and shift the investigation to the relevant NRAs.¹⁰⁷ The usefulness of this approach pleads for a partial transposition of *Trinko* in the EC legal order.

Third, the fact that the US Supreme Court approach can be explained by the specific risks attached to antitrust liabilities before US courts of law (class actions and treble damages) does not rule out the possibility, in the EC, to derive several jurisdictional principles from the *Trinko* case. This is all the more true in the current context, where the Commission tends to increasingly promote private enforcement of competition rules before national courts.¹⁰⁸

At any rate, the signals given by the Commission in recent times are contradictory. It is suggested that the Commission should strive towards the recognition of the two following principles:

- (i) when a sector specific remedy has been applied to an operator and leads to an infringement of competition law, competition authorities should no longer enforce competition rules against operators (*Exhaustion* approach) and ;
- (ii) when a sector specific remedy is available and where there is a potential infringement of competition law, competition authorities shall not enforce competition rules (*O2/T-Mobile* approach), unless the remedy is not applied. In that case, competition authorities should initiate the proceedings and subsequently shift the matter to the regulators (*Sector Inquiry* approach).

While the first principle avoids duplication of proceedings and decision making inconsistencies, the second principle presents the advantage that potential market failures are not left unchecked as well as the advantage that the sector specific remedy (arguably the best suited) is applied.¹⁰⁹ One could, however, question what shall happen if a sector specific remedy has been applied but leads to or leaves competition restrictions. The application of the first principle eradicates the possibility of enforcing competition rules against the operator. However, it does not exclude the possibility of acting, on the basis of competition rules, against the NRA or of asking the NRA to revise its position and to extend the remedies coverage so as to tackle remaining anticompetitive concerns. Furthermore, it could be observed against the exhaustion principle that the enforcement of competition rules besides the enforcement of sector specific regulation may be a quite efficient tool for promoting effective regulation. This is a valid point but it seems that it leads to a degree of legal uncertainty and of regulatory costs that is incompatible with the achievement of regulatory efficiency.

¹⁰⁷ See Commission Press Release IP/98/707 of 27 July 1998, “Commission concentrates on nine cases of mobile telephony prices”.

¹⁰⁸ In addition, similarly to the findings of the Supreme Court in the US, the risk of false positives before national courts in the EC should not be underestimated.

¹⁰⁹ See, for a similar point of view, D. Geradin and G. Sidak, *supra* note [____] at p.18.

2. Use of EC law Remedies directed at NRAs Misconceived Decisions

In parallel to the above, several remedies should be used to ensure compliance of the NRAs with competition rules without targeting the operator. First, the NRAs' decision can be directly challenged through appeal channels and eventually lead to an Article 234 EC reference to the ECJ (2.1). A more straightforward solution is action by the Commission against NRAs' decisions on the basis of Articles 226 or 86 EC (2.2).

2.1 Appealing NRAs' Decisions

Under national law, NRAs generally fit within the overall judicial framework. Depending on the judicial structure of each MS, NRAs' decisions can be challenged before ordinary courts of law or special administrative tribunals. National courts will normally ensure that the decisions of NRAs comply with the requirements of national as well as EC law and, in particular, the competition rules of the EC Treaty.¹¹⁰ However, this may not always be the case. Thus, EC directives contain some limited requirements regarding the judicial review of the NRAs. In the telecommunications sector, for instance, the Framework Directive requires that MS put in place an "effective" procedure of appeal which allows for a party affected by the decision adopted by a NRA to have this decision reviewed.¹¹¹ In other sectors, EC legislation leaves more discretion to MS and in some cases, nothing is provided for.¹¹²

A positive feature of setting up appeal procedures is that, ultimately a judgement on the compatibility of the NRA decision with EC competition rules can be reached through an Article 234 EC reference to the ECJ.¹¹³ Indeed, NRAs do not generally possess the attributes necessary for directly bringing a reference to the ECJ. The requirement to set up appeal procedures reintroduces the possibility of having some light cast on the compatibility of a NRA decision with the competition rules. In addition, the interpretation

¹¹⁰ Pursuant to the principle of "procedural autonomy", in the absence of Community rules on the subject at stake, it is for the domestic legal system of each MS to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens enjoy by virtue of the direct effect of community law. See ECJ, 16 December 1976, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, 33/76, ECR 1976, p.1989. See on this principle, Michel L. Struys, "Le droit communautaire et l'application des règles procédurales nationales", (2000) 67 *JT Droit Européen*, 1.

