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Conflicts Between Competition Law and Regulation in the EC Electronic Communications Sector: An Analysis of the Institutional Framework

*Liyang Hou**

The EC regulatory framework in the electronic communications sector is characterized by the concurrent application of competition law and sector specific regulatory rules. An institutional defect of this dual-regulatory model is the risk of duplication of procedures between competition authorities and regulatory authorities. The 2002 regulatory package issued by the European Parliament and Council of the European Union for electronic communications services and networks makes a great contribution toward resolving the institutional conflicts between the two groups of institutions by establishing a cooperation mechanism. However, the imperfection of the current cooperation mechanism may not fully eradicate institutional conflicts. This paper offers some thoughts on a potential reform of the current cooperation mechanism between competition authorities and regulatory authorities with regard to the residual institutional conflicts.

Introduction

Incentivized by the economic value of electronic communications and a new view of regulatory economics, the liberalization of the electronic communications sector is prevalent worldwide. This former highly regulated sector is gradually being subjected to the rules of market, the so-called 'deregulation'. So far economy-wide competition law and Sector Specific Regulations (hereinafter, SSR) are the two indispensable, if not, only sets of rules that are being simultaneously applied to augment marketplace incentives in many countries. However, the ambiguity of substantive, as well as institutional, differences between competition law and SSR sometimes cause institutional conflicts. In order to prevent duplication of procedures and finally eliminate it, a balance must be struck to allow the simultaneous application of both regulatory regimes. So far, countries have developed three models to balance the dual regulatory regime:

1. Main reliance on competition law (for example, New Zealand);
2. Primary dependence on SSR (for example, United States of America, hereinafter USA); and
3. Concurrent application of competition law and regulation (for example, European Community, hereinafter EC).[1]

* Doctoral Candidate, Faculty of Law, Katholieke Universiteit Leuven, Belgium. E-mail: liyang.hou@law.kuleuven.be

1 *See*, Michel Kerf, Isabel Neto and Damien Geradin (2005), *"Antitrust vs. Sector-specific Regulation* in Telecom: What Works Best?", (February), available at SSRN: http://ssrn.com/abstract=886292

In the EC, the model of the concurrently applying competition law and SSR has raised more institutional problems than the other two approaches to balancing competition law and SSR.[2] First, more parallel institutions are involved in the liberalization process in the EC, including European Court of Justice (hereinafter ECJ), the European Commission (hereinafter, the Commission), National Regulatory Authorities (hereinafter, NRAs), National Competition Authorities (hereinafter, NCAs) and national courts. Second, because it is legitimate for competition authorities to intervene into SSR under the EC legal regime, different institutions with different competences, but sharing common industry areas, lead to complicated institutional conflicts.

The entering into force of the 2002 regulatory package of EC for electronic communications services and networks[3] (hereinafter, the 2002 Framework) considerably streamlined the interconnection between competition law and SSR. With regard to the jurisdictional conflicts between European institutions and national institutions, two brilliant innovations have been introduced. The first is the substantive integration of competition law principles into SSR, the so called three-step analysis (defining relevant markets, designating Significant Market Power—hereinafter, SMP—undertakings, and imposing appropriate obligations),[4] and the second innovation is the establishment of an institutional cooperation procedure, i.e., the consultation procedure provided by Article 7 of Framework Directive[5] (hereinafter, the Article 7 Procedure).

The first innovation considerably enhances regulatory legal certainty by confining NRAs within EC competition law standards, while the second innovation grants the Commission, in particular the Information Society and Media Directorates General (hereinafter, DG Information), a new role resembling the European Regulatory Authority (hereinafter, ERA) to ensure pan-European regulatory consistency. These two moves, substantive or institutional, alleviate many of the institutional conflicts between the Commission and NRAs at European level and conflicts between NRAs and NCAs at national level.

Unfortunately, the 2002 Framework does still leave three institutional conflicts untouched. First, the fact that national regulatory remedies fall out of the reach of the Commission veto

2 For details about the comparison, for example, between EC model and USA model, see Nicolas Petit (2004), "Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in the Trinko Case", *Utilities Law Review*, Vol. 13, p. 6 and also Pierre Larouche (2005), "Contrasting Legal Solutions and the Comparability of EU and US Experiences", 3rd Antitrust Conference in Paris, December 12.

3 It refers to the four new directive concerning liberalization of EC electronic communications sectors in 2002, which are Directive 2002/21/EC of the European Parliament and of the Council of March 7, 2002 on a common regulatory framework for electronic communications networks and services, [2002] *O.J. L*108/33 (Framework Directive). Directive 2002/20/EC of the European Parliament and of the Council of March 7, 2002 on the authorization of electronic communications networks and services, [2002] *O.J. L*108/21 (Authorization Directive). Directive 2002/19/EC of the European Parliament and of the Council of March 7,2002 on access to, and interconnection of, electronic communications networks and services, [2002] *O.J. L* 108/7 (Access Directive); Directive 2002/22/EC of the European Parliament and of the Council of March 7, 2002 on universal service and users' rights relating to electronic communications networks and services, [2002] *O.J. L*108/51 (Universal Service Directive).

4 *See*, Article 14-16 of *Framework Directive, ibid.*

5 *Ibid*, Article 7.

power under the Article 7 Procedure weakens the possibility of the Commission achieving its regulatory objectives.[6] Second, merging competition law standards into SSR expands the margin of overlap between competition law authorities and regulatory authorities.[7] Third, some areas outside the former two innovations possibly would deteriorate the institutional conflicts.[8] The prospect that these institutional conflicts, at the European level and national level, will likely slow the move to a level playing field for the electronic communications players on the common market has been grasped both by the Commission and by scholars.[9]

Some institutional conflicts can be dealt with under the current EC legal system while others require further reform. This paper offers some ideas regarding how to avoid cumulative jurisdictions between competition authorities and regulatory authorities based on a more effective cooperation mechanism. In the following, the paper first investigates the EC model of the concurrent application of competition law and SSR, followed by a brief introduction of the two innovations within the 2002 Framework. Subsequently, the residual institutional problems coming from the imperfection of the current cooperation mechanism are discussed. Next to it, the paper examines the relationship between competition law and SSR in EC and then provide four proposals to improve the current cooperation mechanism by smoothing the residual institutional problems at European level and at national level, and finally presents some concluding remarks.

Current Regulatory Framework of EC

After decades of liberalization, the electronic communications sector is subject to a mix of regulation-oriented competition and antitrust-oriented competition regimes. Within this trend, jurisdiction arrangements have become hardcore issues in regulating the electronic communications sector. Taking consideration of the respective advantages of competition law and SSR, every jurisdiction allows both sets of rules, more or less, to apply to this sector. The EC model is notable for its almost evenhanded dependence on both sets of rules, i.e., concurrent application of competition law and SSR. The 2002 Framework offers two innovative contributions—the Article 7 Procedure and integration of competition law methodologies into SSR—to alleviate the tensions between competition authorities and regulatory authorities resulting from this concurrent evenhanded distribution of power between them.

6 *See*, Commission Staff Working Document Communication from the Commission to the Council, the European Parliament, the European Economic And Social Committee And the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services, {COM(2006)334 final}, SEC(2006) 817, Brussels (2006), June 28, p. 19.

7 *See*, Alexandre De Streel (2003), "The Integration of Competition Law Principles in the New European Regulatory Framework for Electronic Communications", *World Competition*, Vol. 26, No. 3, pp. 489-514.

8 *See*, Commission Staff Working Document Communication from the Commission to the Council, the European Parliament, the European Economic And Social Committee And the Committee of the Regions on the review of the EU Regulatory Framework for electronic communications networks and services, COM(2006) 334 final, SEC 2006 (816), p. 20.

9 *See*, for example, John Temple Lang (2005), "European competition policy and regulation: Differences, Overlaps, and Constraints", 3rd Antitrust Conference in Paris, December 12; and also Nicolas Petit (2004), "The Proliferation of National Regulatory Authorities Alongside Competition Authorities: A Source of Jurisdictional Confusion", GCLC Working Paper 02/04.

Concurrent Application of Competition Law and SSR

Under the current EC law regime, competition law and SSR are both applicable to the electronic communications sector. This was held by the European courts[10] and clearly confirmed by the Commission in Deutsche Telecom case that "competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition".[11] Nevertheless, this approach leads to a situation where the jurisdictional conflicts between competition authorities and regulatory authorities in EC are complex and persistent.

