Reinforcing the Commission's Power in the Communications Sector

An Issue for the Regulatory Framework Review

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Abstract: The reform of the regulatory framework for electronic communications is in progress. One of its major issue could be an institutional one, as the European Commission announced its intention to reinforce its own power, in particular in order to supervise the remedies imposed by national regulators to the dominant operators. Highlighting the importance of the objective of consolidation of the Internal Market, this article examines the case for this reinforcement and analyzes the institutional architecture which endorses it. Even if the proposal to create a European Electronic Communications Authority constitutes an event, the issue of the reinforcement of the Commissions's power should not be considered in the sole light of this project which could be rejected or amended.

Key words: Competition law, Electronic communications, European Commission, European Regulator, European Regulators Group, Harmonization, Internal Market, National regulators, Regulatory framework, Relevant market analysis procedure, Review.

The liberalization of telecommunications, renamed electronic communications to take into account the technological convergence, is henceforth completed. The process was initiated by the European Commission and it generated important case law relating to the choice of the legal basis of the liberalization directives, specifically article 86 CE.

The regulatory framework had a transitional function as it was tied in with the process of opening to competition. The function of the current framework adopted in 2002, as conveyed by the tasks assigned to National Regulatory Authorities, is to promote competition, but also to contribute to the development of the Internal Market and to safeguard the interests of the citizens of the European Union. A third reform is in progress. Following a period of public consultation, the Commission's proposals were published on November 13th 2007 [1].

[1] http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm

The issues brought about successively by the liberalization of the sector, by what is usually called market regulation, are complex. To understand them, it is necessary to resort to legal, economical and technical expertise. As a result, the substantive law issues tend to supersede institutional matters. The largely sectorial nature of the electronic communications regulation confirms this tendency. Although competition law is called to replace the *ex ante* regulation as competition turns out to be effective, sectorial regulation is still dominant, one could say even cumbersome. Nevertheless, the joint application of sectorial law and competition law plays in many cases an important role.

This trend emerges in the relevant market analysis procedure. The procedure aims to determine the undertakings with significant market power concerned by *ex ante* regulation.

Reducing the scope of this procedure is one of the objectives of the current review. The revision of the regulatory framework addresses other important issues: the better management of radio spectrum in view of the development of wireless applications, non discrimination in the context of broadband access, and the evolution of universal service. Nevertheless, no radical change was expected of this revision of the regulatory framework concerning sectorial rules, the question being if the major issue of this reform is not an institutional one.

The institutional subject matter was present in the first stages of the liberalization process. After the first directives had imposed the separation of the regulation and exploitation functions, the 2002 framework clearly opted for independent regulatory authorities carrying out the regulation at a national level. Their tasks were defined in the "framework" directive which organized the relations among these authorities, and also with competition authorities and naturally with the Commission. We seemed to have achieved institutional balance. However, the review could lead to the redefining of the institutional balance. Moreover, the Commission announced its intention of reinforcing its own power in order to emerge as the main actor of the European market regulation. The Commission will not be a full regulator because this solution was abandoned in favour of the proposal to create a European Electronic Communications Market Authority (hereinafter "European Regulator" or EECMA).

This proposal certainly constitutes the main event of the new reform. The issue of the reinforcement of the Commission's power should not be considered in the sole light of this project representing in fact the completion

of a process. On the contrary, the reinforcement process brings about a specific objective the European Regulator could contribute to, namely the supervision of remedies to address competition distortions by requiring the NRA to impose a specific obligation on a dominant operator.

Thus, we shall first examine the case in favour of the reinforcement of the Commission's power in the context of the Internal Market's consolidation before analyzing the institutional architecture endorsing this reinforcement process.

■ The case for the reinforcement of the Commission's power

The Commission clearly states its intention to reinforce its own power and supports this claim by setting forth the necessity to develop the Electronic Communications Internal Market. Other arguments stem from the sharp criticism of the limits of national regulation and are also related to the new regulatory stakes.

The will to develop an Electronic Communications Internal Market

The will to develop an Electronic Communications Internal Market is not a new topic: it ranks among the objectives to be achieved by the national regulators according to article 8 of the "framework" directive [2]. However, the novelty comes from the important place the Commission assigns to this objective as compared to the other objectives of the European electronic communications policy and from the manner in which it emphasizes the incompletion of the Internal Market in this particular sector.