¹¹¹ See Article 4 of Framework Directive, *supra* note [____]: "Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic networks and/or services who is affected by a decision of a national regulatory authority has the right to appeal against the decision to an appeal body that is independent of the parties involved". Also, it is necessary that, where the controlling body is not a tribunal, a further possibility of appeal before a court of law be instituted. This is so in order to safeguard the possibility to ask for a preliminary reference to the Court.

¹¹² In the energy sector, see Article 23(11) of Directive 2003/54, *supra* note [____] and Article 25(11) of Directive 2003/55, *supra* note [____]. Appeal procedures must only be set up for cases of refusal of authorisations, see Article 6(4) of Directive 2003/54, *supra* note [____] and Article 4(3) of Directive 2003/55, *supra* note [____]. In the postal and in the rail sectors, EC legislation does not provide any requirement to set up judicial review mechanisms at the national level.

¹¹³ See e.g. the *Ahmed Saeed* case, where a court had raised the question of the compatibility of a sector specific entity's decision with competition rules.

by the ECJ is a guarantee of lawfulness, which is not necessarily the case with a Commission decision. Nevertheless, the long delays that may result are not fully compatible with the speedy evolution of certain regulated sectors (e.g. the telecommunications sector) as well as with the larger goal of accelerating transition to further liberalisation. Also, it can be subject to question whether courts of law are well placed to rule on NRAs' decisions in highly technical fields. This could prove even more difficult when the assessment requires a combined analysis of both sector specific regulation and competition rules.¹¹⁴

2.2 Action by the Commission against NRA decision

Two routes are potentially available to the Commission in order to bring a NRAs' decision in line with the EC Treaty competition rules. A first route consists in the Commission issuing reasoned opinions pursuant to Article 226 of the EC Treaty (ex-Article 169 EC) if it considers that a NRA's decision violates EC Law. The lack of compliance by the MS in question may serve as a basis for the initiation of legal proceedings by the Commission before the ECJ.¹¹⁵ The doctrine of the combined application of Article 3(g), 10, 81 and 82 EC requires MS to abstain from adopting or maintaining in force measures susceptible of eliminating the "*effet utile*" of these provisions.

A variety of reasons are, however, classically put forward to disqualify this possibility. A first reason is that this doctrine has rarely been used by the Commission. A large majority of the cases alleging a combined infringement of Article 3(g), 10 and 81 or 82 EC have been brought to the ECJ through the preliminary reference channel, in the context of proceedings pending before national courts.¹¹⁶ This is so because the Commission is unlikely to welcome Article 226 EC complaints as it would act as an appeal body against NRAs decisions and that Article 234 EC remains available for such purposes.¹¹⁷ A second reason is that infringement proceedings might prove lengthy and thus poorly suited to remedy a breach of competition law.¹¹⁸

¹¹⁴ The practice, by some MS, to centralize these matters to a specialized chamber within a court of law shall thus be welcomed.

¹¹⁵ In practice, the ECJ and the CFI have never had the opportunity of ruling that a MS infringed EC law because of unlawful action by a NRA. However, there is nothing to prevent that a MS be held liable for unlawful action by a NRA. Indeed, the ECJ's case law makes a very broad interpretation of the categories of public entities that can, on behalf of a MS, be held liable of an infringement of EC law on the basis of Article 226. See ECJ, 22 June 1989, *Fratelli Costanzo SpA v. Comune di Milano*, 103/88, ECR [1989] 1839, See Denys Simon, *Le système juridique communautaire*, 3 ed., PUF, pp.617-619.