A simplistic view of the EC model might suggest there is no risk of conflicts because competition law and SSR are two distinct sets of rules and applicable to different situations at different time.[12] However, if having a closer look we may conclude that in practice, there does exist a great amount of overlap of jurisdiction between the two sets of rules in EC. Because the two different types of rules, competition law and SSR, could be invoked to the same subject matter, different authorities (e.g., the European courts, the Commission, NRAs, NCAs, and national courts) may be simultaneously competent to regulate many circumstances.[13] For instance, a firm concerned with anticompetitive behaviors by an electronic communications player could:

- File a complaint to the Commission on the basis of EC competition law when the practice in question has an effect on intracommunity trade; or
- Lodge a complaint to the NRAs when the practice in question violates a regulatory obligation;[14] or
- Lodge a complaint to the NCAs on the basis of national competition rules or EC competition law when the practice in question has an effect on intracommunity trade.

Consequently, there emerge two categories of institutional conflicts in the EC regulatory regime. The first institutional conflict takes place at European level, referring to the conflict between the Commission and NRAs. If national SSR does not preclude the undertakings from

10 *See*, joint cases C-359/95 and C-379/95 *P Commission and France vs. Ladbroke Racing* (1997) ECRI-6225, Para 34; Case T-228/97 *Irish Sugar vs. Commission* [1999] ECR 11-296, Para 130; and Case T-513/93 *ConsiglioNazionaleDegliSpedizionieriDoganali*[2000]II-IS07,Pa3La.59.

11 *See*, Commission Decision of May 21, 2003 relating to a proceeding under Article 82 of the EC Treaty, case COMP/C - 1/37.451, 37.579-Deutsche Telecommunications AG, *O.J.* 2003, L 263/9, Para 54.

12 *See*, Christian Bergqvist (2004), "*Sector Specific Regulation vs. General Competition Law* - The Case Against Applying Competition Law to the Telecommunication Sector", Discussion paper from July 2004, last access on September 30, 2007 and available at http://www2.jur.ku.dk/jurnetmodcv/showcv.aspx?culture=en&personid=67148

13 Since justice system, i.e., European courts or national courts, is the last resort which resolve disputes finally, this paper assumes there would be no jurisdictional conflicts between justice system and the other three administrative institutions, i.e., the Commission, NRAs and NCAs. Furthermore, this paper also assumes there are no institutional conflicts between the Commission, sitting as a competition authority, and NCAs since Council Regulation 1/2003 already provides an appropriate mechanism for the jurisdictional conflicts between the Commission and NCAs. Last but not least, in pending Case C-366/06 a Finish court referred an interesting question to the ECJ whether the national court can make legal evaluation without the Commission's decision under the Article 7 Procedure. This may suggest an institutional tension between the Commission and national courts concerning the review power of the Commission under the Article 7 Procedure. (*See*, Case C-366/06, reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland) lodged on September 8, 2006 - DNA Verkot Oy, *OJ L*, Vol. 108, p. 33). However, this issue is outside the research of this paper. This paper is only concerned with the conflictive relationship between competition authorities and regulatory authorities, i.e., between the Commission and the NRAs, and between the NCAs and the NRAs.

14 *See*, Article 20 of Framework Directive, *supra* note 3.

engaging in autonomous conduct that prevent, restrict or distort competition, the Commission will intervene regardless of the fact that the undertakings concerned already have been regulated. The second institutional conflict exists at national level, because an anticompetitive activity of a regulated undertaking would simultaneously infringe regulatory rules and competition rules, national jurisdictional conflicts occur as well.

According to some academics, authorities that compete against each other may be more efficient than conjoint decisions by authorities or only one authority deciding on behalf of both.[15] However, the duplication of procedures may generate delays, higher transaction costs and increased legal uncertainty for operators and furthermore from a public policy standpoint overlapping authority is also costly because it creates a duplication of investigative resources.[16] Further, different objectives and methodologies employed by the separate authorities would inevitably produce diverging decisions under certain circumstances.[17] In addition, overlapping authorities would weaken the electronic communications players' confidence on NRAs, and thus, impair the liberalization in the internal market. In practice this risk is more tangible in the case of margin squeeze because the NCAs and NRAs do not necessarily apply the same imputation criteria and other tests in such cases.[18] Based on foregoing, it is accordingly necessary to establish an effective cooperation mechanism in order to solve these conflicts.

Innovations of the 2002 Framework

Assuming that SSR and competition law will gradually converge at the same point where deregulation and liberalization terminate, the 2002 Framework expects to mitigate the conflicts between competition authorities and regulatory authorities by establishing a closer cooperation between them in the so called 'transitional period'. The current cooperation mechanism includes two aspects. First, the Article 7 Procedure requires *ex ante* SSR subject to a conjoint review by DG Information and the Competition Directorates General (hereinafter, DG Competition). Second, the converging competition law methodologies into SSR, on the one hand, demands deregulation to solely competition; on the other hand, requires NRAs to consult NCAs when conducting market analysis.

The Article 7 Procedure

A Brief Introduction

Article 7 of the Framework Directive requires NRAs to notify the Commission and other NRAs of their findings as to market definition, SMP analysis and the regulatory obligations they intend to impose (or remove). Once NRAs notify the Commission of its proposed measure

[15] *See*, Alexandre de Streel (2005), "A Program for Reforms for the European Regulation of Electronic Communications", Presented at the ITS Conference in Porto. In this article the author states that "Laffont and Martimort (1999), Barros and Hoernig (2004) show that it is more efficient that both authorities decide a case independently than jointly for three reasons. First, the probability that cases are solved is highest with independent decisions, even though each authority may give less attention to the case than it was alone. Second, independent decisions are less vulnerable to lobbying. Third, it is also less likely that no authority feels responsible for a given case."

[16] *See*, Nicolas Petit (2004), *supra* note 2.

[17] *See*, for example, the Commission decision in Deutsche Telecom case, *supra* note 11, and Christian Bergqvist (2004), *supra* note 12.

[18] *See*, Damien Geradin and Robert O'Donoghue (2005), "The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector", (February), GCLC Working Paper No. 04/05, available at SSRN: http://ssrn.com/abstract=671804

related to a particular market, the case is registered, and an *ad hoc* case team comprising officials of the services of both DG Information and DG Competition is appointed.[19]

The case team then has one month in which to assess the notification of the proposed measures the 'Phase one' procedure. The vast majority of cases are handled within this one-month period by a letter to the NRA concerned, which may contain Commission comments as to how the measures in question could be further improved. In cases where the Commission considers that, in terms of market definition or SMP analysis, the proposed measures would create a barrier to the single market or if it has serious doubts as to the measures' compatibility with Community law (and in particular, the common policy objectives that all NRAs should pursue), the Commission can conduct a more detailed investigation lasting a further two months (the 'Phase two' procedure). Following this in-depth investigation--- should its concerns be confirmed---the Commission may require the NRA to withdraw the draft measures (the 'veto' decision) and possibly to resubmit the market analysis in question at a later stage. For transparency reasons, the Commission has so far adopted a decision in every case, even where it has had no comments of its own.[20]

Advantages to Resolve Institutional Conflicts

The Article 7 Procedure guarantees a closer cooperation between the Commission and NRAs, between NRAs and their corresponding NCAs, and between one NRA and other NRAs. It, to a large extent, resolves institutional conflicts.

First, the Article 7 Procedure is adopted in line with the three objectives provided by the Framework Directive. It imposes upon the Commission responsibility and power to ensure the coherent regulatory policy on the common market. The implementation of the strongly Europeanized consultation procedures also helps harmonization. Until September 30, 2007, the Commission used the Article 7 Procedure to wield significant influence by vetoing five draft decisions,[21] and causing the withdrawal of ten others before veto.[22] The Article 7 Procedure installs a platform where pan-European consistency can be ensured despite of separate national regulation schemes. In addition, the involvement of interested parties in Article 7 Procedure[23] brings more regulatory transparency and predictability as well.

Second, the Article 7 Procedure is able to relax the tension rising from the concurrent application of competition law and regulation at European level. The Article 7 Procedure installs a platform not only for SSR, but also for EC competition law. Because the application of the Article 7 Procedure is a joint work with DG Competition, it brings EC competition law 'on board'. The two DGs work hand in hand, pooling together their sectoral, regulatory and competition law expertise, thereby reflecting the principles underpinning the regulatory framework.