The objective of development of the Internal Market

The liberalization of the sector making possible the transition from a monopolistic organization to regulated but effective competition is not the

2 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 (Framework Directive), *OJ L* 108 , 24.04.2002, p. 33.

only outlook of the European telecommunications policy. Promoting competition is in fact one of the three objectives identified by article 8 of the "framework" directive which also deals with the protection of the interests of European citizens and the development of the Internal Market. This market has two dimensions: services offered on a European harmonized basis, and pan European or cross-border services.

No hierarchy governs these objectives and one or another could prevail contingent on specific circumstances and periods. As a result, we can consider that competition is sometimes subordinated to general interest objectives pursued in order to promote the interests of European citizens [3]. Furthermore, their rights are guaranteed by two sectorial directives considered as incompressible for a long time as sectorial law was destined to be replaced by competition law: the universal service directive and the personal data protection directive [4].

We could now add all the Internal Market related provisions to this incompressible part. In order to consolidate the Internal Market, the Commission has important competencies according to article 7 of the "framework" directive. These competencies are destined to promote a harmonized scope for sectorial rules, be it the definition of relevant markets or the designation of operators with significant market power.

Even though national regulators are also assigned the task of promoting the Internal Market, their legitimacy derives mostly from their mission of guaranteeing effective competition. Thus, by putting the competition and European market issues against each other, the Commission implicitly raises the question of the distribution of competencies between itself and the regulators. In this respect, the state of incompletion of the Internal Market constitutes the most significant factor legitimating the reinforcement of the Commission's power.

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[3] A. BLANDIN "Du droit des télécommunications au droit des communications électroniques : quel changement de modèle ?", *Le nouveau droit des communications électroniques*, special issue of *Annales des télécommunications*, July/August 2006.

[4] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) *OJ L* 108, 24.4.2002, p. 51.
Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *OJ L* 201, 31.07.2002, p. 37.

The manifestation of the incompletion of the Internal Market

The incompletion of the electronic communications Internal Market manifests itself in the divergences affecting the transposition of the regulatory framework, that determined the Commission to launch infringement proceedings, and also in the divergences occurring in the stages of market regulation.

In the communication of July 2007 on market reviews under the EU Regulatory Framework, the Commission evaluates the consolidation of the Internal Market establishing that there are still obstacles to the full exploitation of its potential [5]. Even though Member States are consistent in their definition of relevant markets and designation of operators having a significant market power, the differences concerning the imposed remedies are not always justified by diverging market circumstances. Concerning for example the mobile termination rates, certain Member States only regulate rates for calls originating from mobile networks as opposed to fixed networks [6]. In conclusion, where cooperation between Commission and Regulators is developed, convergence is supposed to be strong and where the Regulator's autonomy is important, harmonization is supposed to be weak. As a result, the Commission deems it would be difficult for companies operating in several countries to propose offers on a European basis.

Finally, the incompletion could be attributable to the lack of cooperation among national regulators. Article 7 (2) of the "framework" directive provides that the regulators shall contribute to the development of the Internal Market by cooperating with each other and with the Commission to ensure the consistent application of the "framework" directive and of the Specific directives. Article 8 (3) adds that the regulators shall cooperate to ensure the development of consistent regulatory practices. This cooperation is intended to favour the realization of the objective of uniform application of pertinent rules in all Member States as provided by the decision instating the European Regulators Group for electronic communications networks and services.

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[5] Communication of the Commission to the European Parliament, the Council, the European economical ans social Commitee and the Commitee of the Regions, on markets review under the EU Regulatory Framework (2nd report), Consolidating the internal market for electronic communications, COM (2007) 401 final, 11.7.2007.

[6] Communication of the Commission to the European Parliament, the Council, the European economical ans social Commitee and the Commitee of the Regions on the Review of the Regulatory Framework for electronic communications networks and services, COM (2006) 334 final, 28.6.2006.

The decision of July 2002 (amended in 2004 and in 2007) established this Group composed of the heads of each relevant NRA in each Member State and of a representative of the Commission [7]. The role of this Group is to assist the Commission in the consolidation of the Internal Market of electronic communications networks and services. The Group acts as an interface between the regulators and the Commission in order to contribute to the development of the Internal Market and to the uniform application of the regulatory framework in all Member States.