¹¹⁶ See José Luis Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law*, (1999), Oxford University Press, at §7.23 and p.263. However, the author does not make reference to the *CNSD* case where the Commission initiated Article 226 EC proceedings against Italy for an infringement of the competition rules. See ECJ, 18 June 1998, *Commission v. Italy*, C-35/96, ECR [1998] I-3851. Also, it shall be noted that most of the cases of combined infringements of Article 3(g), 10 and of the competition rules of the Treaty concern Article 81 and not Article 82 EC.

¹¹⁷ See J. Faull and A. Nikpay, *supra* note [] at §11.60. Also, on questions that have implications with regard to investments, the Commission might be reluctant to initiate Article 226 EC proceedings against MS.

¹¹⁸ See P. Larouche, *supra* note [] at p.294. This does not, however, take into account the fact that generally infringement proceedings are not brought to an end and it is less than sure that procedures against

A second route for action against a NRA decision is Article 86 EC. In *Ahmeed Saeed and Bodson*, the ECJ held that MS measures that contribute to, or impose on undertakings enjoying special rights, a conduct incompatible with Article 81 or 82 EC fall within the scope of Article 86(1) EC. In the *Italian GSM fees* and the *Spanish GSM fees* decision, Ministries' decisions (at the time, in quality of NRAs) that had the clear effect of favouring the incumbent operator by strengthening its dominant position and extending it to new markets was challenged on the basis of Article 86(1) and 82 EC.¹¹⁹ Thus, the Commission is entitled to proceed on the basis of Article 86(3) EC and adopt a decision against a MS and consequently, against a NRAs' action that favours an operator or a class of operators and lead to a violation of the EC Treaty competition rules.¹²⁰

The adoption of a decision on the basis of Article 86(3) has a number of advantages over the adoption of an Article 226 EC reasoned opinion. First, the procedure is quicker because Article 86(3) decisions are immediately binding in their entirety upon the MS to whom they are addressed, and thereby to the MS organs.¹²¹ In the framework of Article 226 EC, a similar effect can only be obtained after a judgment of the ECJ, which takes generally a much longer time. Second, this decision can be invoked by individuals before national courts and can serve as the basis for a claim of damages against the MS under the rule in *Francovich*.¹²² Third, the procedure under Article 86 EC is much more advantageous for private undertakings than that under Article 226 EC. In *Max.Mobil*, the CFI held that while in the case of Article 226 EC the large discretion of the Commission does not allow the complainants to challenge the Commission's refusal to proceed, Article 86(3) EC leaves less discretion to the Commission, and its refusal can be contested through the initiation of annulment proceedings pursuant to Article 230 EC. Thus, the Commission margin of manoeuvre is more limited (although the opportunity of taking a decision is only subject to a marginal control by the ECJ and CFI). Article 86 EC complaints could prove a more efficient route for third parties than Article 226 EC.

Whatever the pros and cons of Article 86 and 226 EC, a number of public policy considerations may better explain why the Commission has, so far, been reluctant to act against NRAs. Given that the infringement procedure is not directed to the NRA but to the MS in which it operates, the former seems to enjoy a certain degree of immunity. Of course, the MS will generally ask the NRA to bring its actions in line with EC law. But

undertakings be shorter than infringement proceedings. Only one case out of five leads to the introduction of an action before the ECJ and the rest is solved after the issuance of a letter of formal notice or of a reasoned opinion. See Denys Simon, *Le système juridique communautaire*, 3 ed., PUF, at p.658.

¹¹⁹ See Commission Decision 95/489 of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy, OJ L 280 of 23 November 1995 pp.49-57 and Commission Decision 97/181 of 18 December 1996 concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain, OJ L 076 of 18 March 1997 pp.19-29.

¹²⁰ Of course, this procedural route will in the future, become less attractive. The number of public undertakings or of undertakings enjoying exclusive and special rights is substantially decreasing in most network industries.

¹²¹ See ECJ, 30 June 1988, *Commission v. Hellenic Republic*, Case 226/87, [1988] ECR-3611 at §§11-12.