[19] *See*, Electronic Communications: The Article 7 Procedure and the Role of the Commission – Frequently Asked Questions, MEMO/05/255, Brussels, July 14, 2005.

[20] *See*, Communication on Market Reviews under the EU Regulatory Framework: Consolidating the internal market for electronic communications COM(2006) 28, p. 3.

[21] The five veto decisions are case FI/2003/24, case FI/2003/26, case FI/2004/82, case AT/2004/90 and case DE/2005/144. Those veto decisions are available at: http://forum.europa.eu.mt/Public/irc/infso/ecct/library?1=commissionsdecision&vm=detailed&sb=Title

[22] *See*, the EU Competition/Regulation Overview table, made by the Commission, last access on 30th September 2007 and available at:http://ec.europa.eu/information_societv/policv/ecomm/doc/article 7/comp reg %2025092007.pdf

[23] *See*, Article 6 of Framework Directive, *supra* note 3.

The close cooperation between the two DGs ensures that the new principles of the regulatory framework have been put successfully into practice.[24] Second, since the decision based on Article 7 Procedure is co-concluded with the European competition authority, the Commission is expected to be bound by its own decision so that it would not apply EC competition law ex post into already regulated issues, which it did before in Deutsche Telecom Case.[25]

Third, the Article 7 Procedure will help resolve issues stemming from overlapping jurisdictions shared by NRAs and NCAs. When defining the relevant markets, NRAs should consult their NCAs and be compelled to take account of their NCA's opinion.[26] The involvement of NCAs *ex ante* will certainly decrease the possibility of overlapped jurisdiction over competition issues *ex post*.[27]

Converging Competition Law Methodologies into SSR

Another striking feature of the reforms within the 2002 Framework is that the 'new' SSR is built upon the European competition law methodologies and principles. This innovation is justified by several reasons: "firstly, to make the regime more flexible than was the case previously and get regulatory decisions closer to the economic reality of the market; secondly, to maintain legal certainty, as decisions will be based on more than forty years of well-established antitrust case law; thirdly, to ensure a better harmonization of regulatory decisions across Europe; and lastly, to ensure a progressive removal of obligations as competition develops on the different markets and to facilitate the transition towards the pure application of competition law when SSR will no longer be necessary".[28]

In order to impose a regulatory obligation, NRAs have to follow the three-step analysis, i.e., to define the market, to designate SMP undertakings, and to impose appropriate obligations.[29] This three step analysis perfectly resembles the analysis of Article 82 of the EC Treaty. The first step of the analysis, market definition, is significant for solving the institutional conflicts between competition authorities and regulatory authorities. In other words, market definition draws a borderline between the application of competition law and SSR because it is clearly maintained by the Commission that SSR can only be imposed where EC competition law remedies are not sufficient to deal with the market failure concerned.[30]

For the sake of legal certainty in the process of market definition, the Commission advocates a so-called 'three-criterion test' to 'standardize' the definition of the relevant market.

[24] *See*, Nicolas Petit (2004), *supra* note 2.

[25] *See*, Deutsche Telecommunications AG, *supra* note 11. In this case, the Commission challenged the activity of Deutsche Telecom with regard to its subscription fees, though the price of Deutsche Telecommunications was subject to a price-cap obligation imposed by the German regulator. It may come into notice that it is perhaps the positive result of Article 7 Procedure, or maybe only a coincidence, that after the adoption of the 2002 framework no similar cases have been observed so far.

[26] *See*, 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 communication networks and services, C(2003)497, p. 12.

[27] *See*, Article 20 of Framework Directive, *supra* note 3.

[28] *See*, Alexandre De Streel (2003), *supra* note 7.

[29] *See*, Article 14-16 of Framework Directive, supra note 3. For more detail about the three-steps analysis, please refer to Recommendation on Relevant Markets, *supra* note 26, pp. 7-12; Alexandre de Streel (2003), *supra* note 7; and also, Peggy Valcke, Robert Queck and Eva Lievens (2005), *EU Communications Law: Significant Market Power in the Mobile Sector*, Edward Elgar, Chletenham.

[30] *See*, recital 27 of the Framework Directive, *supra* note 3.

The cumulative three criteria used for market definition are assessing the high and non-transitory barriers to entry, the non-dynamics to competition behind, and the possible insufficiency of relevant competition law. According to the explanation of the Commission, the high and non-transitory barriers concern both structural and regulatory barriers that are identified as the core of regulation for initiating competition, i.e., market access and interconnection in the electronic communications sector.[31] Non-dynamic aspects behind entry barriers refer to an examination of whether effective competition could be spontaneously launched at all. The third criterion is to examine whether the mere application of competition law could actually create competition, even if non-transitory barriers to entry and non-dynamics of competition behind already exist. If competition law alone can sufficiently reduce or remove barriers to entry and restore competition, then the SSR concerned should be rolled back. In addition, the Commission urges NRAs to consult their NCAs when evaluating the sufficiency of competition law alone to solve competition issues. The participation of NCAs in the process of imposition of regulatory measures would further strengthen the coordination between NRAs and NCAs and eliminate the institutional conflicts between them as well.

Through the three-step analysis (defining the market, designating SMP undertakings, and imposing appropriate obligations), the decision of NRAs would have an effect of binding competition authorities since both of them will work on a similar methodological basis. Subsequently, a duplication of procedures would, at least in theory, be prevented. Consequently, should the three-step analysis work well, there would be no jurisdictional conflicts between competition authorities and regulatory authorities.

Remaining Institutional Conflicts Within the 2002 Framework

The conflicts, actual or potential, between competition authorities and regulatory authorities have been resolved considerably by the 2002 Framework. However, there are still some residual problems to which the 2002 Framework offers no solution. These problems stem from either the incomplete review power of the Commission in the Article 7 Procedure, or the ambiguity of some concepts within competition-law-oriented regulation, or the SSR falling outside the regime of market analysis and the Article 7 Procedure. All these problems further raise a risk that the relevant competition authorities, either the Commission or NCAs, might resolve their conflicts with NRAs by undoing the NRA's work through the application of competition law on an already regulated issue.

No Veto Power on National Regulatory Remedies: The Article 7 Procedure

Under the Article 7 Procedure, The Commission enjoys review power over the initiation of the regulatory policy by the NRAs. If the draft of national regulatory measures is not compatible with EC laws, in particular contradicts EC regulatory objectives, the Commission can veto NRAs' proposals. However, at present the Commission is only competent to veto the inappropriate analysis of NRAs with regard to the first two steps, i.e., market definition and designation of SMP. As far as the last step, imposition of regulatory remedies, is concerned, the Commission lacks veto power.

[31] *See*, Recommendation on Relevant Markets, *supra* note 26, pp. 10-12.

The Commission may consider whether these remedies are appropriate, for example, whether they are based on the nature of the problem identified, proportionate and justified in the light of the policy objectives enshrined in the Framework Directive, and make its own comments which should be taken utmost account of by NRAs.[32] However, there is no coercive mechanism for NRAs to implement the Commission's proposed remedies. Only when NRAs propose to adopt other obligations on undertakings with SMP than those set out in Article 9 to 13 of Access Directive, does the Commission have veto power on such draft obligations.[33] Hence, the imposition of regulatory remedies is loosely controlled by the Commission in an optional way.

Regulatory remedies have become one of the major concerns of the Commission, as evidenced by the fact that a significant proportion of the Commission's comments so far have related to the appropriateness of the remedies proposed.[34] The Commission has commented on remedies which solved only part of the competition problem identified, appeared to be inadequate, or might have produced effective results too late.[35] The increasing attention of the Commission to remedies suggests the importance of national regulatory remedies in the EC electronic communications market.

Nevertheless, the Commission's non-binding comments on national remedies under Article 7 Procedure cannot forestall a potential divergence with the NRAs. There is a risk that the Commission could not guarantee consistency of regulation in the internal market under the 2002 Framework, if the NRAs are unaccepting of the Commission's comments about the NRA's proposed obligations. Supposing the NRAs might disregard the Commission's comments on their proposed remedies, it is without doubt that the Commission is incompetent to interfere with the national remedies under the 2002 Framework. In search for other means for intervention, Article 86(3) of EC Treaty, which governs the Commission's competition law regulations, is not an ideal legal basis for the Commission to act in case of a conflict with an NRA.[36] Accordingly, the Commission, taking account of its exclusive competence under EC competition law, may possibly have recourse to EC competition law to offset its incompetence over national regulatory obligations in so far as the regulatory results contradict EC competition law. Deutsche Telecom case has already depicted us a picture how the Commission applied EC competition law to urge the German regulatory authority to change their remedies by condemning Deutsche Telecom abusing its dominant position to achieve marginal squeeze, even Deutsche Telecom's wholesale price and retail price were both controlled by the German regulator.[37] There is scant evidence to believe such a circumstance will not recur.

