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**The Competition Law-ization of Enforcement:
The Way Forward for Making the Energy
Market Work?**

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Abstract

The paper develops the concept of competition law-ization of EU regulation and applies it to current and forthcoming rules of EU energy regulation. “Competition law-ization” concerns the institutional structure of EU regulation. It consists of three aspects, namely (i) direct access to regulatees, i.e. the ability to speak directly to undertakings without the intermediation of Member States’ structures, or with as little intermediation as possible; (ii) networked enforcement, i.e., the creation of an orderly European apparatus that enforces EU law under the direction of the Commission; and (iii) private enforcement, i.e. the ability of private undertakings and individuals to enforce their rights, thus effectively patrolling the market. These aspects have been imported from competition law into EU telecommunication regulation and the result has been successful. The paper argues that competition law-ization could remedy some of the shortcomings of liberalization in the European energy sector. The recent proposals to reform EU energy regulation are assessed in the light of competition law-ization. Overall, the proposals can be seen as going in the direction of competition law-ization, but unbundling is criticized as a one-off structural measure that is incapable of giving rise to a permanent structure of rights that can be conducive to more effective regulation.

Keywords

competition law; regulation; energy; telecommunications; institutions; effectiveness

I. Introduction*

Visitors to Saint Peter Square in Rome can admire two statues of Saint Paul and Saint Peter. According to a popular legend, apart from their artistic value, the statues' poise with Saint Peter's finger pointing towards the horizon and Saint Paul's hand indicating the ground, disguises an inconvenient truth of the Catholic church: rules are made in Rome, but they are meant to be applied elsewhere. Divorce between rule-making in Rome and observance or the lack thereof in the catholic world suggests an instructive parallel with the EU 'classic' architecture.

From a legal perspective, the EU too is based on centralized rule-making in Brussels and decentralized enforcement, where, as in the case of Directives, a legislative measure passed in Brussels is handed down to Member States' authorities.¹ This structure, though, creates an effectiveness problem in the EU. Through the years, several tools and techniques have been deployed to overcome this problem.² The aim of this paper is to illustrate one of such techniques, namely competition law-ization, and to explore the ways in which competition law-ization could address the effectiveness crisis besetting EU energy regulation, given that, as explicitly acknowledged by the Commission Sector Inquiry,³ after 10 years of energy liberalization, the results are still disappointing and, indeed, the recent proposals to set in motion the EU legislative machinery for the third time, start from the premise that "*new legislation is needed in order to resolve the structural failing of the electricity and gas market in a number of areas*".⁴

The concept of competition law-ization is explained in Section II. Section III discusses competition law-ization of EU telecommunications regulation. Section IV deals with possible aspects of competition law-ization of EU energy regulation. This Section also discusses the recent proposals by the Commission in the light of competition law-ization. Section V offers concluding remarks.

II. At the Roots of Competition Law-Ization: Competition Law, Institutional Design and Effectiveness

Competition policy has been so fundamental to the construction of the EU that it was already enshrined in the EC Treaty.⁵ If one considers that the Commission obtained the powers needed to

* An earlier version of this paper was presented at the Florence School of Regulation Regulatory Round Table that took place in Florence on May 10, 2007. I am very grateful to my discussants, François Lévêque and Mel Marquis, and to Mark Thatcher, Leigh Hancher, Jon Stern and Nils-Henrik von der Fehr for their useful comments and suggestions. Comments from an anonymous referee are also gratefully acknowledged. My colleague and friend Conor Clyne provided editorial assistance. All errors remain of course my own.

1 For recent studies on the EU institutional structure, see M. Egberg (ed.), *Multilevel Union Administration-The Transformation of Executive Politics in Europe* (New York: Palgrave MacMillan, 2006) and G.P.E. Walzenbach, *European Governance* (Aldershot: Ashgate, 2006). See also G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2005) and 'The Credibility Crisis of Community Regulation', *Journal of Common Market. Studies*, 38(2) (2000), 273.

2 See, e.g., F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', *Modern Law Review*, 56:1 (1993), 19. See also M. Cappelletti, M. Secombe and J. Weiler, *Integration through law: Europe and the American federal experience, Vol. 1, Methods, tools and institutions* (Berlin: Walter de Gruyter, 1986).

3 European Commission, *DG Competition report on the energy sector inquiry* (SEC(2006)1724), dated January 10, 2007.

4 See the Commission background note, MEMO/07/361 (available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/361&format=HTML&aged=0&language=EN&guiLanguage=en> and the package of five legislative proposals announced on September 19, 2007 (http://ec.europa.eu/energy/electricity/package_2007/index_en.htm).

5 For an overview of the history of the application of the competition rules, see Tesouro, 'Some Reflections on the Commission's White Paper on the Modernisation of EC Antitrust Policy' in C. D. Ehlermann and I. Atanasiu (eds.),

enforce the competition law provisions already in 1962,⁶ competition policy is 45 years old. Therefore, one could argue that competition law effectiveness is rather due to its age and that other, less seasoned policies, need time to mature in a similar manner.

Although there is some wisdom in this argument, it ultimately implies that different EU policies suffer from lack of communication or that an older, grey-haired policy, such as competition law, has nothing to say to the younger off-springs on the European scene. This paper starts from a different premise whereby newer policies, notably EU telecommunications regulation, heed the advice of the older competition law policy. The communication between the two, it is argued, has been so intense as to result in the competition law-ization of EU telecommunications regulation.

Competition law-ization designates the process whereby certain institutional features in the enforcement of EU telecommunications regulation have been imported from the enforcement of competition law, *mutatis mutandis*. Competition law-ization is relevant in the context of the present paper because it is the institutional response to a problem of effectiveness that has the potential to spread to EU energy regulation. As a matter of fact, the Commission itself acknowledged in its 2007 *Communication on Prospects for the Internal gas and electricity* that some of its proposals for a new institutional structure of regulation were based “on the approach already used in the electronic communication sector”.⁷ The same statement was reiterated in the important *Communication on An Energy Policy for Europe*,⁸ which was later endorsed by the Council on March 8/9, 2007.

In order to deal with the competition law-ization of EU telecommunications regulation and its potential application to EU energy regulation, it is expedient to first deal with the enforcement of competition law as it is the very origin of competition law-ization. In this respect, this section will offer a necessarily truncated view of competition law. This is because the purpose of the section is to highlight certain institutional aspects of competition law enforcement that have been later used to improve the effectiveness of EU telecommunications regulation and that may eventually become relevant for EU energy regulation. With this purpose in mind, it will be argued that, based on the institutional structure of competition law enforcement, there are three conditions for competition law-ization, each of which is discussed below.

1. Direct Access to Regulatees

The EU competition law provisions are enshrined in the EC Treaty.⁹ Among secondary legislation, the EC Merger Regulation is noteworthy for it significantly complements the array of Commission powers

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European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy (Oxford/Portland, 2001) 259; see also D. Gerber, “The Transformation of European Competition Law?”, *Harvard International Law Journal*, 35(1) (1994), 97.

6 See *Council Regulation No 17 of 6 February 1962 — First Regulation Implementing Articles 85 and 86 of the Treaty* [1962] OJ L13/204.

7 See COM(2006) 841 final, dated January 10, 2007, where the Commission stated: “It is also essential to ensure that decisions at national level do not have an adverse effect on the aspects most critical for market entry and the evolution towards an EC internal market, respectively for gas and electricity. To this effect, certain individual national regulatory decisions, in particular as regards cross border issues and the effective development of competition, should be notified to the Commission. This structure is already used in relation to ... Article 7 of the Electricity Regulation (EC) No 1228/2003 and in the electronic communication sector since 2003...” (emphasis supplied), p. 13. See also fn 26 of this Communication.

8 See COM (2007) 1, dated January 10, 2007. The Commission considered changes to the regulatory structure by “reinforcing collaboration between national regulators by notably requiring Member States to give national regulators a Community objective, and introducing a mechanism whereby the Commission could review some decisions of national regulators which affect the Internal Energy Market” and in fn 13 it added that “this is based on the approach already used in the electronic communication sector and in relation to exemptions for third party access for new gas and electricity infrastructure” (p. 8).

9 EC Treaty Articles 81, 82, 86, 87.

granted under the Treaty provisions.¹⁰ Assuming that these provisions are ‘the law in the books’, the effectiveness problem of EU competition law then becomes: ‘how to make law matter’.¹¹ Competition law is unique in the EU landscape because the Commission is entitled to have direct access to its regulatees.¹² In other words, unlike the other parts of the EU architecture, when making use of the competition law provisions, the Commission has the power to interpret the (rather general) provisions, issue decisions that are directly binding for undertakings and to impose fines. In this respect, the Commission’s role in the field of competition law is akin to that of a classic regulator.¹³

Direct access to regulatees is a first and fundamental condition for effectiveness insofar as it gives to the Commission the ability to dispense with Member States’ structures to enforce EU norms. It is a truism to state that EU competition law is unique in this respect and that its ability to directly address regulatees cannot be replicated in other fields. Yet, competition law-ization of other domains means precisely the attempt to approximate the direct access to regulatees that is a key aspect of competition law enforcement. Indeed, as it will be shown below, the competition law-ization of EU telecommunications regulations implies devising a mechanism whereby the Commission is able to engage in a direct dialogue with regulatees, albeit through the filter of National Regulatory Authorities (“NRAs”).¹⁴

Thus, a first feature of competition law-ization can be described as the Commission’s ability to establish a direct contact with regulatees, without the intermediation or, *rectius*, with as little as possible intermediation, from Member States’ structures.