The issue of the access to the data needed to supply a directory service illustrates the levels of incompletion of the Internal Market. In the 2004 KPN judgement, the Court of Justice ruled on the issue of interpretation of a directive that sets up the obligation for operators to make available the relevant information necessary to the supplying of directory services [8]. The Court's reply concerning the data to be made available [9] doesn't address the divergences of interpretation as to the conditions of supplying of the additional relevant data that an operator is bound to make available according to the national transposition act. Consequently, the decisional practices of national regulators whose task is to rule on the litigations concerning the access to relevant data are affected by divergences that the cooperation among regulators could attenuate.

The necessity to deal with the limits of national regulation

The limits of national regulation constitute the second argument in favour of the reinforcement of the Commission's power. The regulation of cross-border services exposed these limits which are also one of the outcomes of the much criticized lack of independence of the regulators.

The difficulty to regulate cross-border services

The apprehension of the problems caused by the realization of cross-border services is rendered difficult by the organization of regulation at a national level. In addition, the action of the Community in the field of roaming

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7 Commission decision 2002/627/EC, of 29 July 2002 establishing the European Regulators Group for electronic communications networks and services, *OJ L* 200, 30.7.2002; p. 38.

8 ECJ, 25.11.2004, KPN, Case C- 109/03.

9 The name, the address and the phone number.

services resulting in the adoption of a regulation in June 2007 [10] was justified on the basis of the inadequacy of the regulatory frame. Community-wide roaming is defined as the use of a mobile telephone by a roaming customer to make or receive intra-Community calls in a Member State other than that in which his home network is located by means of arrangements between the operator of the home network and the operator of the visited network.

The purpose of the Community's intervention is to regulate and to harmonize the tariffs of roaming which are considered to be excessive. According to the recitals of the regulation, there are several ways to explain the difficulty in regulating these services. On the wholesale markets, the characteristics of international roaming and specifically its cross-border nature have prevented the national regulators from identifying undertakings with significant market power which is the first step in the imposition of *ex ante* regulatory obligations to the operators. On the retail markets, no market was identified as relevant as the international roaming services at retail level are not purchased independently by customers. In addition, national regulators are not deemed able to control the behaviour of the operators of the visited network which renders the measures in favour of consumers inefficient.

The lack of independence of national regulators

The relative criticism of the lack of independence of national regulators adds up to this first argument concerning the limits of national regulation. The principle of separation of the regulation and exploitation functions is the corner stone of the liberalization process. That is the reason why this principle already featured in the first liberalization directives which required the NRA to be independent. Additional guarantees are required by the "framework" directive which specifies that regulation authorities have to be legally distinct from and functionally independent of all organization providing electronic communications networks or services.

Still this is not sufficient to ensure real independence. Thus it is telling that this theme is so present in the Commission's discourse at the very moment when the institutional reform is launched. If we can't deny that this

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[10] Regulation 717/2007 of the European Parliament and the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC*, OJ L* 171, 29.6.2007, p. 32.

line of reasoning benefits the objective of reinforcement of the Commission's power, it is nevertheless justified as shown recently by the "regulatory holiday law" case in Germany. In February 2007, the Commission launched an infringement procedure because the new amendments to the German Telecom law were likely to jeopardize competition in the broadband markets thus advantaging the historical operator Deutsche Telekom. Not only had this "holiday" been granted without consulting the Commission and the other national regulators, but it interfered with the autonomy of the German regulator which is competent to grant an access to competitors to the broadband network of the historical operator and which had already asserted the principle of opening this network to competition. The Commission has announced that it would bring the case before the Court of Justice [11].

The new regulatory issues

Calling for the reinforcement of its own power, the Commission doesn't merely raise these critical arguments but justifies its claim by bringing into play the nature of the regulatory issues. A lot of questions call upon a European intervention: numbering, frequencies, emergency numbers… Nevertheless, in the context of the reform, the functional separation appears as a new source of power for the Commission. The proposal for a directive amending the 2002 directive on access and interconnection introduces a new article allowing national regulators to impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of access products in an independently operating business unit [12]. Before imposing an obligation, the authority shall submit a request to the Commission. Unlike the other obligations the regulators can impose according to the "access" directive, this obligation cannot be imposed autonomously. Notwithstanding, the Commission's intervention is deprived of a European dimension as it doesn't aim to harmonize remedies.

11 IP/2007/889, 27 June 2007.

12 Proposal for a directive of the European Parliament and the Council amending directives 2002/21/EC, 2002/19/EC (art. 13 a) and 2002/20/EC, COM (2007) 697 final, 13.11.2007.