[32] *See*, Article 7(3) of Framework Directive, *supra* note 3.

[33] *See*, Article 8.3 of Access Directive, *supra* note 3.

[34] *See*, Commission Staff Working Document (816), *supra* note 8, pp. 18.

[35] *Ibid.*

[36] *See*, Nicolas Petit (2004), *supra note* 9. The author suggests that in sectors where the 'networking' pattern has been followed (for instance, the electronic communications sector), the NRAs are the arm of the Commission for bringing about market liberalization. Thus, the development of conflictual relationships between the Commission and the NRAs may in the long run compromise vital collaboration between both levels. In addition, the initiation of formal legal proceedings may affect the credibility of the NRA with regards to the regulated entities.

[37] *See*, Deutsche Telecommunications AG, *supra* note 11.

This somehow describes the awkward position of the Commission as the ERA. Since it has very limited means to surveille NRAs under the regulatory framework, it cannot but seek the help of its power based on EC competition law. It is a way roundabout, but it is a way out. However, it certainly decreases legal certainty and efficiency of a national regulatory measure, and inevitably increases transaction costs. An appropriate and proportionate solution is to extend the Commission's veto power to the area of national regulatory remedies. A proposal for extension is being submitted by the Commission,[38] which will be discussed in the next part of this paper.

Ambiguity of Insufficiency of Competition Law: Market Analysis

Converging competition law methodologies into SSR is another innovation of the 2002 Framework. Through this convergence, it requires NRAs to take the position of competition authorities to deal with the regulatory issues. In addition, as already mentioned, the first step, market definition, is significant as regards the borderline between competition law and SSR. Within this step NRAs have to identify the hardcore of regulation, then compare the advantages of SSR with those of competition law, and finally, set up SSR where necessary. It is an appropriate way *ex ante* to prevent conflicts *ex post* between regulatory authorities and competition authorities.

For more legal certainty, the three-criterion test for market definition, along with specific explanations, is introduced by the Commission. The first two principles of the market definition analysis, i.e., high and non-transitory barriers to entry and non-dynamic aspects, are clearly developed. However, the third principle, insufficiency of competition law, causes some uncertainty. In line with the explanation of the Commission, the insufficiency of competition law may exist, where

> "the compliance requirements of an intervention to redress a market failure are extensive (e.g., the need for detailed accounting for regulatory purposes, assessment of costs, monitoring of terms and conditions including technical parameters, etc.), that frequent and/or timely intervention is indispensable and that creating legal certainty is of paramount concern".[39]

Nevertheless, according to the existing case law, competition law, that parallels SSR, has been regarded as a successful instrument to remedy competition problems. For example, based on the principle of 'essential facility', denial of access to infrastructure may be annulled as an infringement of Article 82 of the EC Treaty.[40] Likewise, a margin squeeze by one player

[38] *See*, Commission Staff Working Document (816), *Supra* note 8, p. 18.

[39] *See*, Recommendation on Relevant Markets, *supra* note 26, pp. 11-12.

[40] *See*, Antonio F Bavasso (2002), "Essential Facilities in EC Law: The Rise of an 'Epithet' and the Consolidation of a Doctrine in the Communications Sector", *Yearbook of European Law*, Vol. 21, p. 63; John Temple Lang (2000), "The Principle of Essential Facilities in European Community Competition Law - The Position Since Bronner", *Journal of Network Industries*, Vol. 1, p. 375. The case law has helped clarify the conditions under which an undertaking controlling an essential facility is under a duty to give access to its infrastructure. In Bronner case, ECJ held that, for a refusal to give access to be an abuse of a dominant position, it must be shown that (1) the refusal to grant access is likely to eliminate all competition in the downstream market and cannot be objectively justified and (2) the good, service of infrastructure in question is absolutely indispensable for the carrying out the economic activity (i.e., there is no alternative to this). *See*, Case C-7/97, *Oscar Bronner vs. Mediaprint*, November 26, 1998, [1998] ECR I- 7791.

may be an abuse of dominant position under Article 82 of the EC Treaty, which can be invoked to solve interconnection problems.[41] Furthermore, accounting separation and structural separation, as the standard remedies provided by Access Directive, can also be imposed by competition authorities, though exceptionally.[42] Consequently, there is not an explicit guide to identify in which area competition law is insufficient.

Perhaps realizing this problem, the Commission without further developing the concept of insufficiency of competition law alone states that:

> in practical application NRAs should consult with their NCA and take into account that body's opinion when deciding whether use of both complementary regulatory tools is appropriate to deal with a specific issue, or whether competition law instruments are sufficient.[43]

Reflecting on this interpretation, this paper supposes that the Commission is not so much about to clarify the concept of insufficiency of competition law, but to establish a cooperation mechanism between competition authorities and regulatory authorities. The Commission expects the (in)sufficiency of competition law can be determined jointly by the two institutions through an institutional negotiation rather than a substantive analysis. However, no provision of the final decisionmaker by the Commission would lead to a risk indicated in the following.

In order to target this risk, it is better to assess the negative effects of the uncertainty of the concept of insufficiency of competition law within the entire EC legal context. On the one hand, because the Commission is granted veto power on the definition of national markets, DG Information, together with DG Competition, can finally determine whether EC competition law alone is sufficient or not with regard to a certain market failure. In other words, there indeed stands a final decisionmaker, i.e., the Commission. On the other hand, after the adoption of the Commission's veto decision, (1) Member States are competent to institute an action of annulment before the ECJ according to Article 230 EC Treaty against the Commission's decision on behalf of their NRAs; (2) the national court can refer a case accidentally concerning validity of the Commission's decision to the ECJ by a preliminary ruling in accordance with Article 234 of the EC Treaty; and (3) undertakings directly and individually concerned by the Commission's decision can bring an action of annulment pursuant to Article 230 of the EC Treaty.[44,45] Therefore, it is reasonably safe to draw a conclusion that there is no jurisdictional conflict between EC competition authorities, say the Commission and the NRAs, stemming from the ambiguous concept of (in)sufficiency of competition law vis-à-vis SSR.

[41] *See*, Damien Geradin and Robert O'Donoghue (2005), *supra* note 18.

[42] *See* Commission Decision of October 23, 2001, on the lack of exhaustive and independent scrutiny of the scales of charges and technical conditions applied by La Poste to mail preparation firms for access to its reserved services, *OJ L* 120 of May 7, 2002, pp.19-37. And Commission Press Release IP/97/292 of 11 April 1997, "Settlement Reached with Belgacom on the Publication of Telephone Directories—ITT Withdraws Complaint".

[43] *See*, Recommendation on Relevant Markets, *supra* note 26, p. 12.

[44] *See*, Pending Case T-109/06, *Vodafone Espana and Vodafone Group vs. Commission*, *O. J.* 2002 L 108, p. 33.

[45] The NRAs are certainly not competent to bring a preliminary ruling before ECJ by themselves. *See*, Case C-256/05, reference for a preliminary ruling from the Telekom-Control-Kommission by application of June 13, 2005 in a procedure concerning Telekom Austria AG, OJ C 205 of August 20, 2005.

Nevertheless, the 2002 Framework keeps silence on the final decisionmaker with regard to the diverging views on the (in)sufficiency of national competition law between the NRAs and the NCAs. The NCAs have no veto power or equivalent to challenge the decisions of NRAs since that still exclusively falls into the competence of the NRAs. The present cooperation mechanism may be inefficient especially in case of a failure of the negotiation. Therefore, a possible risk may be detected that NCAs might follow the Commission's methodologies in Case Deutsche Telecom by undoing the latter's work through the application of competition law on an already regulated issue *ex post*.

To conclude, the ambiguity of insufficiency of competition law will not lead to jurisdictional conflicts between the Commission and the NRAs whereas it may raise a risk of institutional tensions between the NCAs and the NRAs. Unfortunately, the Commission appears to pay no attention to this problem so far.