2. Decentralization and Central Oversight: Networked Enforcement

To be able to regulate European undertakings directly, but not having enough staff and resources to do so, hardly seems like a recipe for effectiveness. In this respect, EU competition law is a policy that is permanently at war with itself, to paraphrase the title of Robert Bork’s book,¹⁵ for the wide powers granted by the EU legislature are not matched by its resources. The story of the evolution of the legal techniques devised by the Commission to overcome this mismatch clearly lies behind the scope of this paper. Suffice it to remember the adoption of Regulation 19/1965 and the powers it granted to the Commission to regulate by “block exemption” legislation in order to solve the issue of the 30,000 vertical agreements awaiting an individual decision after notification.¹⁶ For the purposes of defining

10 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

11 See F. Snyder, *cit. supra* fn 2, at p. 1.

12 See F. McGowan, ‘Competition Policy’, in H. Wallace and W. Wallace (eds.), *Policy-Making in the European Union* (Oxford: Oxford University Press, 2000), 115.

13 See C. Scott, ‘Agencies for European Regulatory Governance: A Regimes Approach’, in D. Geradin, R. Muñoz, N. Petit (eds.), *Regulation through Agencies in the EU-A New Paradigm of European Governance* (Cheltenham: Elgar, 2005), 67-88, at 69. See also L. Laudati, ‘The European Commission As Regulator: The Uncertain Pursuit of the Competitive Market’, in G. Majone (ed.), *Regulating Europe* (London: Routledge, 1996), 229.

14 The concept of ‘direct access’ in the context of EU telecommunications is not a strictly legal term. As the Court has made clear in *Vodafone* (order of the Court of December 12, 2007, not yet reported), it is only when the Commission vetoes a decision by an NRA that it is acting in a way that directly affects regulatees for the purpose of standing to sue before the Court. In this paper, the concept of ‘direct access’ is used in a broader sense to indicate the Commission’s heightened ability under competition law and EU telecommunications to enter into contact with regulatees at the national level, compared to the field of energy regulation.

15 R. Bork, *The Antitrust Paradox-A Policy at War with Itself* (New York : Basic Books, 1978).

16 See Council Regulation No 19/65/EEC of March 2, 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [1965] OJ L 36/533. Under Article 1 of Reg 19/65 ‘the Commission may by regulation declare that Article 85(1) shall not apply to categories of agreements to which only two undertakings are party and: (a) – whereby one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market; or – whereby one party agrees with the other to purchase only from that other

competition law-ization, one of these techniques is noteworthy, though, namely cooperation with National Competition Authorities (“NCAs”).

The relationships between the Commission and NCAs have a long history in EU competition law¹⁷ and have been ‘revolutionized’ of late by the adoption of Regulation 1/2003,¹⁸ the so-called ‘modernization’ regulation.¹⁹ Despite the many forms that these relationships have adopted through time, one could argue that one of the rationales behind cooperation remained constant and that is to increase the effectiveness of the Commission in the enforcement of EU competition law. In other words, the Commission has steadily sought to find a match between its ability to regulate directly and the means to do so. The modernization process can thus been interpreted as the latest turn in a story whose common thread is the Commission’s relentless quest for effectiveness.

For the study of competition law-ization, the experience of the cooperation between the Commission and NCAs shows that a second fundamental condition is the ability to achieve a blend of central authority and decentralized enforcement. In some respect, this condition is the mirror image of the ability to regulate directly. The power to confront regulatees directly needs to be assisted by the actual ability to do so and this turns on an issue of resources. Delegation to national structures within a framework that leaves central authority with the Commission has been the effectiveness-driven institutional response of competition law and one that arguably colonized the institutional structures of EU telecommunications regulation. In order to better appreciate this point, it is useful to consider in some detail the specific institutional structure within which cooperation between the Commission and NCAs takes place after modernization, namely the European Competition Network (“ECN”).²⁰

The European Competition Network (ECN): A Closer Look

The ECN was formally set up under the *vires* of Regulation 1/2003. Pursuant to the Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities,²¹ the following general principles apply:

- *“The cooperation within the Network is dedicated to the effective enforcement of EC competition rules throughout the Community”.*
- *“Cooperation between NCAs and with the Commission takes place on the basis of equality, respect and solidarity”.*
- *“The Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding efficiency and consistency. ... The additional powers the Commission has been granted to fulfill its responsibilities will be exercised with the utmost regard for the cooperative nature of the Network”.*

The above already reflects the careful institutional design on which the ECN rests. This is also apparent in the Commission Notice on cooperation within the Network of Competition Authorities

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certain goods for resale; or – whereby the two undertakings have entered into obligations, as in the two preceding subparagraphs, with each other in respect of exclusive supply and purchase for resale’.

17 For a useful overview of the principles underlying these relationships as of 1997, see the *Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 81 and 82 of the Treaty* [1997] OJ C 313/3.

18 See C.D. Ehlermann, ‘The Modernisation of EC Anti-trust Policy: A Legal and Cultural Revolution’, *Common Market Law Review*, 37 (2000), 537.

19 See *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* [2003] OJ L 1/1. On modernisation, see recently A. Komninos, ‘Modernisation and Decentralisation: Retrospective and Prospective’, in G. Amato and C.D. Ehlermann, *EC Competition Law-A Critical Assessment* (Oxford: Hart, 2007), 629.

20 For more information on the ECN, see http://ec.europa.eu/comm/competition/ecn/index_en.html.

21 See http://ec.europa.eu/comm/competition/ecn/joint_statement_en.pdf.

(the “Network Notice”).²² Implementing the principles of Regulation 1/2003 (as set forth in Article 11(6)),²³ the Network Notice provides that the Commission may take up a case from a NCA, thus relieving it of its competence to deal with the case. The Commission’s central role within the network is further buttressed by the conditions under which such power is envisaged, namely

- “*Network members envisage conflicting decisions in the same case*”.
- “*Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgments of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning the assessment of the facts (e.g. market definition), only a significant divergence will trigger an intervention of the Commission*”.
- “*Network member(s) is (are) unduly drawing out proceedings in the case*”.
- “*There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement*”.

The *fil rouge* uniting all these conditions is the Commission’s role as ultimate regulator of the enforcement system. However, the Commission has so far never “*used the possibility of relieving a national competition authority from its competence by initiating formal proceedings under Article 11(6)*”, instead opting for the more soft-spoken solution of submitting comments.²⁴ While it enjoys a pre-eminent role, the Commission strives not to impinge on NCAs’ powers in order to lessen their incentive to cooperate. Indeed, it would be self-defeating if, in the act of seeking relief for its tasks from the NCAs, the Commission were to be left alone because the latter feel that they are being merely used as an instrument.²⁵

Conclusions on Networked Enforcement

‘Networked’ enforcement within a framework that provides for leadership by the Commission is thus a second feature of competition law-ization. Its potential to boost effectiveness is inherent in the multiplication of enforcers as the Commission and NCAs together apply the same set of rules. At the same time, the rules on coordination between enforcers make sure that multiplication does not turn into chaos, as a headless network would lose much of its power if it did not have a system of resolution of conflicts between its members.²⁶ The Commission’s mandate to fulfill this role for the orderly functioning of the network ensures a delicate balance of central oversight in a decentralized system.

This is not to deny that there may be tensions between the Commission and NCAs. In fact, the very care paid to the drafting of the terms of the Network Notice and the Commission’s deliberate attempt

22 [2004] OJ C 101/43.

23 “*The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority*”.

See C. Gauer and M. Jaspers, ‘The European Competition Network Achievements and challenges – a case in point: leniency’, *Competition Policy Newsletter*, 1 (2006), 8, at 9, available through http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_1.pdf

25 According to Wilks, one could go even further and argue that “*the Commission has engineered an audacious coup that has extended its powers, marginalized national competition laws, and corralled the national authorities*”. See S. Wilks, ‘Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?’, *Governance: An International Journal of Policy, Administration, and Institutions*, 18 (2005), 431, at 438.

26 For a description of the way in which coordination is handled, see, e.g., P. Larouche, ‘Coordination of European and Member State Regulatory Policy: Horizontal, Vertical and Transversal Aspects’, in D. Geradin, R. Muñoz, N. Petit (eds.), *Regulation through Agencies in the EU*, cit., fn 13 *supra*.

to avoid using its authority through formal means show eloquently that the network does not rest on a frozen equilibrium. Yet, as likely as they may be, tensions between the components of the network cannot unsettle its underlying rationale, i.e. that effective enforcement of EU competition law requires cooperation between the Commission and NCAs. As a consequence, networked enforcement retains full relevance for competition law-ization.

The emphasis on the need for the Commission to cooperate with NCAs should not lead one to believe that this condition is so overarching as to practically cancel the first one, i.e. direct access to regulatees without Member States' intermediation. This is because one should not mistakenly equate the cooperation between the Commission and NCAs with the kind of cooperation normally required between the EU and its Member States for implementation of EU law. First of all, the Commission and NCAs cooperate with each other to enforce EU law, whereas Member States are required to implement EU law through national measures and in so doing retain a sizeable margin of discretion. Second, the Commission and NCAs form a *European* network, that is to say that NCAs acting within the framework of the ECN form a European structure, thus creating a direct link between the Commission and national administration.²⁷

Much as it is important, the public law angle of competition law-ization should not lead one to forget the role played by private parties as enforcers. This point is discussed below.

