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Public and Private Enforcement of European Private Law in the Energy and Telecommunications Sectors

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Abstract: This article explores the dynamics of public and private enforcement in the EU energy and telecommunications sectors. Both sectors ask for analyses that take into account the availability of multiple enforcement avenues and the need to coordinate different enforcement levels. Drawing on examples from four EU countries (France, Germany, Italy and United Kingdom), the article describes enforcement mechanisms for network access and consumer disputes. The main conclusion is that the balance between public and private enforcement is largely shaped by the national institutional context. Despite increasing integration of the national energy and telecommunications markets, persisting variation is to be expected on crucial aspects of enforcement mechanisms. Most importantly, the national level affects the interplay between regulatory law and private law, which in turn shapes the content of each type of enforcement mechanism. These developments suggest a new regulatory strategy that acknowledges the sources of national diversity while at the same time increasing the effectiveness of each type of enforcement. Such a strategy should not be pursued through a search for perfect complementarity but through the development of hybrid enforcement mechanisms that minimize the weaknesses on the private and public sides.

Résumé: Cet article explore la dynamique de l'*enforcement* publique et privée dans les secteurs de l'énergie et des télécommunications de l'UE. Les deux secteurs demandent des analyses qui tiennent compte de la disponibilité de multiples voies d'exécution et de la nécessité de coordonner les différents niveaux d'exécution. s'appuyant sur des exemples de quatre pays de l'UE (France, Allemagne, Italie et Royaume-Uni), l'article décrit les mécanismes d'application pour l'accès au réseau et les litiges de consommation. La principale conclusion est que l'équilibre entre la sphère publique et privée est en grande partie façonnée par le contexte institutionnel national. Malgré l'intégration croissante des marchés de l'énergie et des télécommunications nationales, la persistance variation est à prévoir sur les aspects cruciaux de mécanismes de l'*enforcement*. Plus important encore, le niveau national affecte l'interaction entre le droit réglementaire et le droit privé, qui à son tour façonne le contenu de chaque type de mécanisme d'exécution. Ces développements suggèrent une nouvelle stratégie de réglementation qui reconnaît les sources de la diversité nationale, tandis que dans le même temps d'accroître l'efficacité de chaque type d'application. Une telle stratégie ne doit pas être poursuivi par la recherche de la complémentarité parfaite, mais à travers le développement de mécanismes d'application hybrides qui réduisent au minimum les faiblesses sur le côté privé et public.

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Zusammenfassung: Dieser Artikel untersucht die Dynamik der öffentlichen und privaten Durchsetzung in den Bereichen Energie und Telekommunikation EU. Beide Sektoren fragen Sie nach Analysen, die Berücksichtigung der Verfügbarkeit von mehreren Durchsetzung Alleen und die Notwendigkeit, die verschiedenen Ebenen zu koordinieren Durchsetzung zu nehmen. Anhand von Beispielen aus vier EU-Ländern (Frankreich, Deutschland, Italien und Großbritannien), der Artikel beschreibt Durchsetzungsmechanismen für den Netzzugang und Verbraucherstreitigkeiten. Die wichtigste Schlussfolgerung ist, dass die Balance zwischen öffentlichen und privaten Durchsetzung wird weitgehend von der nationalen institutionellen Kontext geprägt. Trotz der zunehmenden Integration der nationalen Energie und Telekommunikationsmärkte, anhaltende Variante ist, um über wichtige Aspekte der Durchsetzungsmechanismen zu erwarten. Am wichtigsten ist, die nationale Ebene betrifft das Zusammenspiel zwischen Ordnungsrecht und Privatrecht, das wiederum formt den Inhalt jeder Art von Durchsetzungsmechanismus. Diese Entwicklungen deuten auf eine neue Regelungsstrategie, die die Quellen der nationalen Vielfalt anerkennt, während zur gleichen Zeit die Erhöhung der Wirksamkeit der einzelnen Arten der Vollstreckung. Eine solche Strategie sollte nicht durch eine Suche für eine perfekte Komplementarität durch die Entwicklung von Hybrid-Durchsetzungsmechanismen, die die Schwachstellen auf der privaten und der öffentlichen Seite zu minimieren verfolgt werden, aber.