An Area Outside Market Analysis: Article 5 of Access Directive

In line with the 2002 Framework, the regulatory obligations can be divided into two categories: (1) the obligations imposed independently of a specific designation by the authorities when an operator enjoys SMP[46]; and (2) the obligations that are imposed on the operators that have specifically been designated as having SMP.[47] A majority of regulatory obligations has been required to be imposed based on the three-step analysis and then to be reviewed by the Commission according to the Article 7 Procedure.[48] Obligations imposed without conducting market analysis are outside the control of the Commission because according to Article 7 Procedure, the Commission has no veto power on the proposed national obligations. Not all the obligations within the first sub-category may raise institutional conflicts between competition authorities and regulatory authorities,[49] nevertheless there is an area within the first sub-category, i.e., Article 5(1) of Access Directive (hereinafter, Article 5(1)), which may engender institutional conflicts.

Article 5(1) empowers the NRAs to impose remedies under certain conditions upon undertakings without SMP in order to ensure adequate access and interconnection, and the interoperability of services in a way that promotes efficiency, sustainable competition,

[46] For example, compulsory access to network to ensure end to end connectivity (Article 4 and Article 5 of Access Directive), compulsory access to associated facilities to ensure media pluralism (Article 5 and Article 6 of Access Directive), standardization and in particular interoperability of digital interactive television services (Article 17 and Article 18 of Framework Directive), co-location and facility sharing (Article 12 of Framework Directive), accounting separation (Article 13 of Framework Directive) and universal service obligations (Universal Service Directive). *Supra* note 3.

[47] *See*, Alexandre De Streel (2003), *supra* note 7.

[48] *See*, Article 14 to 16 of Framework Directive, Article 8 of Access Directive and Article 17 of Universal Service Directive. *Supra* note 3.

[49] For instance, universal service obligations will not give rise to jurisdiction conflicts between competition authorities and regulatory authorities, though the imposition of universal service obligations are not subject to the three-step analysis. Member States has the right to define the kind of universal service obligation it wishes to maintain. In addition, such obligations will not be regarded as anticompetitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the member. *See*, Recital 3 of Universal Service Directive, *supra* note 3. Therefore, there would be little jurisdictional conflicts between competition authorities and regulatory authorities with regard to universal services.

and gives the maximum benefit to end-users. Distinct from the second sub-category obligations, the obligations under Article 5(1) can be imposed without conducting market analysis.

Three defects can be discovered with regard to the approach of Article 5(1): First, it may lead to over-regulation and a fragmentation of the internal market;[50] second, the obligations imposed according to Article 5(1) are not subject to the review of the Commission because the veto power of the Commission so far is not concerned with a national regulatory remedy; and third, the 2002 Framework does not either provide a cooperation mechanism at national level for the involvement of NCAs with regard to the obligations imposed under Article 5(1). All of these three defects may lead to a possibility of the intervention of the Commission with regard to the over-intrusive SSR which endangers intracommunity trade, and consequently they generate the risk of jurisdictional conflicts. A proposal for reform of Article 5(1) of Access Directive is brought forward by the Commission,[51] which will be examined in the following part.

Proposals for Resolving Conflict

In order to resolve the risks of duplication of procedures stemming from the three residual problems within the 2002 Framework, further harmonization is necessary. This part will first examine the relationship between competition law and SSR in the EC legal regime. Then four proposals will be brought forward to improve the current regulatory framework by smoothing the residual institutional problems according to the problems occurring at the European level first and at national level second.

Relationship Between Competition Law and SSR: The Principle of *lex specialis* with Exceptions

With regard to the headstream of its legal basis, the EC legislative regime in the electronic communications sector can be found to be based either on Article 95 of the EC Treaty, aimed at creating a genuine internal market for the free movement of people, goods, services and capital in the EC, or on Article 86 of the EC Treaty, which provides for the abolition of special or exclusive rights granted to undertakings.[52] Therefore, from the normative point of view, the regulatory framework in the electronic communications sector should be a *lex specialis* vis-à-vis the EC Treaty, in particular, the economy-wide EC competition law.[53] Be this proposition true, competition law should have not contradicted SSR in terms of the general legal principle *lex specialis derogat legi generali*. Furthermore, competition authorities and regulatory authorities in the EC should have had no overlap of jurisdiction, as maintained by the USA Supreme Court in Trinko case.[54]

50 *See*, Commission Staff Working Document (816), p. 20, *supra* note 8.

51 *Ibid.*

52 *See*, Joachim Scherer (2005)(Ed.), *Telecommunication Laws in Europe*, 5th Edition, Tottel Publishing (West Sussex), p. 3.

53 *See*, John Temple Lang (2005), *supra* note 9.

54 The Trinko case led the Supreme Court of USA to give interesting guidance to determine whether antitrust rules should be enforced in sectors that are already subject to SSR. The Supreme Court held that the firms subject to SSR would be immune from competition law ("implied immunity" doctrine). The aim of this doctrine is to avoid regulatory decisions being frustrated by conflicting decisions under

However, the EC practice is not fully consistent with this normative conclusion. As a fact, "competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition".[55] The Commission's decision may suggest a dual indication. On the one hand, the Commission accepts the position of *lex specialis* of SSR to some extent, because it used the word 'may'; on the other hand, the principle of *lex specialis* of SSR in the electronic communications sector is not absolute and in some cases subject to exceptions because competition law 'may intervene'. Unfortunately, the approach of the concurrent application of competition law and SSR into the electronic communications sector may overburden the electronic communications players by requiring them to comply with two different sets of rules simultaneously.

Justifications for this approach must be varied. A possible explanation may be grounded on the fundamental objective of EC Treaty, i.e., the establishment of a single market. Because the Community does not have exclusive competence in the area of the liberalization of the electronic communications sector, Member States, according to the principle of subsidiarity set out in Article 5 of EC Treaty, enjoy a considerable margin of discretion therein. However, were every action taken by the Community only after the entering into effect of a harmonization of legislation, the establishment of a single market for the electronic communications sector would be too slow to be achieved. Taking into account of the close relationship between competition law and liberalization, intervention based on competition law—where EC has exclusive competence in so far as national regulatory measures are incompatible with the common market and may affect trade between Member States—may be an ideally alternative for the EC to harmonize the electronic communications market. Subsequently, this approach was evolved into the model of the concurrent application of competition law and SSR in the EC regime.

However, the overlapped jurisdiction between the two authorities must be limited to a minimum. Otherwise, it may lead to seriously unfortunate consequences that it:

- Confuses the law, and causes legal uncertainty and unnecessary expense;
- Creates a potential liability, *ex post*, to pay compensation, when that is not justified; and
- Encourages the wider use of the national competition law rules on unilateral conduct (more or less equivalent to Article 82 EC Treaty), which is permitted in principle by Regulation 1/2003,[56] but which may lead to anticompetitive results.[57]

Therefore, a harmonized procedure to solve such jurisdictional conflicts must be developed, especially in the areas where common interests both for competition authorities and regulatory authorities are involved. In order to set up a harmonized procedure between competition authorities and regulatory authorities to ensure competition, promote the common

competition law. *See Verizon Communications, Inc. vs. Law Offices of Curtis Trinko, LLP*, January 13, 2004, *540 US*. For a comparative analysis on Trinko case vs. Deutsche Telecom case, please see Nicolas Pettit (2004), *supra* note 2; and also Pierre Larouche (2005), *supra note* 2.

55 *See*, Deutsche Telecommunications AG, *supra* note 11.

56 *See* Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *O. J. L*.1 of January 4, 2003.

57 *See*, John Temple Lang (2005), *supra* note 9.

market and protect consumers' interest, the 2002 Framework provides a mechanism requiring the cooperation of competition authorities, on the one hand, and converging competition law methodologies into SSR on the other. As discussed before, the 2002 Framework makes great contributions, but it also leaves three residual problems.

Subsequently, the paper offers four proposals in light of the three residual problems discussed in the third part. The key point concerns the question how to avoid duplicated procedures through an effective cooperation between the Commission and the NRAs at the European level, and then between NRAs and NCAs at national level.

Resolving Conflicts at the European Level

Extension of Article 7 Procedure to Remedies

As discussed in the second and third parts, no veto power of the Commission on national regulatory remedies may, however, produce a risk that the Commission would apply EC competition law *ex post* into already regulated issues. The best solution to resolve this risk is of course to establish a genuine ERA.[58] Nevertheless, the Commission admitted that the establishment of a genuine ERA in the electronic communications sectors is incompatible with the principle of subsidiarity, and therefore, is impossible to be achieved in a short-term.[59]

> Therefore, the first proposal of this paper is to extend the Commission's veto power to national regulatory remedies.