3. Private Enforcement

After having embraced modernization, in 2005 the Commission published a Green Paper on damages actions for breach of the EC antitrust rules.²⁸ The aim of the Green Paper was to stimulate private parties to bring actions before national courts for infringement of competition law. Admittedly, private enforcement of EC competition law is an area of “*total underdevelopment*”.²⁹ The Commission itself is deeply engaged in studying the issue further and promised to release a White Paper in early 2008 to pursue the matter further, thus encouraging more private enforcement of competition law.³⁰

The relative novelty of private enforcement in EU competition law should not lead one to shy away from assessing its importance. In fact, private enforcement is so central to EU competition law effectiveness that it forms the third condition of competition law-ization. There are at least two reasons to be optimistic about private enforcement and, in any event, to suggest that private enforcement should not be overlooked in defining competition law-ization.

First of all, one should not forget that competition law, while giving regulatory powers to the Commission and NCAs as public enforcers, also empowers individuals that have suffered injury as a result of anticompetitive conduct to seek redress. In other words, competition law not only punishes wrongful behavior by offenders, but also vests the offended parties with an entitlement to compensation (and/or injunctive relief). This aspect has been buttressed by a line of cases where the Community Courts have emphasized the right of private parties to obtain damages for anticompetitive conduct.³¹ As a consequence, private and public enforcement are “*part of a common enforcement*

27 See Ø. Støle, ‘Towards a Multilevel Union Administration? The Decentralization of EU Competition Policy’, in M. Egberg (ed.), *Multilevel Union Administration*, cit. fn 1 *supra*, 86, where he argues that “*national officials working in competition authorities will see their position as one where they owe allegiance to two principals: their national superiors in the Ministry and the Commission*”, at 100.

28 See SEC(2005) 1732, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0672:FIN:EN:HTML>).

29 See Green Paper, para. 1.2.

30 See <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html>.

31 See Joined Cases C-295/04 to C-298/04, *Manfredi et al* (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:C2006/224/05:EN:NOT>), where the Court reiterated its earlier dictum in *Courage v Crehan* (Case C-453/99), holding that “*as regards the possibility of seeking compensation for loss*

system”, where each undertaking is potentially turned into an enforcement official. This is bound to have a great impact on effectiveness, given that the ability to police the market is increased exponentially.

Secondly, private and public enforcement can develop into a mutually reinforcing relationship or a positive feedback. This may take several forms. For instance, if the Commission and NCAs as public enforcers are very active and issue several decisions, this may raise awareness of competition law principles among the consumers. As individuals become more and more aware of public enforcement and its principles, they and their advisors are more and more likely to seek private antitrust actions.³² The Commission and/or NCAs, once they see that decisions are used in Court, are spurred to keep activity at the same level.³³ In this way, public enforcement delivers legal certainty and uniform guidance that are essential for private individuals who can rely on a stable and well-developed *corpus iuris* to be effectively at their disposal in court.

Thus, private and public enforcement can develop a positive feedback insofar as the former entices the latter, and vice versa. For these reasons, even if private enforcement of competition law is only beginning in the EU, it is nonetheless an important element of effectiveness and represents a third condition of competition law-ization.

III. The Competition Law-ization of EU Telecommunications Regulation

The links between competition law and EU telecommunications regulation date back to the very beginning of liberalization.³⁴ It was the issuance of Directives to clarify the scope of competition law in the field of telecommunication in 1988 and 1990 that paved the way for subsequent legislation and the onslaught to pry open the market throughout the 1990s.³⁵ However, it was not until legislation passed in 2002, the so-called ‘new regulatory framework’, that competition law-ization of telecommunications has become apparent in the structures of enforcement.

Competition law-ization of EU telecommunications regulations stems from three factors: the attempt to forge a direct channel to speak to regulatees in Member States, the creation of a network of enforcers, and the encouragement of private enforcement through the adoption of key concepts from competition law. These aspects are discussed in detail below. Since it is through a specific aspect of the network of enforcers that the Commission can communicate with regulatees, direct access and networked enforcement as conditions of competition law-ization are discussed together. A separate

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caused by a contract or by conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (Courage and Crehan, paragraph 26)”.

32 The *Manfredi* judgment cited above (fn 31) came from a preliminary reference issued by a Justice of Peace in Southern Italy, whose jurisdiction is limited to small claims. This shows the great potential of private enforcement whereby even a lower court is able to discuss antitrust damages and to link successfully with Europe’s highest court.

33 The Commission and NCA may redistribute tasks between themselves and the Commission may even rely on private actions to issue less decisions and more guidance. Even so, the mutually reinforcing character of public and private enforcement remains intact as the Commission and/or NCAs continue to contribute to private enforcement through means other than formal decisions.

34 For an account of the history of telecommunications liberalization and the role of the EU, see M. Thatcher, ‘The Commission and national governments as partners: EC regulatory expansion in telecommunications 1979-2000’, *Journal of European Public Policy*, 8/4 (2001), 558. See also H. Ungerer, ‘Use of EC Competition Rules in the Liberalisation of the European Union’s Telecommunications sector: Assessment of Past Experience and Some Conclusions’, *Competition Policy Newsletter*, 2 (2001), 18.

35 See *Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment* [1988] OJ L 131/73 and *Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services* [1990] L 192/10.

section discusses recent proposals to update the regulatory framework and how it impacts on competition law-ization.

1. Networked Enforcement in Telecommunications and the ‘Article 7’ Mechanism as Direct Access

The regulatory structure of EU telecommunications regulation has been profoundly transformed by the adoption of the Framework Directive in 2002.³⁶ Prior to its adoption, Member States had followed a pattern of spontaneous convergence, by entrusting NRAs with the task of monitoring their respective telecommunications markets. These NRAs had limited interactions with each other and, although they were in close contact with the Commission, cooperation was non-systematic and, in any way, did not take place within a set of binding rules.³⁷

The Framework Directive gave rise to a strongly proceduralized mode of regulation, where NRAs are not only part of a specific-purpose committee, the European Regulators Group (ERG),³⁸ but are also linked between themselves and, more importantly, with the Commission, through a formal procedure.³⁹ In addition, the procedure also imposes tight constraints on the exercise of their regulatory powers. These constraints give to the Commission the ability to ‘speak’ directly to regulatees. Thus, direct access is a peculiar feature of networked enforcement. This will become apparent through a closer look at the relevant provisions, and, specifically Article 7 of the Framework Directive.

The Article 7 Mechanism

Before doing so, it is expedient to remember that telecommunications regulation under the new regulatory framework requires NRAs to abide by a fundamental rule: no regulation without market analysis.⁴⁰ In other words, NRAs have a substantive and procedural obligation to carry out a market analysis before they can impose regulatory measures. Both (i) the markets and (ii) the way in which they must be analyzed are set out in an instrument adopted by the Commission, respectively the 2003 Recommendation on relevant markets and the 2002 Commission guidelines on market analysis and the assessment of significant market power.⁴¹ This already creates a European common ground for

36 See *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the “Framework Directive”)* [2002] OJ L 108/33.

37 See M. Thatcher, *Internationalisation and Economic Institutions-Comparing European Experiences* (Oxford: Oxford University Press, 2007), ch. 9, ‘The European Path to Radical Reform: Telecommunications in France, Germany, and Italy 1988-2005’.

38 See *Commission Decision of 14 September 2004 amending Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services* [2004] OJ L 293/30.

39 See S. Cassese, ‘Il concerto regolamentare europeo delle telecomunicazioni’, *Giornale di Diritto Amministrativo*, (2002), 689.

40 See Article 15 (“National regulatory authorities shall ... define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law ...”) and Article 16 (“... national regulatory authorities shall carry out an analysis of the relevant markets ... Where a national regulatory authority is required ... to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis ...”) of the Framework Directive.

41 See *Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services* [2003] L 114/45 and *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services* [2002] OJ C 165/6. The Recommendation on the relevant markets was updated on December 17, 2007 (see [2007] OJ L 344/65). See *Commission Staff Working Document, Public Consultation On a Draft Commission Recommendation On Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic*

regulation since all NRAs are required to abide by the same set of rules. Building on this premise, Article 7 sets forth the central rules for networked enforcement and the Commission's direct access to regulatees.

The network-like structure of enforcement stems and the ability to engage in a direct dialogue with regulatees from the provisions that require NRAs to notify to the Commission and to other NRAs the draft regulatory measures that they intend to adopt, including their market analyses,⁴² at the same time granting to the Commission a veto power over draft measures notified by NRAs (Article 7). In particular, the Commission may "*take a decision requiring the national regulatory authority concerned to withdraw the draft measure*". It is clear that the veto power places the Commission at the heart of the regulatory system and it by-passes the usual (and cumbersome) infringement procedure under Article 226 EC by allowing the Commission the direct power to stop an NRA. In this way, the Commission crosses the traditional boundaries that separated its work from that of the NRAs and directly contributes to shaping regulatees' obligations. Arguably, therefore, the veto power enshrined in Article 7 gives to the Commission the power to have direct access to regulatees.

Taken together, networked enforcement and the veto power represent a significant aspect of competition law-ization of EU telecommunications regulation. First of all, the cooperation between NRAs and the Commission shares significant aspects with the ECN insofar as both take place under a well-defined and legally binding coordination mechanism. Secondly, the Commission's leadership role in both cases ensures a similar blend of single authority and decentralization. In the case of EU telecommunications regulation, this aspect can go as far as creating a direct channel of communication between the Commission and regulatees. The veto power effectively gives to the Commission the possibility to adopt a measure that affects regulatees. Thus, one could argue that Article 7 has re-created the conditions for direct access that is typical of the competition law provisions.