1. Introduction: Enforcement in Multilevel Systems

This article explores the interplay between public and private enforcement in the EU energy and telecommunications sectors. The starting point is that enforcement mechanisms should be understood within multienforcer and multilevel systems. Thus, multiple and crossing horizontal and vertical relationships must be taken into account. Complicating matters further, the meaning of each type of enforcement is subject to change.[1]

In the EU landscape, three developments are affecting the balance between public and private enforcement. First, the traditional principle of Member States' procedural autonomy has progressively changed its meaning. While still officially followed in EU legislation and ECJ case law, today it cannot be interpreted to mean a complete separation of EU and national spheres on remedial issues. The well-known requirements of equivalence and effectiveness lead to substantial modifications of national remedies.[2] As far as the enforcement of EU rights is

1 The public and private labels are, to some extent, misleading because the roles of private parties and public bodies are intermingled; see F. CAFAGGI & H.-W. MICKLITZ, 'Administrative and Judicial Enforcement in Consumer Protection: The Way Forward', in *New Frontiers of Consumer Protection*, eds F. Cafaggi & H.-W. Micklitz (Antwerp/Oxford/Portland: Intersentia 2009). This article sticks to conventional usage but endorses the view that each type of enforcement leaves room for several different choices.

2 See M. DOUGAN, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts', in *The Evolution of EU Law*, eds P. Craig & G. de Burca (Oxford: Oxford University Press 2011). Most interestingly from the point of view of private enforcement, the issue of standing by private persons in cases involving the infringement of EU

concerned, the present situation has been described as one of 'double hybridization' of remedies. On the one hand, national law provides the basis for a claim on compensation, but this national law is reshaped under EU law influence. On the other hand, national law also determines the claim's concrete legal and procedural content. The next step could well be a new type of 'horizontal liability', allowing individuals to claim compensation remedies on substantial and procedural grounds wholly determined by EU law.[3]

Second, an attempt to strengthen private enforcement is clearly visible in such initiatives as the directive on alternative dispute resolution, the regulation on online dispute resolution, the Commission's recommendation on collective actions and the proposed directive on antitrust damages.[4]

Third, a less visible development is the strengthening of administrative enforcement by national regulators, sometimes in close coordination with the Commission or European agencies.[5]

These developments prompt the question of whether the achievement of the single market in the energy and electronic communications sectors requires full harmonization not only from the point of view of substantive rules but also in the field of enforcement mechanisms. Proposals pointing towards such a direction have already been advanced.[6]

However, the reforms that took place in both sectors do not show a linear trajectory that will inevitably lead to more harmonization and centralization. Competing views can be identified on the type of enforcement mechanisms best suited to pursue the goals of the single market. For example, stricter enforcement of network access and interconnection obligations is claimed to foster integration and competition. However, a competing claim is that it could thwart investments in new infrastructures. Claims of underenforcement or overenforcement are only rarely grounded in firm empirical evidence. This means that the causal relationship between more or less enforcement and market performance is

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law is now understood as a matter of treaty interpretation and not as an aspect falling in the national procedural autonomy framework (DOUGAN, 'The Vicissitudes', pp 437–438).

3 N. REICH, 'The Interrelation between Rights and Duties in EU Law: Reflections on the State of Liability Law in the Multilevel Governance System of the Union: Is There a Need for a More Coherent Approach in European Private Law?', 29. *YEL (Yearbook European Law)* 2010, p (112) 123–125.

4 A critical discussion of the latest developments is provided by C. HODGES, 'Collective Redress: Breakthrough or a *Damp Squibb*?', 37. *Journal of Consumer Policy* 2014, p 67.

5 H.-W. MICKLITZ, 'Administrative Enforcement of European Private Law', in *The Foundations of European Private Law*, eds R. Brownsword et al. (Oxford/Portland: Hart Publishing 2011).

6 A. OTTOW & K. DE WEERS, 'Towards a European Enforcement Toolkit?', The Europe Institute Working Paper 01/11, suggest the creation of a uniform group of enforcement measures at EU level. National procedural autonomy could be preserved by leaving to NRAs the choice how to use them.

difficult to identify. Additionally, the real impact of enforcement is determined by the joint actions of several public and private actors. Depending on MSs' policies, the number of enforcers and the tools available to each of them can be greater or smaller. Therefore, the harmonization debate risks overlooking one crucial issue, namely the distribution of enforcement powers among different public and private enforcers. Moreover, the national legal context usually affects not only the choice of the enforcement tools but also its content. As we shall see, the relationship between administrative enforcement and judicial or arbitral enforcement can be designed in different ways and lead to different outcomes.