The institutional architectures supporting the reinforcement of the Commission's power

The successive reforms of telecommunications law helped shape an institutional architecture supporting the reinforcement of the Commission's power. From now on, the project of creation of a European regulator adds up to the Commission's propensity to recenter the regulation process.

The tendency of the Commission to act as a European regulator

If we take into account the arguments of the Commission in favour of the reinforcement of its own power, it will be necessary to regulate the market at a European level. This evolution can be described as a centralizing one.

The carrying out of the task to consolidate the Internal Market

The Commission's regulatory power rests basically on the procedure of article 7 of the "framework" directive. Aiming at the consolidation of the Internal Market for electronic communications, article 7 lays down a consultation stage guaranteeing the respect of the article 8 objectives, specifically in the field of Internal Market development. The history of the adoption of the "framework" directive shows that the question of the scope of the Commission's power is very controversial. In fact, during the 2001/2002 negotiation process, the issue of the respective powers of the national regulators and of the Commission opposed the Council and the European Parliament. The common position tended to give the regulators the last word while the Parliament claimed for the empowerment of the Commission. The final compromise favours the latter.

Article 7 provides that where a national regulatory authority intends to take a measure which falls within the scope of the aforementioned articles, it shall at the same time make the draft measure accessible to the Commission and to the other national regulators, together with the reasoning on which the measure is based. This procedure plays a central role in the market analysis procedure organized by article 16 of the "framework" directive. Article 15 of this directive sets up that the Commission shall adopt a recommendation on relevant product and service markets within the electronic communications sector and shall publish guidelines for market

analysis and the assessment of significant market power [13]. Consequently, the national regulators shall identify the operators having a significant market power on their national markets. If the identified markets are not competitive and if competition law is not able to prevent abuses, the regulators shall impose specific regulatory obligations notably concerning access and interconnection or the determination of certain retail prices. While the project of measure aims at defining a relevant market which differs from those defined in the recommendation, or at deciding whether or not to designate an undertaking as having a significant market power and while this measure would affect trade among Member States, the Commission disposes of several tools according to article 7 (4). It can formulate serious doubts so that the draft measure shall not be adopted for a further two months. Within this period, the Commission may take a decision requiring the NRA to withdraw the draft measure. This decision shall include proposals for amending the draft measure.

With regard to the decisional practice, the instated procedure has mainly quantitative effects so that one can doubt the efficiency of such an inflation of measures. The Commission listed at least 600 projects of notified measures in its second report on the market analysis published while the round of analysis for the 18 markets identified in the recommendation is almost completed. The regulators initiated autonomously the withdrawal of 28 projects and the Commission requested the withdrawal of 5 projects. For instance, it required the Finnish regulator (Ficora) to withdraw a decision establishing that an operator was dominant on the mobile access market because his market share exceeded 60% whereas this criterion is not sufficient according to competition law [14].

From a qualitative point of view, the analysis of the impact of this procedure cannot be detached from that of the carrying out of the 2002 regulatory framework. Yet, the Commission admits in its last report that it is difficult to credit the market's dynamism to this new framework while the effects of the previous one still run [15].

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[13] 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 communications networks and services. *OJ C* 497, 11.2.2003.

[14] MEMO/07/457, 13.11.2008.

[15] Communication of the Commission to the European Parliament, the Council, the European economical and social Commitee and the Commitee of the Regions, European electronic communications regulation and markets 2006 (12th report), COM (2007) 155, 29.3.2007.

We are even less certain of the impact of the new provisions of the future "framework" directive [16]. The modifications proposed on November 13th obviously concern article 7 and reinforce the Commission's power as to the choice of remedies to address competition problems. On one hand, whereas the Commission could only formulate doubts and require the withdrawal of measures concerning the determination of relevant markets and the designation of dominant operators, from now on, its competence will be extended to remedies the national regulators impose to these operators. This new veto on remedies is severely criticized by the national regulators, for instance the German regulator [17]. On the other hand, by setting up a new stage of renotification of amended draft measures, the proposal allows the Commission to adopt a decision requiring the NRA to impose a specific obligation.

Abiding by the same trend of substituting its own powers to those of the regulators, a new paragraph 7 inserted in article 16 would allow the Commission to take a decision requiring the NRA to designate certain undertakings as having significant market power and to impose specific obligations where the regulator has not completed its analysis of a relevant market within the time limit laid down in article 16 (6). The appeal of substitution of power is equally conveyed by the manner in which the roaming regulation was treated. This confirms the tendency of exerting the competencies devoted to national regulators at a European level.