The above considerations have analyzed EU telecommunications regulation from a procedural angle. For a better assessment of the extent of competition law-ization it is now important to turn to substantive law aspects, which make it apparent how competition law has pervaded EU telecommunications regulation. As it will be shown below, this dovetails with private enforcement, the third key fundamental aspect of competition law-ization.

2. Competition Law Concepts in EU Telecommunications Regulation and Private Enforcement

EU telecommunications regulation has traditionally been a form of asymmetric regulation. Considering that the market would be populated by incumbents and a host of newcomers, regulation mainly consisted in imposing special obligations on the former to enable the latter's viability. The legal notion imposed on designated incumbents and the trigger for asymmetric obligations was the notion of Operator having Significant Market Power (SMP).⁴³

Before the new regulatory framework entered into force, an operator was presumed to have SMP when he had 25% or more of the relevant market. No rule laid down how this determination had to be made and each NRA operated on the basis of its own set of rules with no coordination. In a very significant turn, the new regulatory framework redefined the notion of SMP by providing that "[A]n undertaking shall be deemed to have significant market power if, either individually or jointly with

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communication networks and services, SEC(2006) 837, dated June 28, 2006 (available at http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/recommendation_final.pdf)

42 The flow of information is managed through a dedicated web-site that collects all communications made by NRAs, which also contributes to a networked enforcement mechanism. See http://ec.europa.eu/information_society/policy/ecomms/article_7/index_en.htm.

43 See D. Geradin and M. Kerf, *Controlling Market Power in Telecommunications: Antitrust vs Sector Specific Regulation* (Oxford: Oxford University Press, 2003); I. Lloyd and D. Mellor, *Telecommunications Law* (London, LexisNexis, 2003); and I. Walden and J. Angel, *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2005).

others, it enjoys a position equivalent to dominance”.⁴⁴ Further, as recital 25 of the Framework Directive also makes clear, “the definition used in this Directive is equivalent to the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities”, thus leaving no doubt as to the full applicability of the concept of dominance developed under competition law for the purposes of EU telecommunications regulation.

In a similar fashion, the Framework Directive states that:

- “The Commission shall define markets in accordance with the principles of competition law”.⁴⁵
- “The Commission shall publish ... guidelines for market analysis and the assessment of significant market power which shall be in accordance with the principles of competition law”.⁴⁶
- “National regulatory authorities shall ... define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law”.⁴⁷
- “... national regulatory authorities shall carry out an analysis of the relevant markets Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities”.⁴⁸

What these provisions make abundantly clear is the competition law-ization of substantive aspects of EU telecommunications regulation, which now borrows heavily from competition law.⁴⁹ This trend has been a constant one in the application of the EU framework. The result is a mixed regime, where EU telecommunications regulation has met with competition law to blossom in a fruitful hybrid.⁵⁰

For instance, in 2005, when commenting on the adoption of two (out of three by then) veto decision, officials belonging to the Directorate General for Competition stated adamantly: “The most important part of the Commission’s assessment of the draft measures of NRAs is to verify whether Community law, in particular Community competition law, has been correctly applied to the facts gathered by the NRA. It is in this area that the Commission undertakes the most thorough scrutiny and checks whether the NRA has not erred in the application of the legal principles set out in Community law, including the case law of the Community courts”.⁵¹

44 See Article 14.2 of the Framework Directive.

45 See Article 15.1 of the Framework Directive.

46 See Article 15.2 of the Framework Directive.

47 See Article 15.3 of the Framework Directive.

48 See Article 16.1 of the Framework Directive.

49 See A. de Stree, ‘The Integration of Competition Law Principles in the New European Regulatory Framework for Electronic Communications’, *World Competition*, 26 (2003), 497. See also P. Nihoul and P. Rodford, *EU Electronic Communications Law: Competition and Regulation in the European Telecommunications Market* (Oxford, Oxford University Press, 2004) and X. Bitzidou, *EC Law and Electronic Communications: From Sector Specific Regulation to EC Competition Law Concepts* (Athens: Sakkoulas Publications, 2005).

50 See A. de Stree, ‘The New Concept of ‘Significant Market Power’ in Electronic Communications: The Hybridisation of the Sectoral Regulation by Competition Law’, *European Competition Law Review*, (2003), 535. According to this author, “... the hybridisation of the SMP regime with competition law methodologies ... is just an attempt to ensure that regulatory decisions are more flexible and closer to the economic reality of the market” (at p. 541). In fact, some have argued that the application of competition law concepts to telecommunications regulation has a straitjacket effect, as regulators have less room to achieve their objectives than before. It is not possible to reach a definitive view on this matter within the boundaries of the present paper, also because any assessment heavily hinges on the specific set of national rules at issue and on a comparison between the relevant regulators’ discretion before and after such rules have been changed as a consequence of the EU framework.

51 See D. Grewe, A. G. Inotai and S. Kramer, ‘Two recent veto decisions under the new Regulatory framework for electronic communications: The importance of competition law principles in market analysis’, *Competition Policy Newsletter*, (1) 2005, 49, at 52.

From the point of view of competition law-ization, it is not only the fact that EU telecommunications regulation's key concepts are now aligned with competition law. It is also relevant that, having been re-shaped after competition law, the system of rights and obligations closely resembles that of competition law. That is to say that, when an undertaking is deemed to have a dominant position and, as a consequence, is subject to remedies being imposed upon it, competitors are in a position that is akin to that of private parties that suffer damage from anti-competitive behavior, *mutatis mutandis*. This is because a competitor acting in a market where a dominant undertaking is also present can expect the latter to abide by the regulatory obligations imposed upon it. In some and not negligible cases, these obligations mandate the dominant company to start a commercial dealing with its rivals. The chief example are the access obligations that typically concern access to the incumbent's network and are often the vital ingredient behind newcomers' ability to offer new services, such as broadband internet access.

Therefore, the new regulatory framework is likely to deliver an enforcement mechanism that shares some similarities with private enforcement under competition law insofar as competitors can be expected to keep a very vigilant eye on the incumbent and report breaches to the NRA (and to the NCAs as well).⁵² This then translates into the NRAs' further activity to ensure that regulatory obligations are observed. In sum, besides networked enforcement and direct access, EU telecommunications regulation also features private enforcement, thus revealing a high degree of competition law-ization.

3. Effectiveness, Institutional Design and Recent Developments

In the 11th Report on the implementation of the directives on electronic communications,⁵³ the Commission issued an upbeat statement on the successful take up of the latest legislative measure. It declared that "*most of the necessary work has been done. The evidence suggests that intensifying competition is bringing increased consumer benefits and that the outlook for innovation and investment within Member States and across borders is positive. The Framework notably assures the citizen that basic services are provided at an affordable price and that special social needs are catered for*". Further, EU telecommunications regulation is openly described by the Commission as "*a true success story for the EU*".⁵⁴

There are reasons to believe that institutional design, hence competition law-ization, is one of the factors leading to what can be considered as a high degree of effectiveness in the application of EU telecommunications regulation. First of all, starting from the premise that the institutional design for the enforcement of competition law is capable of delivering effective enforcement, a move that inches EU telecommunications regulation closer to competition law institutions of enforcement can already be valued positively from the point of view of effectiveness.

Second, enforcement activities have benefited from a healthy dose of regulatory competition between NCAs and NRAs. Prior to competition law-ization through the regulatory framework, NCAs and NRAs were largely insulated from each other. The 'new regulatory framework' has raised the effectiveness of enforcement by giving to NCAs and NRAs the same set of principles to enforce, albeit dividing their roles according to a temporal dimension. NRAs have the role of preventing

52 See, e.g., the Commission decision in the recent *Telefonica* case (Case COMP/38.784 – Wanadoo España vs. Telefónica, Commission decision of July 4, 2007) and the role played by regulatees and the sector-specific regulator (available at http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38784/dec_en.pdf). It is also interesting to note that, according to press sources, the Spanish regulator asked the Spanish government to appeal the decision on the ground that the Commission action pre-empted its powers, thus weakening the national regulators' position (see Mlex, Financial Times, July 12, 2007).

53 COM(2006) 68.

54 See DG Info website, http://ec.europa.eu/information_society/policy/ecommm/tomorrow/index_en.htm.

abusive behavior, whereas NCAs can intervene to fine abusive behavior that has been committed.⁵⁵ There is a large overlap, though, both because the rules – as noted – are essentially the same and also because NRAs also have powers to fine for non-compliance. Undertakings thus complain that they are exposed to being fined twice for the same behavior.⁵⁶ Regardless of the merits of this complaint, it shows that the competition law-ization of EC telecoms regulation has led to over-, not under-, enforcement.

Moreover, responses by operators to the consultation process started in view of the update of the regulatory framework tellingly show satisfaction with direct access by the Commission through veto power. In fact, respondents were in favor of even extending veto powers, hence direct access, because of its positive impact on transnational activities.⁵⁷ This further shows that the institutional features borrowed from competition law, i.e. competition law-ization, are delivering significant results in terms of effectiveness.