To keep the enquiry within manageable bounds, the focus has been limited both from a geographical and a subject matter point of view. Evidence on enforcement practices is collected for a small sample of MSs: Germany and United Kingdom for the energy sector and France and Italy for the electronic communications sector. In both cases, enforcement is discussed for network access disputes (Germany and Italy) and consumer disputes (United Kingdom and France). The vertical (between the EU and the national level) interplay and the horizontal (among national remedies) interplay of remedies are assessed. No claim is made about the representativeness of this sample for the whole EU. However, it is submitted that it provides a good starting point to assess the range of enforcement options available in the two sectors.

Section 2 is devoted to the energy sector and discusses the German and UK examples. Section 3 is devoted to the telecommunications sector and discusses the French and Italian examples. Section 4 pulls the threads together and explains why policymakers should stop searching for perfect complementarity between public and private enforcement and start thinking about hybridization strategies.

2. The Energy Sector

EU energy law brought some degree of harmonization on enforcement matters. Specific provisions address the dispute resolution powers of NRAs, both with regard to obligations stemming from the directives and with specific reference to consumer matters. Sanctioning powers are included among the available enforcement tools. Procedures for cross-border disputes make explicit the role that the Agency for the cooperation of energy regulators (Acer) can play.[7] Still, MSs enjoy a large discretion in shaping the content of each enforcement tool. This section uses the German and the UK examples to explain how such discretion can

7 An overview is provided by D. BUSCHLE, 'The Enforcement of Energy Law in Wider Europe', in *European Energy Law*, eds D. Buschle et al. (Basel: Helbing Lichtenhahn 2011), who also refers to dispute resolution in the European Energy Community. Of course, the landscape of international energy litigation is much broader and includes many aspects of international treaty law and international arbitration. See A.T. MARTIN, 'Dispute Resolution in the International Energy Sector: An Overview', 4. *Journal of World Energy Law & Business* 2011, p 332.

be used. The analysis of the German case is more focused on network access disputes, while the analysis of the UK case is more focused on consumer disputes.

2.1. Germany: The Ups and Downs of Private Enforcement

Germany displays two peculiar features, one on the public side and one on the private side. Public enforcement is largely driven by the choices made about the competences of the national competition authority (*Bundeskartellamt* or BKA) and the national energy regulator (*Bundesnetzagentur* or BNA). Since 2005, the BNA has only been entrusted with network regulation, while merger and abuse control in the energy markets have been left to the BKA. The powers granted to the latter were further extended in 2007, when a new type of control on the energy prices of incumbent firms was included in Article 29 of the Act against Restraints of Competition (GWB).[8] Such design leads to a dualism that blurs the traditional distinction between *ex ante* regulation and *ex post* competition law enforcement. Moreover, the spheres of action of the BKA and the BNA are, by no means, clear-cut. Section 111(1) of the 2005 *Energiewirtschaftsgesetz* (EnWG) excludes the application of the GWB, but the BKA must still apply EU competition law to anticompetitive agreements and abuses in the network segment. Moreover, section 58(3) EnWG states that the two authorities shall strive to give a uniform interpretation to the EnWG, while at the same time avoiding any conflict with the GWB. The dualism is also apparent in the choice to entrust the BNA with the same type of remedies already available to the BKA, that is, injunctions, skimming-off of profits, administrative fines, and administrative penalties (ss 33–34a, 81, and 86a GWB and ss 32–33, 65, 94, and 95 EnWG).[9]

Statistics about the frequency of use for each type of remedy are not available. However, the enforcement activities of the BKA in the energy sector are widely publicized and described in its annual reports. The BNA seems more cautious in using fines and penalties. However, such observation lends itself to different interpretations. It could be that the BNA prefers to overcome resistance by network operators through informal negotiations.[10] An alternative interpretation is that the BNA prefers to use the skimming-off remedy because,

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8 The BKA already tested the new rules in 2008, with 30 gas companies held to apply abusively excessive prices and forced to reduce them or defer price increases, for an amount totalling almost EUR 130 million. See BKA, *Antitrust Enforcement by the Bundeskartellamt – Areas of Focus in 2007/2008*, 26–27 Oct. 2011. In 2013, the eighth revision of GWB extended s. 29 for another five years.