The exercise on a European level of powers devoted to national regulators

The roaming regulation of 2007 was presented as a "personal" success of the Commission which appeared as the "natural European regulator". Does that justify saying that its power replaced that of national regulators? This statement is not accurate if we consider the fact that the Commission exerted its power of initiative strictly within the framework of the European Community Treaty. However, it is questionable whether the roaming regulation is valid or not. In fact, this regulation is based on article 95 of the EC Treaty which aims at harmonizing national legislations even as the

16 Proposal for a directive of the European Parliament and the Council amending directives 2002/21/EC, 2002/19/EC and 2002/20/EC.

17 Dr. Iris Henseler-Unger, Vice President of Bundesnetzagentur, "The regulatory agenda : 2008-2009", *19th Annual Communications and Competition Law Conference*, Munich, 19 May 2008.

regulation is deprived of a harmonization effect (there were no existing national laws in force before the adoption of the regulation) [18].

Nevertheless, the hypothesis of substitution is partially true as, on the Commission's initiative, the Community has intervened outside the regulatory frame for electronic communications, that is to say in a field where the "framework" directive didn't instate the Community's competency, and subsequent to a mistaken procedure based on the application of competition law [19].

Moreover, the regulation of 2007 doesn't conceal the fact that it was necessary to amend the 2002 directive in order to derogate to the rules providing that where there was no operator designated as dominant, the price of services should be determined by commercial agreement. Therefore it would be more accurate to refer to the substitution of the public intervention aiming to enhance consumer protection to the market forces, rather than to the substitution of competencies between the Commission and the regulators. This is all the more true as the regulation assigns the application of the rules concerning roaming prices to the national regulators. Nonetheless, derogating to rules of the "framework" directive made its amendment necessary in order to adopt specific measures to regulate international roaming [20]. Thus, the regulation as a whole constitutes a specific measure according to the new paragraph 5 of article 1 of the "framework" directive [21].

Such an approach seems to be consistent in so far as it respects the principle of subsidiarity. The Community's action would thus complete the action of national regulators. Should we consider that this approach presents a risk of "regulations based" intervention following the development of pan European services and that it lacks a global perspective? [22] Or would it be more suitable to deem that the said regulation is only an instrument which is aimed at addressing issues on a case-by-case basis? If the latter were true

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18 Reference for preliminary ruling from the High Court of Justice (England and Wales), Case C-58/08, OJ C 107/17, 26 April 2008, p. 17.

19 Press release, "Commission closes proceedings against past roaming tariffs in the UK and Germany", 18 July 2007, IP/07/1113.

20 Roaming Regulation, art. 10.

21 Idem, art. 1 (3).

22 D. LESCOP, "Le Groupe de Régulateurs européens en faveur… d'un régulateur européen", *Concurrences*, no. 2, 2007, p. 170.

then we should keep to questioning the choice of the regulation as a specific measure.

At any rate, the Commission's success in the field of roaming seems to have had an important impact on the content of the proposed institutional reform.

The project of creation of a "European regulator"

The project of creation of a European regulator may be perceived as an alternative to the direct reinforcement of the Commission's and the European Regulators Group's powers.

An alternative to the direct reinforcement of the Commission's power

The proposal to create a new European regulator called European Electronic Communications Market Authority (EECMA) came as a surprise since this solution had been criticized by the Commission itself. Considering that this option was quite inadequate, the Commission gave priority as late as June 2007 to the direct reinforcement of its own power [23]. According to Viviane Reding:

> "the roaming issue proved that we already have a European Regulator, namely the Commission, which is a genuine independent and supranational institution. If we really believe in a common market for telecommunications operators and their clients, the reform should reinforce the Commission's control over the national telecommunications markets." [24]

This reinforcement should be based on article 7 of the "framework" directive and allow the Commission to refuse certain remedies imposed by national regulators and even to impose its own remedies for the sake of consistency.

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[23] Proposal for a Regulation of the European Parliament and the Council establishing the European Electronic Communications Market Authority (EECMA), COM (2007) 699, 13.11.2007.

[24] "La Commission veut plus de pouvoirs pour contrôler les télécoms", *Europolitique*, no. 3319, 5.6.2007, p. 5.