Recent Developments

As noted, a review of the current regulatory framework is under way since 2006, when the Commission originally envisaged changes in its approach to spectrum management, the simplification of Article 7 procedures and the extension of the scope of veto powers.⁵⁸ In February 2007, in a Joint Statement, Commissioner Reding and ERG Chairman envisaged a more far reaching change in the institutional design by indicating that they were considering stepping up the role of ERG and to structure the cooperation between the latter, the Commission and NRAs in a different way,⁵⁹ suggesting the possible creation of an independent regulatory authority.⁶⁰

⁵⁵ On the complementarity between competition law and sector-specific regulation, see recently G. Psarakis, ‘Sector-Specific Regulation And Competition Law In The Electronic Communications Sector Against The Backdrop Of The Internal Market’, *European Competition Law Review*, (2007), 456.

⁵⁶ See, e.g., Telecom Italia response to the Public Consultation on the Review of EU Regulatory Framework for Electronic Communications Networks and Services http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review_2/comments/telecom_italia.pdf according to which: “*even if the evaluation is carried out on different profiles ... there is a sort of competitive competence, potentially able to cause moments of conflict, as it has been noted. It must be highlighted the degree of potential danger that such an overlapping can create in the subject of sanctioning. Mainly, it is not possible to exclude that the two Authorities judge the same behaviour in different way, or rather, and this is even more serious, that it will create a duplication of sanctions for the repression of the same case in point. For example, it has been noted that the abuse of dominant position perpetrated by a TLC operator can be punished both under the regulatory profile and also under the profile of the competition law*” (p. 51-2).

⁵⁷ *Ibidem*, “*In its public consultation on the Recommendation, the Commission is consulting on whether to extend its veto powers to include the proposed remedies. The purpose of such an extension would be to foster a consistency in the way that remedies are applied across Europe and to improve the competitive environment within the internal market. In general terms, TI supports this proposal of the Commission*”.

⁵⁸ See the *Communication on the Review of the EU Regulatory Framework for electronic communications networks and services*, COM (2006) 334, dated June 29, 2006, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0334en01.pdf

⁵⁹ See Joint Statement of Viviane Reding, EU Telecom and Media Commissioner, and Roberto Viola, Chairman of the European Regulators Group (ERG). In a key passage, the Joint Statement recites as follows: “*We have agreed today to consider with an open mind all means of improving the current system of cooperation between the Commission and the ERG, and of strengthening the ERG as an efficient integrated system of independent regulators. Particular options that the Commission has raised to date and that will need to be elaborated and considered further include an enhanced role for the ERG in existing regulatory and legislative processes, the strengthening of the internal market powers of the Commission, and the transformation of the ERG into a “federal system” of National Regulators (possibly modelled on the European System of Central Banks), or a combination of these*” (available at http://www.erg.eu.int/doc/whatsnew/erg_comm_reding_27_febr_2007_joint_statement.pdf).

⁶⁰ See also, V. Reding, ‘Europe’s telecommunications market ahead of the reform of the EU’s regulatory framework’, speech given in Düsseldorf on June 12, 2007, where the Commissioner stated: “*Do we perhaps ultimately need a new*

In November 2007, the Commission unveiled its proposals for reform of the regulatory framework.⁶¹ The proposals include a Regulation to establish a new body, the European Electronic Communications Market Authority.⁶² From the point of view of competition law-ization, this does not mean reduced networked enforced or less direct access. In fact, as students of regulation through agencies in the EU argue, “*the Commission seeks to delegate to agencies rather routine operational tasks, but seeks to retain control of higher profile and more important policy making, monitoring and enforcement processes*”.⁶³

This is confirmed by the proposal, which explains that the main rationale behind the agency is the need to upgrade the role of ERG in view of achieving more consistent application of EU regulation.⁶⁴ Further, the agency is described as an advisor to the Commission and, in the Article 7 process, will issue an opinion to the Commission on potential veto decisions.⁶⁵ This shows that the agency is designed to take off some of the work load from the Commission, which, in any event, retains full power to direct the network and speak directly to regulatees. If anything, it can be expected that the agency contributes to improve the quality of the Commission’s ability to engage in direct access by relieving the latter of some of its day-to-day task and enabling it to better concentrate on major issues.

IV. EU Energy Regulation: *Quo Vadis?*

The recent launch of the third energy package on September 19, 2007 is likely to mark an important milestone on the path to making the energy markets work in Europe. The Commission issued liberalization directives in the energy sector in 1996 and 1998.⁶⁶ A second wave of directives was issued in 2003.⁶⁷ Yet, still in April 2006, the Commission sent a record 28 letters of formal notice to 17 Member States for failure to adequately transpose the 2003 energy directives.⁶⁸ In January 2007, when presenting the results of its Sector Inquiry, the Commission concluded that: “*while progress has been made, the objectives of market opening have not yet been achieved. Despite the liberalisation of the internal energy market, barriers to free competition remain*”,⁶⁹ thus confirming its first ‘gloomy’

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type of European facility, a "one stop shop" which works together with the Commission and the national regulatory authorities in order to ensure better coordination and more agreement on mandatory remedial measures and lower market entry barriers in the telecommunications markets? Do we actually need a "European Networks Agency"? This is one of the options we are currently examining in order to create a level playing field for European telecommunications companies”. See also the public presentation of the Commission’s Review of the EU regulatory framework for electronic networks and services and on the revision of the Recommendation on relevant markets, held on July 13, 2006 (available at

http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/130706reviewpresentation.pdf).

61 See http://ec.europa.eu/information_society/policy/ecomms/tomorrow/index_en.htm.

62 See COM(2007) 699.

63 See C. Scott, Agencies for European Regulatory Governance, cit., supra fn 13, at p. 82.

64 See recitals 5-12 of the proposed Regulation.

65 See Article 5 of the proposed Regulation.

66 See *Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity* [1997] OJ L 27/20 and *Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas* [1998] OJ L 204/1.

67 See *Directive 2003/54/EC 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/EC* [2003] OJ L 176/37 and *Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC* [2003] OJ L 176/57.

68 See IP/06/430.

69 See Sector Inquiry, p. 1.

impressions on the state of these markets.⁷⁰ In short, there is a widespread awareness that energy liberalization needs intensive care.

However, there are not many diagnoses of the malaise and therefore it is not surprising that the therapy that is being tried leaves commentators divided, mostly on the basis of national preferences rather than on the proposals themselves. For instance, reactions to unbundling seem to be dictated by prior national choices, i.e. whether Member States have already opted for such unbundling or not.⁷¹ Thus, we are confronted with an effectiveness problem in search of a framework to be analyzed and, possibly, of an answer.⁷²

This section attempts to address this issue by using competition law-ization. Competition law-ization is thus serving a double role. On the one hand, it provides a conceptual framework within which one can assess the current state of EU energy regulation or, more precisely, the current institutional structure of enforcement. The key question here is: if and to what extent is there competition law-ization in the institutional structure of EU energy regulation? On the other hand, competition law-ization carries a normative bias. By assessing current gaps on the basis of competition law-ization, the paper suggests a way in which this concept could be brought to bear on EU energy regulation. This also entails assessing the recent proposals on the basis of competition law-ization.⁷³

A word of caution is in order on the suitability of deriving inspiration for the energy sector from telecommunications. Although this has already been attempted in the pre-2003 context,⁷⁴ some may argue that the industries are so different that any parallel is inherently flawed. For instance, the role of the network may seem too different in telecommunications, electricity and gas to allow any sensible generalization. Equally, while few would dispute that private enforcement is on the rise both in competition law and telecommunications, a similar enthusiasm is yet to be seen in energy law.

Although there is much wisdom in these arguments and they rightly caution about the limitations of the present attempt, one should not forget that competition law-ization concerns institutional design. Even if regulatory structures are still a function of industry structure, this does not make regulatory institutions for one industry completely unsuitable for another one. One should be even less wary of importing institutional structures from the generally applicable competition law to specific sectors. In addition, as noted, the Commission itself acknowledged that, in looking for institutional solutions for the third package, it took some cues from electronic communications.

70 See Neelie Kroes, "Towards an Efficient and Integrated European Energy Market – First Findings and Next Steps", European Commission Conference, Energy Sector Inquiry – Public Presentation of the Preliminary Findings, speech in Brussels of February 16, 2006.

71 See Reuters, June 26, 2007, 'Member states urge EU to break up energy firms' (available at <http://uk.reuters.com/article/oilRpt/idUKL2629914820070626>), listing Denmark, Britain, the Netherlands, Belgium, Sweden, Finland and Romania as supporters of unbundling. See also European voice, August 2, 2007 'France and Germany lead unbundling opposition' (available at <http://www.europeanvoice.com/archive/article.asp?id=28645>) reporting that France, Germany, Austria, Bulgaria, Cyprus, Greece, Latvia, Luxembourg and Slovakia sent a letter to the Commission opposing unbundling

72 For suggestions on how to improve the effectiveness of EU energy regulation from a substantive standpoint, i.e. looking at the substance of the actual rules to be implemented and changes needed thereby, see F. Lévêque, 'Antitrust Enforcement in the Electricity and Gas Industries: Problems and Solutions for the EU', *The Electricity Journal*, 19:5 (2006), 27.

73 For a review of regulatory gaps, although not based on competition law-ization, see J. Vasconcelos, 'Towards the internal energy market: how to bridge a regulatory gap and build a regulatory framework', *European Review of Energy Markets*, (2005), 81.

74 See C. Scott, 'Making the Experience of European Community Telecommunications Law and Policy Speak to the Energy Sector', in L. Hancher (ed.), *The European Energy Market: reconciling Competition and Security of Supply* (Köln: Bundesanzeiger, 1995), 131.