9 For a detailed description, see J. Keßler & R. Bonome-Dells, 'Länderbericht Energie Deutschland', in *Kundenschutz auf liberalisierten Märkten*, eds J. Kessler & H.-W. Micklitz (Baden-Baden: Nomos 2008), p 92 ff.

10 See, e.g., the agreement concluded in February 2012 with 38 network operators about investment budgets, reported in German Energy Blog at http://www.germanenergyblog.de/?p=8736.

unlike injunctions or administrative fines, it leads immediately to the reduction of network tariffs. An additional advantage is that the judicial review that often follows the application of such remedy helps the BNA to clarify the boundaries of its powers and has precedential value for future cases.

While the German legal system provides broad opportunities for public enforcement, sometimes from two different authorities, its effectiveness in approaching the optimal level of compliance is difficult to judge. The BKA advertises in its press releases the high monetary benefits stemming from its enforcement activity. However, to assess the effectiveness of public antitrust enforcement, we would need data about the total costs of anticompetitive behaviour. In the case of network regulation by the BNA, we could start from the observation that a decrease of network tariffs fosters entry by new competitors. Therefore, the enforcement activity of the BNA could be deemed successful if it prompted such a decrease. However, network tariffs are dependent on many factors, the most important one being investments. In the past decades, German energy policy has been resolutely oriented towards increasing energy production from renewable sources. As a consequence, network investment needs rose exponentially. For example, according to the data from Entso-e, the increase in German TSO's network tariffs between 2011 and 2014 was driven by investments in offshore grid connection and onshore grid development.[11] However, between 2010 and 2012, there was a decrease in the share of network charges included in electricity prices for households.[12] These two opposite trends show that the effectiveness of public enforcement cannot be assessed by simply looking at the final market outcome.

If we focus on frequency of use for each type of remedy, we can observe that in the period 2004–2013 both the BKA and the BNA exploited their enforcement powers more than once per year.[13] Of course, the rate of deployment for each remedy cannot be the same. Each authority chooses strategically among

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11 ENTSO-E, *Overview of Transmission Tariffs in Europe: Synthesis 2014*, June 2014, pp 19–20.

12 Compare ACER/CEER, *Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2011*, 29 Nov. 2012, p 32, with ACER/CEER, *Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2012*, November 2013, p 26. A 15% increase in network charges was registered in 2013, probably because of network expansion: see ACER/CEER, *Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2013*, November 2014, pp 33–34. Data collected in EUROPEAN COMMISSION, *Energy Prices and Costs Report*, SWD (2014) 20 final/2 of 17 Mar. 2014 confirm that Germany's network costs are aligned to EU-28 average.

13 Evidence for the BKA can be drawn from its Annual Reports. Evidence for the BNA can be drawn from the online database of the decisions made by the BNA's Ruling Chambers that are charged with regulatory tasks in the electricity and gas sectors (Beschlusskammern 4, 6, 7, 8, 9). For example, searching for *Mißbrauchsverfahren* (abuse proceedings) for each Ruling Chamber gives a total of about 160 decisions (search run on 27 Sep. 2014). The database is available at http://beschlussdatenbank.bundesnetzagentur.de/.

them, so a lower rate for one remedy does not imply lower effectiveness. Frequency of use can only show that the remedies employed more often do not face insurmountable costs. However, such information says nothing about the optimal choice among several different remedies.

On the private enforcement side also, Germany displays one peculiar feature. In energy disputes about supply or network access, contract law has often been invoked to define the legal consequences of a breach of competition law. According to German case law, breach of section 1 GWB about prohibited agreements can lead to claims of adjustment of noncompetition clauses. This approach, which can be grounded on several different contract doctrines, has been applied many times to energy supply contracts.[14]

Even more interesting are those situations in which contract law provides relief in the same area already covered by competition law or sector-specific regulation. As far as private enforcement of competition law is concerned, the litigation rate is quite high in the energy sector.[15] A lot of cases are decided on the ground of contract law, even though competition law might apply as well. The equity control of section 315 BGB is the most important legal tool, but in disputes about the adjustment of gas prices the fairness control of section 307 BGB plays an important role.[16]

The wide opportunity given to network users and customers to rely on contract law has paved the way for legal actions that would not have tried otherwise. If we consider that in many cases such actions are stand-alone, that is, they do not rely on previous decisions by the BKA or the BNA, we should conclude that private enforcement plays a significant complementary role. At the same time, we should ask what type of relationship is there between those private actions and the enforcement strategies of the independent authorities. The case law about network tariffs suggests that complementarity is less than perfect.