An alternative to the reinforcement of the European Regulators Group's power

Turning the Commission into a European Regulator fits in a particular context. Benefiting from the successful regulation of roaming, the Commission ceased to consider the reinforcement of the European Regulators Group's power as a plausible alternative. According to the Commission, this Group is not seen as a potential regulator and could be replaced by the EECMA.

In the context of the reform, the Commission invited the European Regulators Group to submit propositions of pan European regulation. Two scenarios were envisaged, the first consisting of the reinforcement of the advisory power of the Group, the second conferring a genuine decision-making power according to article 7.

In its reply from February 27th 2007, the Group stayed on its guard preferring to favour the full exploitation of its own expertise capabilities, the reinforcement of its advisory power according to article 7 and the participation to the groundwork on regulation tools of cross-border services [25]. In fact, the Group doesn't approve of a radical change in the existing framework. As a result, the Group is hostile to all initiatives aiming to weaken the national regulators. According to the Group, the latter have a privileged position of knowledge and understanding with respect to their national markets allowing them to decide on the appropriate remedies. To prove its point, the ERG refers to the principle of subsidiarity. This principle governs its reflection on the opportunity to set up a centralized decision-making system while the Group deems that the appropriate method is the one developed in its document on the theory of harmonization. This method requires identifying the fields to be coordinated at a European level. In this context, it is obvious that the Group encourages the setting up of a network of national regulators which already constitutes the basis of the ERG. The proposal of creation of a Regulator rests on such a system [26].

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25 ERG advice in the context of the Review of the Regulatory Framework for Electronic Communications Networks and Services, in response to the letter by Commissioner Vivian Reding of 30 November 2006.

26 Proposal for a Regulation establishing the EECMA, art. 1.

The implicit reinforcement of the Commission's power

In spite of the fact that the Commission gave up the solution of direct reinforcement of its own power, this process of reinforcement constitutes nevertheless one of the major issues of the project of creation of a European Regulator. The fact that the European Medicines Agency (EMEA) was chosen as a model for this new Authority illustrates this development. Delivering opinions and assisting in preparing single market measures of the Commission would be the main tasks of the EECMA and its opinions would not be binding for the Commission. We should nevertheless mention a field where the Regulator would have a decision-making power according to article 8 of the directive proposal for the creation of a EECMA, namely the harmonisation of issuance of rights of use for numbers from the European Telephone Numbering Space. This is the reason why a Board of appeal should be created. The decisions taken by this Board could be contested before the Court of First Instance or the Court of Justice which are also competent in cases where no right of appeal lies before the Board.

The organization of the new authority shall comprise a Board of regulators, an administrative board, a director and the Board of appeal. The EECMA would incorporate the task of the ENISA (the European Network and Information Security Agency) and replace the ERG. This Authority would be independent and would provide advice and assistance as well as fulfilling several tasks, the main ones concerning the strengthening of the Internal Market. Considering these tasks, it is difficult to qualify this authority as a regulator.

The publication of this project fuelled many reactions. The ARCEP is hostile to this project and the European deputy rapporteur of the reform promptly announced that the Parliament would make an alternative proposition [27]. Thus, the rapporteur on the Regulator project proposes the creation of the BERT (European Telecommunications Regulators Body) an independent and temporary advisory body which is not supposed to replace ENISA [28].

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27 C. TRAUTMANN, "Evolution ou révolution ?", *Lettre de l'ARCEP*, March-April 2008, p. 8.

28 European Parliament, draft report on the proposal for a regulation of the European Parliament and of the Council establishing the EECMA, Pilar del CASTILLO VERA, 17.4. 2008, 2007/0249 (COD).

At this stage, we should question the opportunity to create such an Agency and especially whether this is the best solution or the best time for such an enterprise.

In order to decide whether this solution is well-founded, we should first consider the quality of the arguments in favour of an institutional reform. The European Regulators Group reasoned along these lines in its letter from February 2007. The Group estimates that complete harmonization of remedies would be economically undesirable. In certain circumstances, some variation in regulatory remedies may be desirable. A balance must be struck between the promotion of national efficiency and trade reciprocity. With regard to this issue, the position of the Group complies with the Internal Market's development policy as laid down by European case law and by derived law.