Thus, the lessons of competition law-ization and how they played out in the telecommunications sector should remain as a relevant point of reference in the present discussion, while keeping in mind the limitation of the analogy.⁷⁵

1. No Competition Law Enforcement

In starting the assessment as to the degree of competition law-ization of EU energy regulation (if any), it must be stated at the outset that the enforcement of the competition law provisions so far has been remarkably underdeveloped in the energy field. Two decisions issued in 2004 concerning an infringement of Article 81 by GDF, ENI and Enel in gas supply contracts ended a decade without any formal decision.⁷⁶ During this period the Commission deliberately chose informal settlement as an enforcement tool.

According to Commissioner Monti “*during the initial delicate transition phase from monopolised to liberalised energy markets, the focus should lie, in some occasions, on Commission's interventions improving effectively the market structure, rather than on formal procedures imposing fines*”.⁷⁷

Indeed, during Monti's tenure as a Commissioner, the Commission brokered several agreements from energy companies, closing proceedings in return for commitments to modify commercial behavior.⁷⁸ For instance, Gazprom and ENI agreed to remove destination clauses, i.e. clauses that prevented the buyer (ENI) from reselling gas supplied by Gazprom in a territory other than Italy, from their contract.⁷⁹ In the *Marathon* cases, the Commission equally pursued a strategy based on

75 For an earlier discussion on institutional reform and adaptation of solutions implemented in telecommunications, see Center for European Policy Studies, *Rethinking The EU Regulatory Strategy For The Internal Energy Market*, 2004, available at <http://www.ceps.be/index3.php>.

76 See Commission decision of 26.10.2004 in case COMP/38662. See C. Cultrera, ‘Les décisions GDF – La Commission est formelle : les clauses de restriction territoriale dans les contrats de gaz violent l'article 81’, *Competition Policy Newsletter*, 1 (2005), 45, (“[Les décisions adressées à GDF et ENI] sont très intéressantes a maints égards: elles sont les premières décisions formelles adoptées par la Commission depuis une décennie dans le secteur de l'énergie...” emphasis supplied).

77 See M. Monti, European Commissioner for Competition Policy, ‘Applying EU Competition Law to the newly liberalised energy markets’, speech in Rome on October 6, 2003 (available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/03/447&format=HTML&aged=0&language=EN&guiLanguage=en>).

78 For a full account of competition law cases in the energy sector, see P. D. Cameron, *Competition in Energy Markets- Law and Regulation in the European Union* (Oxford: Oxford University Press, 2007), ch. 11-14.

79 See IP/03/1345. Other cases concerning gas supply agreements potentially contrary to Article 81 EC that were settled or where the investigation was closed further to amendments to the agreements, include the *Corrib* joint marketing agreement (IP/01/578); *Nigeria LNG* (IP/02/1869); the *UK/Belgium gas interconnector* (IP/02/401); the *GFU* case (IP/02/1084), concerning joint sales of Norwegian natural gas through a single seller, the so-called Gas Negotiation Committee; the *DUC/DONG* case (IP/03/566); and *Gazprom/Ruhrgas* (IP/05/710). In an earlier case, *Gas Natural/Endesa* (IP/00/297), the Commission also sought a consensual solution to end clauses that foreclosed competition and impeded to a large customer to become a reseller.

consensual solutions to secure newcomers' access to gas pipelines.⁸⁰ Access issues were also at the core of early cases on electricity interconnectors, also closed without a formal decision.⁸¹

Although the Commission itself appeared dissatisfied with this strategy,⁸² and although it started several proceedings following the conclusion of the Sector Inquiry,⁸³ the lack of formal precedents so far is, in and of itself, a limitation on the ability to engage in competition law-ization. In this respect, it is worth noting that, given the actual structure of the energy markets which normally features an incumbent company and several fringe players, decisions pursuant to Article 82 are the most valuable source of precedent to define competition law obligations in the energy sector. Until a sizeable decision practice is achieved, competition law-ization will be hampered, as will its potential for delivering more effectiveness to EU energy regulation.

It can be noted in passing that the timing for such a development is highly opportune. The ongoing reform of Article 82 and the important judgment in the *Microsoft* case ensure that the Commission will fully take into account economic analysis,⁸⁴ thus resulting in a more refined application of competition law. It is not possible to predict whether a revised approach to the enforcement of Article 82 will lead to softer or tougher enforcement. In fact, the key point of the reform is to deliver an enforcement that is more in tune with the emphasis on economic analysis that is behind the modernized application of Article 81. Thus, there are reasons to hope that application of a 'reformed' Article 82 in the energy field would lead to better decision-making.⁸⁵

80 The Marathon cases concerned the alleged refusal by a number of European companies, including BEB, Ruhrgas, Thyssengas in Germany, Gasunie in the Netherlands and Gaz de France, to grant the Norwegian subsidiary of the US gas producer Marathon access to their gas networks. These complex proceedings steered towards a solution in 2001, when the Commission settled the case with Thyssengas, after the company offered commitments aimed at making third party access more effective (IP/01/1641). In 2003 the Commission closed the investigation against the Dutch gas company Gasunie and the German gas company BEB, charged with the same infringement. Only in 2004, however, the whole case came to an end, when Gaz de France and Ruhrgas offered commitments suitable to solve the access problems detected by the Commission (IP/04/573).

81 See the UK-France interconnector case (IP/01/341) and the Germany-Norway-Denmark interconnector case (IP/01/30). In the former case, the Commission expressed concerns about the capacity available on the electricity submarine cable linking the United Kingdom and France that, at the time, was used exclusively by EDF. After the Commission expressed its concerns on the foreclosure of such facility to competition, the operators of the cable agreed to open up access to the infrastructure used for electricity import and export between the two countries. In the Commission's view, any restrictions on the attribution of transmission rights or discriminatory treatment would have amounted to a potential abuse of dominant position. In fact, granting a transmission priority right in favour of a particular company would have allowed it to circumvent the rules for capacity allocation applicable to other market operators. This would have been regarded as a discriminatory treatment by the two operators, which held a dominant position in the market for the transmission of electricity between the UK and the continent. In the case of the Germany-Norway-Denmark interconnector, E.ON, Statkraft and Elsam had entered into an agreement whereby these companies reserved the entire capacity on interconnectors or cables linking high-tension grids in Germany, Norway and Denmark. The Commission objected that the contract prevented the emergence of a functioning European internal market in electricity. Further to these concerns by the Commission, the companies agreed to free transmission capacity on their cables.

82 See 2003 Report on Competition Policy, point 97 (*"Whilst in the past a number of cases were closed following settlements, it is expected that in future more formal decisions will be taken. This will provide additional legal certainty and allow the Commission to clarify its policy formally"*).

83 See, e.g., formal proceedings against Electrabel and EDF for suspected foreclosure of the Belgian and French electricity markets, (MEMO/07/313, dated July 26, 2007), and against the ENI and RWE Groups concerning suspected foreclosure of, respectively, the Italian and German gas supply markets (MEMO/07/186 and MEMO/07/187, dated May 11, 2007).

84 See *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>) and case T-201/04, *Microsoft Corp / Commission*, not yet published (available at <http://curia.europa.eu/jurispgi-bin/gettext.pl?where=&lang=en&num=79929082T19040201&doc=T&ouvert=T&seance=ARRET>).

85 See Mario Siragusa, "Abuse of Dominance Issues", intervention at the IBC conference on Competition Law in the Energy Sector, Brussels, November 29, 2006.

2. Loose Networked Enforcement and No Direct Access

It is well known that the 2003 Electricity and Gas Directives provided for the establishment of NRAs in the energy sector, including rules on their tasks and organization.⁸⁶ In addition, the Commission formally constituted the European Regulators' Group for Electricity and Gas ("ERGEG") as an advisor to the Commission.⁸⁷ Prior to the creation of ERGEG (and afterwards), electricity and gas regulators already met informally: the Florence and Madrid forums, as they were named after the venues of the meetings, provided stakeholders and regulators with a convenient opportunity to agree on issues of policy and regulation without the need for formal acts.⁸⁸ If one also includes NCAs, the regulatory institutions overseeing the EU energy markets indeed form a complex web.

However, "*the network of governance mechanism ... is still in statu nascendi*".⁸⁹ Moreover, cooperation between members of the network and the Commission is almost exclusively on a voluntary basis, with nothing comparable to the high level of proceduralization that was found in the Article 7 procedure or the Network Notice in the case of competition law matters.⁹⁰

Assuming that one can talk of an emerging network, direct access to regulatees as described in competition law and EU telecommunications regulation is lacking entirely in EU energy regulation. Instead, the Commission pursues the 'classic' approach of initiating formal infringement procedures against Member States for failure to transpose EU law.⁹¹ However, this procedure may only be a chimera of effectiveness.⁹² The choice to leave to national governments' whims the task of implementing and enforcing EU energy regulation, subordinates the latter to the domestic politics of the day. The case of Italy is indicative.

In 2001, the government started to work on a bill to reform NRAs. The Minister in charge of the Bill, Franco Frattini, stated that the energy authority would be abolished because energy matters should be entrusted to a ministry and not to an independent authority.⁹³ While preparation of a bill was ongoing, in August 2002 the government decided to pass a decree to freeze tariffs, including electricity tariffs, which were under the control of the energy authority.⁹⁴ Thus, the government disregarded the energy authority's institutional prerogatives. Moreover, the government's action undermined the overall credibility of the regulatory system that was based on the principle that tariff-setting did not belong to the government anymore.