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14 See references in J. Jaecks & F.J. Säcker, 'Article 81(2) EC & Civil Law Effects', in *Competition Law: European Community Practice and Procedure*, eds G. Hirsch et al. (London: Sweet and Maxwell 2008), pp 724–732, who refer to rules on partial invalidity (s. 139 BGB), re-interpretation pursuant to s. 140 BGB, supplemental interpretation of the contract, and interference with the basis of the contract (s. 313 BGB).

15 See S. Peyer, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence', 8. *J. Comp. L. & Econ.* (*Journal of Competition Law & Economics*) 2012, p 331; S. Peyer, 'Germany', Report for the AHRC Project on Comparative Private Enforcement and Collective Redress, available at http://www.clcpecreu.co.uk/. Unfortunately, the final output of the project (B.J. Rodger (ed.), *Competition Law Comparative Private Enforcement and Collective Redress across the EU* (Alphen aan den Rijn: Kluwer Law International 2014)) does not provide detailed information about sectors.

16 See P. Rott, 'The Adjustment of Long-Term Supply Contracts: Experience from German Gas Price Case Law', *ERPL* 2013, p 717.

Before the 2005 EnWG, network tariffs were set up by network operators through trade associations' agreements (*Verbändeverainbarungen*). This self-regulation failed to foster competition in the upstream and downstream markets. The EnWG replaced it with regulated tariffs, to be set up by the BNA in the earliest period according to a cost-based methodology, and from 2009 onwards according to the ordinance on incentive regulation (*Anreizregulierungsverordnung* or ARegV of 29 July 2007). Before the new regime of regulated tariffs entered into force, the BKA was able to preserve its enforcement powers over the trade associations' agreements.[17]

The same approach was followed for private actions: tariffs determined according to the sector agreements could be scrutinized on the basis of section 315 BGB.[18] Such a position opened the floodgates to litigation,[19] although the BGH has progressively clarified the relationship between the private actions grounded in contract law and the enforcement powers of the BNA. In the famous Vattenfall case, the BGH affirmed the BNA's decision about the restitution of excessive network tariffs by the network operator. However, revision of the network tariffs could not be claimed in individual actions grounded on section 315 BGB.[20] When the new incentive regulation entered into force, the BGH still held that the equitable control on network tariffs was possible in principle but acknowledged that a heightened deference should be given to the tariffs set up by the BNA.[21]

What the German case law on network tariffs seems to suggest is that the meaning and role of private enforcement are influenced by the evolution of the sector regulation. Before the 2005 EnWG and during its earlier implementation, actions grounded in section 315 helped to fight abuses of dominance by network operators. However, when the sector regulator started to use its enforcement powers, the BGH forbade individual actions that could lead to double compensation or interfere with the expert assessment of the BNA. Such a development of the relationship between private and public enforcement can also be detected in the decisions of the BNA itself. In the early years of cost-based network tariffs, explicit references to section 315 were used to justify the choice of specific parameters.[22] However, under the new regime of incentive regulation, the BNA denies the revision of tariffs to network users who have already brought

17 BGH 28.6.2005 – KVR 17/04, Stadtwerke Mainz, *NVwZ* 2006, 853.

18 BGH 18.10.2005 – KZR 36/04, *NJW* 2006, 684 (Stromnetznutzungsentgelt I).

19 For a full account, see B. SCHOLTKA & G. BRUCKER, *Entgeltregulierung der Energienetze* (Berlin: Erich Schmidt Verlag 2013), p 118 ff.

20 BGH 14.8.2008 – KVR 39/07, *BeckRS* 2008, 20436; BGH 30.3.2011 – KZR 69/10, *NJOZ* 2012, 966.

21 BGH 15.5.2012 – EnZR 105/10, *NJW* 2012, 3092, with comment by P. LINSMEIER. See also B. SCHOLTKA et al., 'Die Entwicklung des Energierechts im Jahr 2012', *NJW* 2013, 2724 and 2727.