¹²² See ECJ 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, Case C 6-9/90, [1991] ECR I-5357. See also for a recent illustration ECJ, 30 September 2003, *Gerhard Köbler v Republik Österreich*, Case C-224/01, not yet published.

this situation creates a tension with the requirement of independence between the government and the NRA as it implies that the government ends up giving instructions to the NRA.

Another limitation of this approach is that, from a policy-making perspective, Article 226 or 86 EC proceedings are unlikely to be initiated by the Commission. In sectors where the “networking” pattern has been followed (such as, for instance, the telecommunications sector), the NRAs are the arm of the Commission for bringing about market liberalisation.¹²³ Thus, the development of conflictual relationships between the Commission and the NRAs may in the long run compromise vital collaboration between both levels. In addition, the initiation of formal legal proceedings may affect the credibility of the NRA with regards to the regulated entities. This is arguably illustrated in the *Deutsche Telekom* case, where the Commission had also been seized on the basis of Article 86 EC but subsequently decided to leave these claims and to proceed solely on the basis of Article 82 EC.

A third limitation of this, is that, from a purely legalistic standpoint, the initiation of proceedings for an alleged infringement of the competition rules could give rise to a difficult conflict between equally ranking norms. It could be considered that the NRA applied the national sector specific rules based on directives adopted pursuant to Article 95 EC and that it acted in full compliance with this provision. Thus, if the legitimate enforcement of sector specific legislation led inevitably to an infringement of the competition rules, it would be difficult to decide which set of rules should prevail. However, a situation of frontal conflict of this kind is extremely unlikely to occur.¹²⁴

For the reasons that have just been given, the Commission’s reluctance to act against NRAs is understandable. Nevertheless, it is submitted that in light of the drawbacks of the *Deutsche Telekom* approach, the Commission should not hesitate to commence

¹²³ In several network industries sectors, the Commission has opted for a model of “managed decentralization” whereby NRAs are entrusted with important regulatory powers with, however, a certain degree of supervision by the Commission. In the telecommunications sector, for instance, the new Framework Directive on electronic communications strengthens the powers of the NRAs, which will be ultimately responsible for defining markets and identifying the operator significant market power to which the heavier regulatory obligations contained in the specific directives will apply. In exchange for the increased discretionary powers granted to NRAs, the directive provides for a cooperation mechanism whereby whenever a NRA intends to take a specific measure in a field where it is granted a certain margin of appreciation (definition of the market, analysis of the market, etc.), and whenever this measure is liable to affect trade between MS, it has to inform the Commission and the other NRAs. The Commission as well as the other NRAs may then make comments to the relevant NRA concerned within a certain period of time. The NRA has to take the utmost account of these comments when adopting its measure. In some cases, the Commission can even force the NRA to withdraw its draft measure. In addition, cooperation between authorities has been further institutionalized with the setting up of formal network. A Commission’s decision of July 2002 established a European Regulators Group (ERG) for Electronic Communications Networks and Services with a view to ensure the consistent application of the regulatory framework, see *supra* note [____]. In the electricity and gas sectors, a similar ERG has been set up, see *supra* note [____]. The networking approach is, however, more limited than for telecommunications. The EC framework in the field of energy does not set up far reaching procedures for ensuring cooperation between NRAs.

¹²⁴ In *Deutsche Telekom*, for instance, there was clearly a possibility to comply with the two sets of rules.

proceedings directed at NRAs. An encouraging illustration of this has been recently reported in the telecommunications sector. The Commission has evoked the possibility of using Article 226 EC to act against NRAs enforcing national sector specific legislation that is contrary to the EC framework.¹²⁵ Pushing this a step further, the Commission could act against NRAs that do not comply with competition rules. It shall be recalled, in that respect, that during the year 2000, the Commission had already evoked the possibility of introducing actions against NRAs' decisions that would be contrary to EC competition rules.¹²⁶