86 See Article 23 of the 2003 Electricity Directive and Article 25 of the 2003 Gas Directive.

87 See *Decision 2003/796/EC on establishing the European Regulators Group for Electricity and Gas* [2003] OJ L 296/34.

88 See B. Eberlein, 'Regulation by Cooperation: the "Third Way" in Making Rules for the Internal Energy Market', in P. D. Cameron, *Legal Aspects of EU Energy Regulation: Implementing the New Directives on Electricity and Gas across Europe* (Oxford: Oxford University Press, 2005). For information on the forums' activities, see http://ec.europa.eu/energy/electricity/florence/index_en.htm and http://ec.europa.eu/energy/gas/madrid/index_en.htm.

89 See P. D. Cameron, *Competition in Energy Markets*, cit. supra fn 78, p. 111. See also 'The internal market in energy: harnessing the new regulatory regime', *European Law Review*, 30 (2005), 631, and J. Vasconcelos, 'Co-operation between Energy Regulators in the European Union', in C. Henry, C. Matheu and A. Jeunemaitre (eds.), *Regulation of Network Utilities* (Oxford: Oxford University Press, 2001).

90 Cited above at fn. 22.

91 The Commission or NCAs are of course free to enforce the competition rules. Nevertheless, this should *accompany* enforcement actions pursuant to regulatory statutes, and not *replace* them.

92 See C. Harding, 'Member State Enforcement of European Community Measures: The Chimera of 'Effective' Enforcement', *Maastricht Journal of European and Comparative Law* (1997), 5. See also C. Harlow and R. Rawlings, 'Accountability and law enforcement: the centralized EU infringement procedure', *European Law Review*, 31 (2006), 447.

93 See *il sole 24 ore*, November 23, 2001.

94 See Law decree of September 4, 2002, No. 193.

The attempts to abolish Italy's energy regulator show how vulnerable an NRA can be when it is not securely part of a European network. By contrast, the link with the Commission and with the other NRAs confers a high degree of resilience to these authorities against governments that show little liking for NRAs. It is highly telling that the bill that envisaged the abolition of the energy regulator never considered a similar measure for the NRA in charge of electronic communications (which was already formally linked to the EU telecommunications enforcement network). Moreover, the Italian case shows that, without a stable foundation in EU law, NRAs are subject to 'swings' in national politics, another element that is inimical to stable regulatory policy (and therefore, presumably, to the kind of large sunk investment that could be important both at the national level and at the level of the internal market).

In sum, without an EU network of enforcers with the Commission at the helm, effective implementation becomes too dependent on national preferences. Moreover, there is a high risk of non-uniformity, since powers and resources of NRA may vary greatly. This puts the effectiveness of EU energy regulation clearly in jeopardy.

3. *Limited Opportunities for Private Enforcement*

The assessment of the extent of competition law-ization of EU energy regulation with respect to the system of private rights involves complex issues about the relationships between sector-specific regulation and competition law.

As a starting point, it is worth recalling that "[T]he provisions on TPA [third party access, ndr] in the Electricity and Gas Directives can ... be seen less as creating a new right of access and more as defining and clarifying the extent of a right that already exists...".⁹⁵ This view has also been endorsed by the European Court of Justice, which held that "... the First Gas Directive ... and the Second Gas Directive have the effect, if not the object, of introducing competition into a sector which had hitherto not been subject to competition ... It follows that one of the aims of the Second Gas Directive is clearly competitive. It is no surprise, therefore, that the competitive objective of the Merger Regulation should also be assumed by one of the objectives of the second electricity and gas directives. Consequently, the fact that the Commission pursued the practical realisation of the Second Gas Directive cannot indicate a misuse of powers when that objective is also the objective for which that regulation conferred its powers on the Commission".⁹⁶

If one starts from the premise that sector-specific legislation's aim is to bring to the fore rights that are already granted to undertakings by virtue of the competition law provisions, it follows that EU energy regulation must be deemed to have a system of rights and obligations that enjoys a certain degree of competition law-ization. In a telling case, the Commission praised the Italian Competition Authority for finding that gas incumbent ENI had abused its dominant position where the abuse comprised of "*discontinuing works, which had been started by the network branch in view of increased gas capacity requirements, for the expansion of a main import pipeline into Italy, running between Tunisia and Sicily (TTPC pipeline)*".⁹⁷ The case shows that a newcomer could expect the incumbent to refrain from stopping works for the expansion of a pipeline once the project is launched.

95 See P. D. Cameron, *Competition in Energy Markets*, cit. supra fn 78, p. 355, where he also recalls the view of C. D. Ehlermann, 'The Role of the European Commission as regards National Energy Policies', *Journal of Energy and Natural Resources*, 12 (1994), 342.

96 Case T-87/05, *Commission/EDP*, [2005] ECR, p.II-3745, para. 96. See also case C-17/03, *VEMW and others*, [2005] ECR, p. I-4983, para. 62.

97 See Sector Inquiry, paras. 158-159. See also the decision by the Italian Antitrust Authority, A358/*ENI-Trans Tunisian Pipeline*, decision of February 15, 2006, *Bollettino* 5/2006 (available through www.agcm.it).

This means that an incumbent may be coerced by a newcomer to perform an activity that is beneficial to competition.⁹⁸

Even if the Italian case represents a leading precedent which is no doubt going to be observed closely by other network operators and supply undertakings in other markets, the fact remains that the case is an isolated one. In other words, compared with EU telecommunications regulation where, for each market subject to regulation, one can expect a well-defined set of rights and obligations, in the case of EU energy regulation the process of bringing to the fore such rights and obligations entails all the complex activities that are connected with a finding of a breach of competition law. For instance, in the Italian case mentioned above, the proceedings lasted for more than one year.⁹⁹ This is a remarkably short duration for abuse of dominance proceedings. However, it seems far too long when measured from the perspective of a newcomer who has made investments on the basis of the planned expansion and sees his plans ‘frozen’ for a year.

In addition, there is a clear risk in private parties relying solely on competition law proceedings to establish the rights and obligation of dominant undertakings. That is, by their very nature, competition law proceedings are aimed at ascertaining if a violation occurred or not. As a consequence, they may provide clear guidance as to how *not* to behave and result in *negative* enforcement. However, this still leaves open all the positive construction of the dominant undertaking’s obligations.

This is a problem that also affects ‘classic’ private enforcement or private actions brought before a Court by a private party to obtain redress after rights granted to him/her under sector-specific EU legislation have been infringed by a measure taken by the public authorities.¹⁰⁰ For instance, in a judgment issued in October 2006,¹⁰¹ the Italian Constitutional Court ruled that a moratorium adopted by the Region of Puglia exposed the government to a serious risk of breach of its international commitments, notably the Kyoto targets and the ensuing EU rules on green energy. The Administrative Tribunal for Sicily in an equally groundbreaking decision has upheld the plea brought by a private company against similar behavior by the Sicilian authorities. It ruled that local authorities imposing an indefinite stop on the construction of green energy plants act against EU law.¹⁰² This judgment has been followed by yet another one issued by the Administrative Tribunal of Molise in 2006.¹⁰³ From the point of view of effectiveness, though, judicial enforcement can at most result in a negative order, i.e. it can declare that the behavior adopted by a local authority is contrary to EU law, and hence must be repealed. This is only the *pars destruens* of enforcement, or how *not* to enforce EU energy regulation. Positive action is lacking and, if no authority takes the lead in adequate enforcement, EU energy regulation will remain only on the books.

4. Prospects for Competition Law-Ization and the Commission Proposals

Judged from the point of view of competition law-ization, the current state of EU energy regulation could be described as lacking both an adequate procedural framework and substantive provisions enabling private enforcement. This is because, on the one hand, the network of regulators (including the Commission) is still in its infancy and as such currently lacks direct access to regulatees (compared to the direct access enjoyed under competition law and EU telecommunications regulation). On the

98 It is important to note that, in the case at issue, this obligation was qualified by two factual circumstances, i.e. that work had been under way for some time and that onerous ship or pay contracts had already been signed.

99 See Autorità Garante della Concorrenza e del Mercato, *ENI-TRANS TUNISIAN PIPELINE*, cit.

100 See Joined Cases C-6/90 and 9/90, *Francovich*, [1991] ECR, p. I-5357 and Case C-213/89, *Factortame*, [1990] ECR, p. I-2433.

101 Judgment No. 364 of 2006.

102 See judgment No. 150 of 2005.

103 See judgment No. 739 of 2006.

other hand, the system of rights under EU energy regulation is far from providing a degree of legal certainty that could spark private enforcement (as in the case of competition law and EU telecommunications regulation).

Based on these premises, one can proceed to assess whether and how the recent legislative proposals advanced by the Commission address these gaps. In this respect, it seems useful to distinguish procedural from substantive rules, i.e. to address separately (i) the proposed innovations concerning NRAs' powers, their cooperation and the creation of an agency and (ii) the rules on unbundling.