By such an extension, the Commission should be granted the power to examine whether the national regulatory remedies would create a barrier to the single market and whether they are compatible with the Community law and in particular, the objectives referred to by Article 8 of Framework Directive. Similar to the veto power on market definition and designation of SMP, the Commission cannot have the power to replace a national remedy by one of its own, but can only indicate the problems of the remedy proposed by the NRA in its justification for the veto decision. This veto decision must be accompanied by a detailed and objective analysis of why the Commission considers the draft remedies should not be adopted, if appropriate, together with specific proposals for adopting draft remedies.

This reform will be submitted by the Commission to the Council of European Union on November 13, 2007.[60] In the summer of 2006, the Commission issued a Communication with two staff working documents whereby stating its proposals to reform the 2002 Framework for public input.[61] In its proposals, the Commission expressed the need for greater consistency in the application of national remedies and proposed that:

[58] *See*, Commission Staff Working Document (817), *supra* note 6, pp. 16-19.

[59] *Ibid*, pp. 20-21.

[60] *See*, the Commission's roadmap for 2006 review, last access on September 30, 2007 and available at: http://europa.eu.int/information_societv/policv/ecomm/tomorrow/roadmap/index en.htm

[61] *See*, Communication from the Commission to the Council, the European Parliament, the European Economic And Social Committee And the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and service, COM(2006) 334 final, SEC(2006) 816 & SEC(2006), pp. 8-9.

> in order to contribute to the development of the internal market, the Commission proposes to extend the veto powers under the market review procedure to include proposed remedies.[62]

Although the extension will indisputably contribute to EC regulatory consistency, the disadvantaged side of the extension is the increasing workload of the Commission and accordingly the decreasing efficiency of implementation at national level. Fortunately, the Commission also proposed to simplify the notification procedure with regard to certain draft national measures in order to focus on cases where substantial problems may arise. Though the proposal of a simplified Article 7 Procedure is not to target the increasing workload of the Commission after the extension of veto power, it will certainly achieve desired effects also. Such a simplified procedure is proposed by the Commission to be applied to the following categories of cases:

- Notifications of markets which were found to be competitive in the previous review, unless substantial changes in competitive conditions have occurred since that review; and
- Notifications where only minor changes to previously notified measures are proposed (such as the details of a remedy)".[63]

In addition, according to the Commission's proposal:

> For cases falling under the simplified procedure, a standard notification form could be established to limit the information required to a minimum so as to reduce significantly the administrative burden for NRAs, operators and the Commission. In such cases, in exceptional circumstances where the Commission detected serious problems with the measures under consultation, it could still require the measure to be notified in full.[64]

Conclusively, the extension of veto power, together with the simplification of the Article 7 Procedure, will promote a consistent European regulatory policy, on the one hand and, ensure that SSR will only be imposed where necessary, on the other. The participation of DG Competition, and especially the extension of the Commission veto power, will not only put the Commission in a position to examine the national regulatory measures under EC competition law, but also render SSR as a *lex specialis* to economy-wide competition law.[65] This move is likewise significant to relax the institutional tensions between EC competition authorities and NRAs. Because, on the one hand, NRAs should comply with competition law methodologies to deliberate competition problems in the electronic communications sector, and on the other hand, DG Competition is granted the power to examine the draft measures of NRAs, the Commission, as EC competition authority, should be bound by the regulatory measures of NRAs. After examination, a positive decision of the Commission concerning the draft measures of NRAs should also be a confirming decision that the national regulatory measures are compatible with EC competition law. To put it straightforward, the Commission should regard SSR as a *lex specialis* to EC competition law, and therefore, be 'e-stopped' to ground on EC competition law for intervention in the future.

[62] *See*, Commission Staff Working Document (816), *supra* note 8, p. 19.

[63] *See*, Commission Staff Working Document (817), *supra* note 6, p. 16.

[64] *Ibid.*

[65] *See*, John Temple Lang (2005), *supra* note 9.

Extension of the Commission's Review Power to the Enforcement Stage

According to the 2002 Framework, the Commission is only competent to review the initiation of the regulatory measures by the NRAs. It, however, has no competence at a further step to monitor NRAs enforcing the approved regulatory policies. The uncontrolled enforcement may lead to a fresh risk. Because of insufficient or unpredictable information, the Commission, at the moment of examination of the draft measure, may not foresee the 'adverse effects' of the measure concerned in the process of enforcement. Supposing the adverse effects might take place, without review power in the process of enforcing SSR may the Commission, when necessary, possibly invoke EC competition law to attack a market failure stemming from an inappropriate enforcement. Hence, an institutional conflict is still possible even after the extension of Commission's veto power.

In order to manage the jurisdictional conflicts when enforcing SSR, two groups of cases with different causations will be examined. The clear case can be solved under the current regulatory framework whereas the bottleneck case requires further harmonization.

The Clear Case: The clear case refers to a situation where a regulatory remedy may not exist, or may exist but the NRA fails to enforce it. In this case, as indicated by the Commission the possibility to act on the basis of competition rules could prove extremely useful.[66] The Commission may start the procedure (by, for instance, launching a sector inquiry) in order to bring the failing NRAs' attention on a particular problem. Subsequently, the Commission will defer the case to the relevant regulator. Eventually, the problem is handled by the NRA through the application of sector specific remedies. The competition rules are thus only enforced as an 'ignition' device. This approach has already been followed by the Commission in the pricing of leased lines inquiry and the mobile termination charges inquiry.[67]

Based on the practice of the commission, the second proposal of this paper is to set up a two-step cooperation mechanism with regard to the clear case.

At the first step, the Commission should be endowed with the power to inform NRAs of the latter's failure of observation of a market failure and urge NRAs to respond within a certain time limit. In order to keep a consistent and independent regulatory framework, a revised Article 7 Procedure should provide the Commission with such an enquiry power. In line with the principle of subsidiarity, the Commission enjoys no executive or punitive power over the unobserved market failure.

At the second step, if NRAs does not respond actively and adequately so that the market failure concerned is still untouched within the certain time period, then it might be justifiable for the Commission on its own motion to take a step further, i.e., applying EC competition law into the market failure concerned.

The Bottleneck Case: By contrast, the bottleneck case refers to a situation, where while NRAs have already taken regulatory measures to a certain market failure, an anticompetitive activity that distorts trade between Member States still takes place from the perspective of EC competition law. If this case is indeed caused by inefficient NRAs in a sense that NRAs have

[66] *See*, Alexandre de Streel (2005), *supra note* 15.

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

imposed regulatory obligations while nevertheless are inefficient to solve the market failure concerned, this case is more or less similar to the clear case aforementioned. There is little doubt that the Commission can follow the two-step regime to solve the problem concerned. However, on a second thought, this may be a different case that NRAs are deliberate to adopt a regulatory obligation in the transition period in order to boost competition in the long run, while such a temporary measure may be incompatible with EC competition law in the view of the Commission.[68] Be it the case, the Commission's intervention would frustrate the plans of the NRAs.

Indeed, the approaches of SSR are often different from those of competition rules. In the field of conditions for access to a network, for instance, SSR often takes into account the investments incurred by the owner of the infrastructure, the existence of intellectual property rights or the necessity to preserve competition in the long run.[69] By contrast, competition rules are less concerned with these objectives. For instance, a generous application of essential facility doctrine may have a disincentive effect on potential competitors' innovations and investments because they can free-ride on others' commercial advantages by arguing that the latter is an essential facility.[70] Since competition authorities are primarily concerned with the elimination of actual restrictions of competition, they generally attach little importance to the necessity that access conditions ensure sufficient rates of return on investments and do not undercut incentives for innovation, etc.[71] A possible outcome is that NRAs may legitimate access conditions that a competition authority would on the contrary consider as incompatible with EC competition law.

It therefore is necessary to establish a cooperation measure at the enforcement stage and this corresponds with the argument brought forward by the Commission that effective cooperation between competition authorities and regulatory authorities would prevent the duplication of procedures concerning identical market issues.[72]

The third proposal of this paper is, if possible, to set up a cooperation procedure, analogous to the Article 7 Procedure, which can be launched by the Commission when a market failure is detected under EC competition law in the process of enforcing SSR.