VI. Conclusive Remarks

The best approach for limiting conflicts and regulatory inconsistencies between competition authorities and NRAs is to propose the implementation of institutional reforms. A first option that was implemented in the UK is to entrust NRAs with the power to actively enforce the competition rules. This option was also explicitly considered in the postal sector where Directive 97/67 provides that NRAs may apply EC competition law. The problem of this approach, however, is that in the long run two diverging approaches to competition law (i.e. the NRA's approach, on the one hand and the NCA's approach, on the other hand) could progressively emerge.¹²⁷ Also, it does not eradicate the risk of multiple proceedings, because two entities remain competent. For these reasons this option has been criticized.¹²⁸

A second option is to set up the NRA as a division/department of the NCA. The main advantage of this approach is that it eliminates the problem of duplication of proceedings (one stop shop) and consequently limits transaction costs for operators. Also, it limits the risks of regulatory inconsistencies. Does that amount to say that this is the best solution?

¹²⁵ Recently, the Finnish Telecom Authority (hereafter, "Ficora") notified several measures (i.e. market definition, designation of Significant Market Power operators and imposition of remedies) to the Commission on the basis of article 7 of the Framework Directive. The Commission made comments in early 2004 announcing that the remedies proposals were not in line with EC sector specific legislation. Given that the Framework Directive does not entrust the Commission with the power to invalidate measures proposed by NRAs, the Commission announced that would not hesitate to commence 226 proceedings for bringing Ficora in line with EC sector specific regulation requirements. It is not clear whether the Commission intends to develop such practice. The solution might instead have been motivated by the specific features of the case, and in particular, that the problems were of a legislative nature (Ficora bound by Finnish rules of transposition that define remedies in contrariety with EC framework). See on this, European Telecoms Newsletter, Arnold & Porter and <http://forum.europa.eu.int/Public/irc/info/ecctf/home>

¹²⁶ See Communication from the Commission, "Unbundled Access to the Local Loop: Enabling the Competitive Provision of a Full Range of Electronic Communication Services, including Broadband, Multimedia and High Speed Internet", JOCE C 272 of 23 September 2000, pp.55-66 at §6.

¹²⁷ See, for instance, Santiago Martinez Lage and Helmut Brokelmann, "the Respective Roles of Sector Specific Regulation and Competition Law and the Institutional Implications", in C. D. Ehlermann and L. Gosling, supra note [____]. The authors evoke the danger of a "sector specific body of competition law" at p.662.

¹²⁸ See, on this, Damien Geradin and Michel Kerf, *Controlling Market Power in Telecommunications - Antitrust vs. Sector Specific Regulation*, (2003) Oxford University Press, at pp.214-216 and pp.350-352. See also, OECD, Relationship between Regulators and Competition Authorities, DAFPE/CLP(99)8, supra note [____] at p.30.

This is not sure. In a system of this kind, specific issues of sector specific regulation might be neglected (universal service, investment incentives etc.). In addition, this approach only internalizes problems. Difficulties may thus arise in terms of decision making transparency and difficulties for the authority to reach consensual rulings on controversial issues.¹²⁹

It seems thus, that no institutional approach can guarantee the elimination of potential regulatory inconsistencies and of multiple proceedings. The increasing proliferation of NRAs alongside competition authorities should be accompanied by the adoption of rules clarifying their relationships. Ideally, these rules would apply to all network industries sectors where NRAs have been set up. In terms of substance, the recourse to a *lex specialis* approach and the admission that competition authorities should not target operators when a sector specific remedy has been applied would probably constitute an improvement. The eventual restrictions of competition that could remain should then be treated on a cooperative/integrated mode between competition authorities and NRAs (through for instance, the competition authority asking the NRA to reopen the case). Ultimately, action against NRAs on the basis of the remedies provided for by the EC Treaty could be envisioned.

In any event, the risks described above should rapidly disappear once full liberalisation has been achieved. At this time, NRAs will have become useless. The risks linked to regulatory proliferation will vanish in the dawn of regulatory extinction.

¹²⁹ See Giuseppe Tesaro, “Relations between Regulatory and Competition Authorities in the Communications Industry: the Italian Experience” in C. D. Ehlermann and L. Gosling, *supra* note [___] at p.701.