22 See, e.g., BNA, Decision BK8-05/020 of 28 Jul. 2006, p 11.

individual legal actions according to section 315. The regulator states that such actions cannot replace the proof of a specific damage from excessive tariffs that is required by the EnWG.[23]

How should the recourse to contract law in matters covered by regulation be evaluated? Several systematic problems have been pointed out. First, the bilateral control of section 315 BGB sits uneasily with the invalidity prompted by infringements of competition law. Second, the relationship between the two types of liability, one contractual and the other one noncontractual, is far from clear. Third, the distribution of the burden of proof is different in the two cases.[24] Of course, it may well be that contract law provided for individual compensation where neither competition law nor sector-specific regulation could be invoked. However, it could be argued that the reduction of network tariffs prompted by the BNA provided larger aggregate benefits for network users than the sum of individual actions.[25] Moreover, the outcome of follow-on actions arising from the ECJ decision in the RWE case confirms that chances for individual compensation are dim.[26] Even in some individual cases, the sector regulator can supply more flexible remedies than civil law courts. For example, the BNA is willing to modify the contract terms written by network operators.[27] Such a modification is more difficult to obtain in legal actions grounded in contract law.

The tendency to rein in general contract law and to replace it with more tailored sector-specific rules seems irreversible.[28] However, if private enforcement grounded in contract law is going to play a residual role in the energy sector, the

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23 See, e.g., BNA, Decision BK-8-12-100 of 25 Sep. 2013.

24 For these criticisms, see G. Kühne, 'Billigkeitskontrolle und Verbotsgesetze', *NJW* 2006, 2520.

25 According to Peyer, 'Germany', p 21, the overall success rate for private enforcement claims is 40% (37.2% in the smaller sample analyzed in Peyer, 'Private Antitrust Litigation', p 352 ff.). Moreover, damage claims are successful in less than 30% of the cases. Assuming that the same figures apply to energy cases, their added value in terms of both deterrence and compensation seems to be low. In the EU-27, the average success rate is 33% (45.5% for damage actions): see Rodger, *Competition Law*, p (150) 154.

26 Although the ECJ forbade automatic price increases in energy contracts, the three years limitation period applied by the BGH allowed monetary relief only for a handful of consumers: see ECJ 21 Mar. 2013, *RWE Vertrieb AG* v. *Verbraucherzentrale Nordrhein-Westfalen eV.*, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-92/11&td=ALL; ECJ 23 Oct. 2014, *Alexandra Schulz* v. *Technische Werke Schussental GmbH und Co. KG and Josef Egbringhoff* v. *Stadtwerke Ahaus GmbH*, http://curia.europa.eu/juris/liste.jsf?num=C-359/11. See N. Reich, 'The EU Constitutional Framework for Enforcement of European Private Law', in this issue, as well as H.-W. Micklitz & N. Reich, 'Luxemburg ante portas – jetzt auch im deutschen "runderneuerten" AGB-Recht?', in *Festschrift U. Magnus*, eds P. Mankowski & W. Wurmnest (München: Sellier 2014).

27 See, e.g., BNA, Decision BK7-09-005 of 3 Mar. 2010 (modification of connection agreement for a biogas plant).

28 See, e.g., BGH 4.3.2008 – KZR 29/06, *NJW* 2008, 2175, which finds in the older Energy Act of 1998 the legal ground for the right of the network user to the equitable control of network tariffs,

goal of protecting both individual and collective interests should be pursued with other means. For example, section 32(3) EnWG already provides for an action for damages, but so far it has been used less often than general contract law. The suggestion here is to design a regulatory system in which private enforcement is directly embedded in sector-specific rules. The main advantage is to avoid the coordination costs entailed by reliance on contract law and, to some extent, competition law. Another option is to broaden the compensatory remedies available to NRAs. The main problem is that in many legal systems, including Germany, the NRAs are not ready to take up this role.[29]

2.2. United Kingdom: The Rise of (Public and Private) Regulatory Enforcement

The United Kingdom was a pioneer in energy liberalization, but performance indicators of retail markets show persisting problems. Since 2008, the UK energy regulator, Ofgem, has adopted several measures aimed at improving the functioning of retail markets. In 2014, Ofgem referred the retail energy market to the Competition and Markets Authority (CMA) for investigation. Reasons justifying such decision included weak consumer response, incumbency advantages, possible tacit coordination, vertical integration, barriers to entry, and expansion. The CMA should publish its final report by the end of 2015 and, if an adverse effect on competition is found, action to remedy it will be taken, including structural reforms.[30]