(i) Procedural Rules

With respect to procedural innovations, several proposals seem to go in the direction of more competition law-ization. Besides laying down objectives for NRAs as the Framework Directive does,¹⁰⁴ the proposals significantly reinforce the network structure of enforcement. This is ensured by listing as a duty of an NRA the following:

- cooperating on cross-border issues with the regulatory authority or authorities of other Member States;
- complying with, and implementing, decisions of the proposed Agency (see below) and of the Commission;
- reporting on a yearly basis on its activity and the fulfilment of its duties to the Agency and the Commission;
- monitoring the level of market opening and competition at wholesale and retail levels, including any distortion or restriction of competition in cooperation with competition authorities, and providing any relevant information or relevant cases to the attention of the competition authorities concerned;¹⁰⁵
- close cooperation, including the provision of information, especially at the regional level to “*to ensure an optimal management of the network, develop joint electricity exchanges and the allocation of cross-border capacity, and to ensure a minimum level of interconnection capacity within the region to allow for effective competition to develop*”.¹⁰⁶

In addition, the Commission is entitled “to adopt guidelines on the extent of the duties of the regulatory authorities to cooperate with each other and with the Agency, and on the situations in which the Agency becomes competent to decide upon the regulatory regime for infrastructures connecting at least two Member States”.¹⁰⁷

As a further aspect of procedural competition law-ization, the new proposals set forth a special procedural framework for compliance with guidelines that is reminiscent of the Article 7 procedure. The new proposals empower the Commission to adopt guidelines on a number of issues, including, e.g., public service obligations,¹⁰⁸ the certification of a Transmission System Operator as complying with rules on unbundling,¹⁰⁹ detailed obligations for Independent System Operators,¹¹⁰ unbundling of

104 See new Article 22b in the proposed Electricity Directive. Please note that references are limited to the proposal for the new Electricity Directive because the rules in the proposed Gas Directive are identical.

105 See new Article 22(c) in the proposed Electricity Directive.

106 See new Article 22d in the proposed Electricity Directive.

107 See new Article 22d (4) in the proposed Electricity Directive.

108 See new Article 3(10) in the proposed Electricity Directive.

109 See new Article 8(b)(13) in the proposed Electricity Directive.

110 See new Article 10(a)(3) in the proposed Electricity Directive.

distribution system operators,¹¹¹ and NRAs' powers.¹¹² If an NRA is in breach of said guidelines, the Commission may require the NRA "to amend or withdraw its decision if it considers that guidelines have not been complied with".¹¹³ This provision, although limited to a relatively narrow set of issues, i.e. compliance with certain guidelines, nonetheless represents an important breakthrough, given that it grants to the Commission the sort of direct access to regulatees that was so far lacking in EU energy regulation.

Another important aspect that shows increased attention to competition law-ization is the proposal to create an Agency. First of all, the Agency is composed by representatives of all NRAs and, as such, it is meant to further reinforce cooperation between them.¹¹⁴ Second, the Agency may act as a facilitator in the various dealings between the Commission and NRAs. For instance, the Agency may be required to provide its opinion as to whether a decision by an NRA complies with Commission guidelines or not.¹¹⁵ Third, the Agency has the power to issue decisions binding on NRAs (and supposedly regulatees) on technical issues if so empowered under relevant guidelines, on the regulatory regime for cross-border infrastructure and on exemptions from obligations to grant access to new infrastructure.¹¹⁶ Fourth, the Agency assists NRAs in complying with supranational regulation and equally issues opinions to newly-envisaged technical bodies, i.e. the European Networks of Transmission System Operators for Electricity and Gas.¹¹⁷

As already noted with respect to the idea of creating an agency in the telecommunications sector, the delegation of powers to such an agency would not dilute the role of the Commission. As a consequence, it can be expected that the proposed Agency will reinforce the network structure of enforcement and contribute to the Commission better exercising its envisaged new powers.

Although the above only offers a summary of the procedural innovations set out in the Commission proposals, it can be concluded that the latter go a long way towards improving on the degree of competition law-ization and can therefore be expected to contribute significantly to the effectiveness of EU energy regulation. The assessment of substantive innovations raises more complex issues.

(ii) Substantive Rules

It is well known that the Commission is strongly minded to propose ownership unbundling in order to break the deadlock of EU energy liberalization.¹¹⁸ How should one assess this proposal from the point of view of competition law-ization? In order to address this question, it may be useful to recall that ownership unbundling stems from a competition law analysis.¹¹⁹ The Commission seems to believe that vertical integration between network management and supply leads undertakings to "inevitably" abuse their dominant position. This position has a distinguished pedigree in the Community case

111 See new Article 15(4) in the proposed Electricity Directive.

112 See new Article 22(a)(14) in the proposed Electricity Directive.

113 See new Article 22(e) in the proposed Electricity Directive.

114 See Recital 8 of the proposed Regulation to create an agency ("It is appropriate to provide a framework within which national regulatory authorities are able to cooperate. This framework should facilitate the uniform application of the legislation on the internal market for electricity and gas throughout the Community ...").

115 See Article 7(4).

116 See Article 7, paras (1) and (7) and Article 8.

117 See Articles 6(3) and 7(6).

118 See recently Neelie Kroes, European Commissioner for Competition Policy, 'Improving competition in European energy markets through effective unbundling', speech in New York, dated September 27, 2007.

119 Besides a competition law problem, vertical integration is also an internal market problem, hence the legislative process' legal basis is Article 95 EC.

law¹²⁰ and led the Commission to require that regulatory functions must be separated from supply in the telecommunications sector in the early days of liberalization.¹²¹

In spite of its noble origins, unbundling remains a one-time regulatory measure decided in Brussels. Even if it proves successful in procuring the much desired improvement in the conditions of supply, it does not contribute to the sort of de-centralized, grass root-level enforcement that can be obtained once individual undertakings and individuals are vested with rights *vis-à-vis* dominant companies. In other words, regardless of its actual merits, unbundling does not score high in the ranking of competition law-ization because it still leaves untouched one of the gaps identified above, namely the lack of a systematic analysis of the energy markets on the basis of competition law and the issuance of periodic assessment and imposition of remedies. This process, which has become widespread in telecommunications, ensures a greater degree of enforcement because it makes regulation more transparent and allows for more shared participation among stakeholders, including consumers.

Through access to regulatory decisions, everybody becomes aware of dominant positions and obligations imposed on dominant companies. As noted, this makes market actors, suppliers and consumers alike very vigilant, thus ensuring a high degree of effectiveness. It is not surprising to see that Commissioner Kroes, who is so firmly defending unbundling in the energy sector, is said to be just as firm in opposing unbundling in the telecommunication sector.¹²² In addition, unbundling would not avoid regulation necessary to define access conditions.

In sum, an assessment of the Commission's recent proposals from the point of view of competition law-ization yields a mixed result. On the one hand, the procedural innovations indeed strengthen networked enforcement and create a sort of direct access to regulatees. On the other hand, the key substantive innovation, i.e. unbundling, seems to fail to realize the potential for effectiveness that competition law-ization of rights and obligations could deliver, in preference for a one-off structural measure.

V. Conclusion

This paper started with a view from Saint Peter's square. Rules are made in Rome, but do they matter outside the beautiful colonnade? This can rightly be a metaphor of EU energy regulation in its current state. This paper has sought to develop the concept of competition law-ization as a technique to improve effectiveness. It consists of three elements:

- **Direct access to regulatees**, i.e. the ability to speak directly to undertakings without the intermediation of Member States' structures, or with as little intermediation as possible;
- **Networked enforcement**, i.e., the creation of an orderly European apparatus that enforces EU law under the direction of the Commission; and
- **Private enforcement**, i.e. the ability of private undertakings and individuals to enforce their rights, thus effectively patrolling the market.

120 See Case C-41/90, *Höfner and Elser / Macrotron*, [1991] ECR, p. I-1979, para. 27; Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou / Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, [1991] ECR I-2925, para. 37; and Case C-18/88, *RTT / GB-Inno-BM*, [1991] ECR I-5941, para. 23.

121 See *Commission Directive 90/388 on competition in the markets for telecommunications services* [1988] OJ L 192/10, which stated that "[T]he delegation to an undertaking which has a dominant position for the provision and exploitation of the network, of the power to regulate access to the market for telecommunication services constitutes a strengthening of that dominant position" (recital 29).

122 See Euractiv, "Commission split over telecoms 'unbundling'", September 26, 2007 (available at <http://www.euractiv.com/en/infosociety/commission-split-telecoms-unbundling/article-167078>).

Competition law-ization has spread to EU telecommunications regulation and proved a successful avenue through which the latter has increased its effectiveness. EU energy regulation is still lagging behind. This is because:

- **No direct access.** The Commission does not enjoy direct access to regulatees, instead relying on Member States according to the classic architecture of EU law;
- **Infant networked enforcement.** The network of enforcers is in its infancy and, in any event, works by consensus and voluntary cooperation; and
- **Limited private enforcement.** Private undertakings and individuals have to go through a painfully long process of discovery through competition law proceedings to see their rights (and the corresponding obligations on incumbents) defined.

The new package of proposals to reform EU energy regulation recently put forward by the Commission goes to some length to address these gaps. Cooperation between NRAs and the Commission is likely to be strengthened and become binding. The creation of an Agency will also have a positive impact on networked enforcement. Finally, the proposals envisage a mechanism that is akin to direct access. However, the much-hyped unbundling does not seem apt to create the structure of rights that is needed for strong and continuous private enforcement, as it is a one-off structural measure.

Thus, there are reasons to hope that some degree of competition law-ization may take root in EU energy regulation too, with the ensuing benefits in terms of effectiveness. However, we are only at the beginning of the legislative process and, even at this stage, there is a high degree of opposition.

It seems that the EU is also in need of a high dose of faith and courage in order to continue steadfastly in its mission.

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