When detecting a market failure after the imposition of regulatory obligations, the Commission should be granted the power to ask for reasoned opinions from NRAs. After receiving the letter for reasoned opinions from the Commission, the NRAs should, within a certain time limit, provide sufficient justifications for the market failure identified by the

[68] For example, an infrastructure sharing agreement by SMP undertakings in order to establish the next generation network may entail a risk of foreclosure on sites used for installing antennas, masts and other network elements for other competitors, as indicated by Commission Decision, O2 UK Ltd./T-Mobile UK Ltd. of April 30 , 2003, *OJ L* 200 of August 7, 2003; Or taking different economic calculation methods by different institutions may lead to contrary decisions, as indicated by Deutsche Telecom case, *supra* note 11.

[69] *See*, e.g., Article 12(2) of Access Directive, *supra* note 3.

[70] *See*, Derek Ridyard (2004), "Compulsory Access Under EC Competition Law - A New Doctrine of 'Convenient Facilities' and the Case for Price Regulation", *European Competition Law Review*, Vol. 11, pp. 669-673.

[71] *See*, Nicolas Petit (2004), *supra* note 2.

[72] *See*, Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002/C.

Commission, or submit revised regulatory obligations in relation to the market failure concerned. Within both the cases, the NRAs must take a new market analysis, as it did before for their draft measures under the current Article 7 Procedure. Similar as its veto power in the examination of draft measures, the Commission also enjoys veto power on the reasoned opinions or revised regulatory obligations of the NRAs. If the veto power is deployed by the Commission, NRAs have to take utmost account of the comments of the Commission and submit new regulatory measures afterwards.

This idea was unfortunately not yet caught by the Commission in its proposals for public input. A possible explanation is that at the current stage the Commission's focus is the extension of its veto power to the area of remedies so that it is hesitating to go this far.

No Need to Amend Article 5 of Access Directive

As we discussed before, Article 5(1) of Access Directive provides NRAs with an opportunity to impose regulatory obligations on none-SMP undertakings without conducting market analysis. Under the current Article 7 Procedure, the Commission enjoys no veto power on national regulatory obligations. Therefore, although Article 5(3) of Access Directive requires NRAs to implement this provision in accordance with the Article 7 Procedure, the Commission cannot actually surveille such regulatory measures. This could also render conflicts between the Commission and NRAs.

However, if the veto power in Article 7 Procedure would be extended to the level of remedies according to the first proposal of this paper, then the Commission could be given the possibility to veto NRA measures taken in this regard.[73] Under such a situation, there would be no conflict between the Commission and NRAs, though those obligations are imposed without conducting market analysis.

The Commission paid attention to this issue in its proposal, where it submitted that:

> Article 5(1) of the Access Directive empowers NRAs to impose obligations, under certain conditions, on non-SMP undertakings in order to ensure adequate access and interconnection and interoperability of services. Unlike other obligations that can be imposed on companies by the NRAs, these obligations can be imposed without conducting market analysis. In order to avoid overregulation and a fragmentation of the internal market by the imposition of inconsistent obligations under this article, the Commission could be given the possibility to veto NRA measures taken in this area.[74]

Resolving Conflicts at National Level

The jurisdictional conflicts between competition authorities and regulatory authorities may exist not only at European level between the Commission and NRAs, but also at national level between NRAs and NCAs. In order to prevent national duplication of procedures, the 2002 Framework requires Member States to ensure consultation and cooperation between NRAs and NCAs on matters of common interest.[75] However, because of the imperfection of the cooperation mechanism of the 2002 Framework as indicated above, the risk of multiple

[73] *See*, Commission Staff Working Document (817), *supra* note 6, pp. 21-22.

[74] *Ibid*, pp. 20-21.

[75] *See*, Article 3(4) and Article 3(5) of Framework Directive, *supra* note 3.

proceedings before NRAs and NCAs remains still high. In the following, this paper tries to examine this issue first by *ex ante* preventive measures and second by *ex post* cooperative measures. The former measures concern the respective competences of NRAs and NCAs to liberalize the electronic communications sector while the latter refer to the allocation of jurisdictions between these two groups of institutions when a case comes up.

Ex ante *Preventive Measures*

Through integrating competition law methodologies into SSR provided by the 2002 Framework, NCAs are expected to be bound by the isogenously regulatory measures of NRAs through the cooperation mechanism, despite of the fact that the latter work on an *ex ante* basis, and therefore be self-restrained to take duplicated action *ex post* based on competition law. In particular, the 2002 Framework sets up a limitation that SSR can only be imposed where competition law alone is insufficient for a specific market failure. In so doing, the 2002 Framework aims to draw a borderline between the application of competition law and SSR at the stage of market analysis in order to eliminate the jurisdictional conflicts in the area of common interests between the two liberalization instruments. However, ambiguity of insufficiency of competition law remedies and the loose cooperation between NRAs and NCAs would undermine the effectiveness of this promising mechanism.

> Therefore, the fourth proposal of this paper is to urge the Commission to draw a guideline to set up a more effective cooperation mechanism between the NRAs and the NCAs with regard to the ambiguous concept of (in)sufficiency of competition law.

The 2002 Framework can be divided into three layers of SSR according to their respective objectives. First, "spectrum allocation" deals with the allocation of scarce resources by Authorization Directive; second, 'social regulation' aims to ensure that the needs of citizens which are considered to be important by the legislature are satisfied even though they are not necessarily guaranteed by the market alone under Universal Service Directive; and third, 'economic regulation' aims at ensuring the functioning of an effectively competitive internal market, thereby maximizing economic efficiency in line with Framework Directive and Access Directive.[76] Driven by different underlying methodologies from competition law[77], spectrum allocation and universal service obligations are traditionally thought of as areas that competition law alone is insufficient to deal with.[78] Therefore, the overlapped jurisdictional conflicts between NRAs and NCAs can only arise at the third layer of regulation, 'economic regulation'. Based on the assumptions of such new guideline is expected to be drawn as follows:

[76] *See*, Alexandre de Streel (2003), *supra note* 7.

[77] Competition law is mainly based on analysis of price/cost structure, the test of which is seldom taken in the operation of universal service obligations and allocation of spectrum.

[78] For details about the insufficiency of competition law over universal service obligations, please see Jean-Michel Glachant (2002), "Why Regulate Deregulated Network Industries?", *Journal of Network Industries*, No. 3, pp. 297-311; For details about the insufficiency of competition law over spectrum allocation, please *see* Nils-Henrik M and Von Der Fehr (2007), "Modern Telecommunications Regulation: An application to Allocation of Spectrum Rights", last access on September 30, and available at: http://www.pts.se/Archive/Documents/SE/von Fehr Modern Telecom Regulation 200904.pdf: and also, Damien Geradin and Michel Kerf (2003), *Controlling Market Power in Telecommunications: Antitrust vs. Sector Specific Regulation*, pp. 353-356, Oxford University Press (Oxford).

Exclusive Areas of SSR vis-à-vis Competition Law: The exclusive jurisdictions of SSR to which the reach of national competition law should not be extended must be clearly underlined. These areas at least include protection of universal services obligations and allocation of radio spectrum. This argument is compatible with the current regulatory framework and can be effectuated with little effort.

First, with regard to universal service obligations, the recital 3 of Universal Service Directive clearly provides that:

> (Universal service)[79] obligations will not be regarded as anticompetitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the member.

In addition, it is a principle confirmed by ECJ in Corbeau Case that universal service obligations may be a justification to exclude competition according to Article 86(2) of the EC Treaty.[80] Therefore, it goes without doubt that a proportionate imposition of universal service obligations precludes the application of competition law. Then according to the words held by European courts and the Commission that competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition[81], there should be no duplication of procedures at national level regarding universal service obligations.

Second, as far as spectrum allocation is concerned, Authorization Directive leaves little room for competition law to play. It only requires that the procedure for assignment of radio frequencies should in any event be objective, transparent, non-discriminatory and proportionate.[82] In accordance with the ECJ case law, the procedure for assignment of radio frequencies should be assessed according to Article 49 of the EC Treaty, which concerns the freedom to provide services.[83] Furthermore, according to Authorization Directive undertakings that breach obligations under spectrum allocation will be monitored by NRAs and may be punished by a relevant authority.[84] In this regard, NCAs are certainly precluded by Authorization Directive, and therefore, should not take duplicated procedures concerning spectrum allocation.