On the legislative side, several reforms tried to strengthen both public and private enforcement. The reforms were partly connected to the implementation of the Third Energy Package, partly to national developments in the regulation of energy markets, and partly to more general policy choices in UK competition and consumer laws. What seems to be emerging is an enforcement system in which traditional contract remedies and judicial enforcement play a residual role, while the enforcement of energy law relies heavily on special remedies and special dispute resolution venues. The overarching goal is to put public and private

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thus excluding the need to resort to s. 315. See the comment by P. LINSMEIER, 'Gesetzliches Leistungsbestimmungsrecht bei Netznutzungsentgelten', *NJW* 2008, 2162.

29 See H.-W. MICKLITZ, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse', 32. *YEL* 2013, p 266 (arguing that the individual action model is still the prevailing one and that the BNA approaches consumer protection only as part of protecting the wider public interest). However, structural and procedural changes of German agencies have been pointed out: see T. BACH & W. JANN, 'Animals in the Administrative Zoo: Organizational Change and Agency Autonomy in Germany', 76. *Int. Rev. Admin. Sci. (International Review of Administrative Science)* 2010, p 443.

30 Ofgem, *Decision to Make a Market Investigation Reference in Respect of the Supply and Acquisition of Energy in Great Britain*, 26 Jun. 2014; CMA, *Energy Market Investigation – Statement of Issues*, 24 Jul. 2014.

enforcement on an equal footing, but the final outcome could well be an increasing dependence of private enforcement on the initiatives of the energy regulator (or other public enforcers).

Let us begin with the enforcement and dispute resolution powers available to the UK energy regulator, Ofgem. Any infringement of licence conditions or statutory requirements can be sanctioned with enforcement orders or financial penalties. Ofgem can also accept commitments by the infringer. The same enforcement powers apply to infringements of rules (or licence conditions) of a national or European origin.[31] Data about the outcomes of investigations suggest that those powers produce a significant level of deterrence. Between 2012 and early 2014, financial penalties overcame GBP 30 million. In some cases, Ofgem was able to obtain from the infringers additional compensation to be paid directly to consumers or consumer funds.[32] It is important to underline the impact that the implementation of the Third Package has had on the scope of Ofgem's enforcement powers. On the one hand, enforcement can now refer to obligations directly stemming from EU energy law. On the other hand, the 2011 Regulations granted Ofgem the power to modify licence conditions without the consent of the industry (ss 11A–11H Electricity Act 1989). This means that additional obligations can be more easily imposed upon the market operators. At the same time, it could also mean an increase in the monitoring and enforcement activities.

No less relevant is the role Ofgem can play in dispute resolution procedures. The Electricity Act conferred the power to hear disputes in connection cases (s. 23) and billing cases (s. 44A). The standard licence conditions grant Ofgem the power to hear complaints against the transmission (condition C9) and the distribution operators (condition 7). The 2011 Regulations added the power to hear disputes related to the obligations under Directive 2009/72/EC (ss 44B–D Electricity Act 1989). [33] It is too early to assess the impact of the new rules, but it is already clear that they broaden the options the regulator can exploit to increase the effectiveness of energy regulation.

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31 Sections 25–27F Electricity Act 1989, as amended by the Electricity and Gas (Internal Markets) Regulations 2011 (S.I. no. 2704/11), which implemented the Third Energy Package. Although references in the text are to the electricity sector, the same rules can be found in the Gas Act 1986.

32 Ofgem's sanctioning powers have not been challenged through judicial review so far. Regulatory decisions about licence conditions can be challenged before the CMA. There has been only one case in 2007, with a decision against Ofgem. See the overview in M. Clarke & T. Cummins, 'Judicial Review in the Energy Sector: The England and Wales Perspective', *Int. Energy L. Rev.* (*International Energy Law Review*) 2011, p 244, as well as the list of challenges until 2012 in House of Commons, Energy and Climate Change Committee, Consumer Engagement with Energy Markets, vol. II, 20 Dec. 2012, Ev 125–127.

33 See the complete list of dispute resolution powers in Ofgem, *Guidance on the Determination of Disputes for Use of System or Connection to Energy Networks*, 24 Aug. 2012.