Assuming that this is the correct diagnosis, we still have to decide whether the solution is appropriate or not. For instance, we may argue that this solution replaces other solutions despite the fact that the multiplication of independent authorities is already subject to criticism. In a report to the French Senate on the assessment of the ARCEP, it is argued that the current institutional system is quite efficient. In this system, the Commission already plays the role of natural European regulator and a reformed ERG could perform as a real advisory committee [29].

Furthermore, the project must comply with the subsidiarity and proportionality principles. The Commission deems that the creation of the new authority already complies with these principles. The project should conform to the subsidiarity principle because the development of the Electronic Communications Internal Market is an objective that must be achieved at Community level. The project is also supposed to comply with the proportionality principle, but the Commission takes into account only the institutional dimension of proportionality and affirms that the creation of the EECMA doesn't aim to replace national regulators, but to integrate the cooperation among them within the Community system.

Proportionality should also be considered in the light of substantive rules. We have to question whether the project of an Authority doesn't contradict the principle of progressive substitution of competition law to sectorial law. As asserted in the "framework" directive, sectorial law only applies when two

29 *Rapport d'information n° 350*, Sénat, Bruno Retailleau, June 2007.

conditions are satisfied: the relevant market is not effectively competitive and competition law is deemed unfit to reduce or withdraw the barriers or to re-establish effective competition.

If there is a tendency to deregulation, why then should a new body be created and endowed with new sectorial competencies at the very moment when the new recommendation on relevant markets of 2007 cuts down to half the markets that could be concerned by the regulation? [30]

Moreover, this foretold substitution should have important institutional consequences. Of course, this substitution should not lead to the removal of national regulators, but it was meant to reduce the scope of their competencies focusing them on the issue of universal service provision, licences and frequencies. The current approach is very different as the creation of the new Authority would counterbalance the simplification of the regulation. The Authority is expected to guarantee that simplification would be tied in with more specialization and independence.

If the objective is to reduce the powers of national regulators then the creation of a European regulator entails either creating new competencies or transferring national competencies to the Community. The proposal for a regulation establishing the EECMA also provides that the tasks of the ENISA will be reassigned to the EECMA which means that competencies may also be transferred from one European body to another.

It is not the first time that the issue of network security is treated within the electronic communications regulatory frame. The 2002 directive concerning the processing of personal data in the electronic communications sector already provided that the operators should take appropriate measures to safeguard security of their services. The proposal for a directive amending the "framework" directive includes the security issues. On this basis, the Commission's power could be reinforced as this institution may adopt appropriate technical implementing measures after taking into account the opinion of the Authority.

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[30] Commission recommendation 2007/879/EC of 17 December 2007 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 communications networks and services, *OJ L* 344, 28.12.2007, p. 65.

■ Conclusion

Undoubtedly, we witness a tendency of reinforcement of the Commission's power in the field of electronic communications market regulation. In this respect, the prospect of an institutional architecture supporting the reform and of a natural cooperation between the different institutions is certainly somewhat idealistic. The risk of seeing the institutions compete among themselves is minimized and the issue of the balance of powers is discarded.

A historical approach of this trend leads to the assumption that the Commission's role may yet be important and thus a source of conflict with the regulators. What is more, the Commission's role has been challenged ever since the foundation of a European telecommunications policy. In this regard, the choice of article 86 (3) as the basis for the liberalization of this sector constitutes a precedent [31]. Furthermore, from now on, the Parliament represented by its rapporteur readily denounces the fact that the draft framework increases the Commission's power [32].

Finally, by upholding the unique objective of Internal Market consolidation, the institutional reform runs the risk of compromising the objective of deregulation. It could also minimize the safeguard of the citizens' interests constituting an autonomous objective whose realization doesn't rely solely on the competition and Internal Market related objectives.

The substantial amendment or the rejection of the proposal of the directive creating EECMA is at this point a plausible hypothesis. Moreover, seeing that most of the provisions which reinforce the Commission's power are included in the proposal amending the "framework" directive, the amendments proposed by the Parliament to this text, together with those concerning the EECMA directive, could slow down the tendency to the reinforcement of the Commission's power [33]. In any case, the debate in the framework of the review opens the institutional "Pandora's box".

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31 ECJ, 19 March 1991, Case. C 202/188, France/Commission: *Rec*., 1991-I, p. 1223.

32 Entretien avec l'eurodéputée Catherine Trautmann, *Europolitique*, no. 3467, 11 février 2008.

33 European Parliament, draft report (Catherine Trautmann), 2007/0247 (COD).