Sufficiency of SSR vis-à-vis Competition Law in the Area of Common Interests: The 'economic regulation' is concerned with competition problems stemming from access, interconnection and retail prices, which is an area of common interests both for competition authorities and regulatory authorities.[85] However, drawing a borderline between SSR and

[79] Words are added by the author.

[80] *See*, Case C-320/91 Corbeau [1993] ECR1-2533, [1995] 4 CMLR 621, Para 21. See other reference at Case T-260/94 Airline, [1997], ECR 11-997, [1997] 5 CMLR 851; Case C-203/96 *Chemische Afvalstoffen Dusseldorp B V and Others vs. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR 1-4075, [1998] 3 CMLR 873; and Case C-475/99 *Ambulanz Glockner vs. Landkreis Sudwestpfalz* [2001] ECR 1-8089, [2002] 4 CMLR 726.

[81] *See*, *supra* note 10.

[82] *See*, Recital 29 of Authorization Directive, *supra* note 3.

[83] *Ibid*, Recital 12.

[84] *Ibid*, Article 10.

[85] *See*, Michel Kerf, Isabel Neto and Damien Geradin (2005), *supra* note 1.

competition law seems to be a 'mission impossible'.[86] Fortunately, as maintained by the Commission that effective cooperation may be a better way to resolve such substantive conflicts[87], it is not necessary to touch upon this sensitive substantive line. As discussed before, among the three-step analysis market definition is a significant step to differentiate the jurisdictions NRAs from that of NCAs. In addition, within the three-criterion test for defining relevant market, the first two criteria, i.e., the high and non-transitory barriers to entry and the non-dynamics to competition, aim to differentiate competition law from SSR from a substantive point of view while the third criterion, the insufficiency of competition law, is more like a cooperation mechanism. Therefore, resolving the institutional conflicts between NRAs and their NCAs hinges on the practicability of the third principle.

The key point for establishing an effective cooperation mechanism is to clarify who has the power of last say when a negotiation fails with regard to (in)sufficiency of competition law. Because this is a conflict between the NRAs and their NCAs, EC law is not competent to solve this issue. However, for the sake of a consistent single market the Commission may urge Member States to set up a relevant authority who can finally determine the sufficiency of national competition law or national SSR in case of a negotiation failure. This would to a great extent prevent the NCAs from applying national competition law *ex post* into already regulated issues by the NRAs.

To conclude, as far as the third condition for market definition, i.e., insufficiency of competition law, is concerned, it may be established that SSR is more sufficient to regulate the electronic communications sector than competition law in the area of spectrum allocation and social regulation. Nevertheless, with regard to economic regulation the Commission may suggest Member States to set up a dispute settlement system in case of a failing negotiation between the NRAs and their NCAs.

Ex post *Cooperative Measures*

The preventive measures cannot completely ensure national competition law would not intervene into already regulated activities. Reasons for this can be found from two aspects. First, the forward-looking approach of NCAs may render outdated regulation afterwards, which may be incompatible with competition law. Second, the dispute settlement mechanism under the 2002 Framework and competition law mechanism are two parallel procedures and therefore the applicants may bring two cases simultaneously before the two authorities based on the same facts.

> Aware of the risk of duplication of procedures, the 2002 Framework provides that:
>
> Member States shall ensure, where appropriate, consultation and cooperation between those authorities *[i.e., the NRAs]* and national authorities entrusted with the implementation of competition law [...] on matters of common interest. Where more than one authority has competence to address such matters Member States shall ensure that the respective tasks of each authority are published in an easily accessible form.[88]

[86] For contributions concerning the substantive difference between SSR and competition law, please *see* Christian Bergqvist (2004), supra *note* 12; Damien Geradin and Robert O'Donoghue (2005), supra *note* 18; John Temple Lang (2005), supra *note* 9; and also Pierre Larouche (2005), *supra* note 2.

[87] *See*, the Commission guidelines on market analysis and the assessment of significant market power, Note 15, *supra* note 72.

[88] *See*, Article 3(4) of Framework Directive, *supra* note 3.

In order to implement the requirements within the 2002 Framework, most Member States have, however, spontaneously designed cooperation procedures at the national level. With regard to this issue, Dr. Nicolas Petit made a great contribution in his paper, "The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion".[89] In the following, this paper refers to his work.

The national cooperation mechanisms either take the form of law, and/or take the form of 'agreement', 'protocols' or 'memorandum of understandings' between NCAs and NRAs.[90] So far there exist three categories of cooperation mechanisms at national level.

The first mechanism that exists in most Member States requires NRA to inform the competition authority when the former has knowledge of anticompetitive practices in the sector they regulate.[91]

A second mechanism requires NCAs to communicate with the NRA when the former are called to rule on a dispute that falls within the jurisdiction of the latter. In a majority of cases, this leads to the consultation of the NRA and/or to the possibility of producing a report.[92] In other cases, the NCA will rely on the NRA for some aspects of its decisions.[93] Finally, in some circumstances, this leads to the referral of the case by the NCA to its NRA.[94]

Third, even Member States that opted to entrust the regulator with the enforcement of the competition rules have designed cooperation mechanisms. In the UK, a rule of priority determines which of the NRA or NCA must deal with the case and reciprocal consultation requirements are set up. In case of conflict between the two authorities, the minister determines which authority shall have jurisdiction.[95]

[89] *See*, Nicolas Petit (2004), *supra* note 9.

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

[91] *Ibid*, *See* for instance in the telecommunications sector, the requirements of the law in Italy, Spain or France. Also, NRA may consult NCA when apply competition law concepts within the implementation of their regulatory missions. The regulator must obtain consent of the competition authority to take some decisions or, at least, is under the duty to consultation, in Germany, for the definition of the dominant position and the delimitation of markets.

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

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

[94] *Ibid.* Christophe Lemaire (2003), *Energie et concurrence: Recherches sur les mutations juridiques induitespar la liberalisation des secteurs de l'electricite et dugaz*, *Presse Universitaires d'Aix-Marseille*, pp. 378. However, the author considers that there is no duty, for the NCA to stay proceedings and to refer the case to the NRA. Two proceedings can thus take place. And *Laurence Idot*, *Regies de concurrence et regulations sectorielles*, in *La regulation des services publics en Europe*, (1998) TEPSA.

[95] *Ibid.* Aurore Laget-Annamayer (2002), *La regulation des services publics en reseaux*, LGDJ-Bruylant, Bruxelles, p. 434.

A majority of observers consider that these procedures have worked efficiently and that NRAs and NCAs do, in practice, effectively collaborate.[96] In sum, the development of cooperation mechanisms at national levels certainly limits most of the risks of multiple proceedings before NRAs and NCAs. Consequently, the *ex post* cooperative measure at national level currently works well and can be kept unchanged as it is.

Conclusion

With regard to the EC model, i.e., the concurrent application of competition law and SSR, in the electronic communications sector, perhaps the best and ideal solution for resolving institutional conflicts is to establish a genuine ERA. The ERA with great possibility would be the Commission, in contrast with the role played by it according to Regulation 1/2003[97] in the area of the enforcement of EC competition law. Then such a centralized mechanism could allow the Commission to internalize the transaction costs caused by the current jurisdictional conflicts between competition authorities and regulatory authorities, both at the European level and at national level.

Unfortunately, this is hardly to be achieved in the foreseeable future. So far the second-best solution offered by the Commission is to promote the cooperation between competition authorities and regulatory authorities. This cooperation mechanism can also achieve certain desired results. However, unlike a centrally controlled administration mechanism by establishing a genuine ERA, a pre-established cooperation mechanism frequently, if not always, leaves residual institutional conflicts because the designer can not foresee all the problems. Corresponding to its defect, the effectiveness of a cooperation mechanism is occasionally interrupted, provided an unexpected problem takes place.

At this moment, the EC is dealing with the improvement of its cooperation mechanism. The '2006 review project' has been launched; proposals of the Commission will be submitted to the Parliament and the Council of European Union at the end of this year; and the revised cooperation mechanism is expected to achieve some positive results in 2009-2010, or perhaps even later.[98] Nevertheless, taking into account the seemingly endless deregulatory process, the adjustment of the cooperation mechanism will unfortunately be initiated continually in the future with no ending. ■

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[96] *Ibid.*

[97] Regulation 1/2003, *supra* note 56.

[98] *See*, the Commission's roadmap for 2006 review, *supra* note 60.