EU energy law was not the only factor driving the extension of Ofgem's competences. Since 2012, the planned reforms of the UK energy markets made it clear that the growing pressure on the regulator's resources needed a broader and more structured response. A new enforcement vision and a new organizational structure for the enforcement activities were proposed in 2013. The main aspects of the proposal are the annual list of Strategic Enforcement Priorities and the appointment of an Enforcement Decision Panel (to decide contested cases) and of a Settlement Committee. Moreover, Ofgem has set down new enforcement guidelines and the process to be followed in calculating the amount of a financial penalty.[34]

As far as consumer disputes are concerned, an independent ombudsman scheme was introduced by the Consumers, Estate Agents and Redress Act 2007. It applies to households and microbusinesses. The decision is binding on the energy company but not on the customer. Thousands of disputes are decided each year, the majority with a financial award.[35] However, there is evidence that just 5% of complaints addressed to energy companies escalate to the energy ombudsman.[36] This unsatisfactory outcome is in line with the low level of consumer trust registered by Ofgem in early 2014.[37]

Before turning to private enforcement, the peculiar relationship between sector regulation and competition law shall be highlighted. Unlike the other three countries considered in this article, the United Kingdom decided to grant Ofgem concurrent enforcement powers in the field of European and national competition laws. The regulator was given wide discretion to choose whether to apply competition law or sector regulation. Fears that such delegation might lead to underenforcement of competition law have been voiced.[38] Indeed, Ofgem has applied competition law only in two cases.[39] Assessing whether a more intensive

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34 OFGEM, *Review of Ofgem's Enforcement Activities – Strategic Vision, Objectives and Decision Makers*, 19 Nov. 2013; OFGEM, *Statement of Policy with Respect to Financial Penalties and Consumer Redress*, 31 Mar. 2014; OFGEM, *Enforcement Guidelines*, 12 Sep. 2014.

35 See information at http://www.ombudsman-services.org/energy.html.

36 See GFK, *Complaints to Ombudsman Services: Energy*, 11 Dec. 2013, available at www.ofgem.gov.uk.

37 Slightly more than 50% of customers said they were satisfied with their supplier, while complaints increased by more than 50% by the beginning of 2011: OFT, OFGEM & CMA, *State of the Market Assessment*, 27 Mar. 2014.

38 See the references to the debate in G. MONTI, 'Utilities Regulators and the Competition Act 1998', in *Ten Years of UK Competition Law Reform*, ed. B.J. Rodger (Dundee: Dundee University Press 2010).

39 In the first one (National Grid), the abuse of dominance in metering services was sanctioned with a fine of GBP 41.6 million, later reduced to GBP 15 million by the Court of Appeal (*National Grid plc* v. *Gas and Electricity Markets Authority*, [2010] EWCA 114). In the second one (Electricity North West Ltd., May 2012), binding commitments were accepted. As reported by the JOINT REGULATORS GROUP, *Building Confidence that Consumers in Regulated Sectors Are*

use of competition law would have been warranted requires a complex enquiry. However, the UK legislator has already decided to prompt the sector regulator towards an explicit assessment of the reasons why applying competition law is or is not the more appropriate way of proceeding. Moreover, the new CMA has been granted the power to apply competition law in place of a sector regulator, while the Secretary of State has been granted the power to remove the concurrent competition function of certain sector regulators.[40] A stronger coordination should also be achieved through the UK Competition Network (UKCN), bringing together the CMA and the sector regulators.[41]

Besides coordination and information sharing, to some extent already present in the previous regime, the new rules on concurrency seem to suggest a different relationship between competition law and sector regulation. According to the CMA Guidance, when applying competition law, the regulators are not required to have regard to their sectoral duties. Moreover, even when a regulator decides to issue an enforcement or penalty order under sector powers, the CMA is still entitled to undertake an investigation in relation to the same or similar facts.[42] The attempt to confer primacy to competition law is clearly visible here. Much less clear, however, is whether the leadership role of CMA will lead the sector regulator to choose the right enforcement option.

We can now turn to private enforcement. The first observation is that it must be dealt with in close connection to public enforcement. That is, the most important private enforcement tools are dependent on the public ones. The Energy Act 2013 introduced the consumer redress order. According to sections 27G–O Electricity Act 1989, Ofgem may make the order when a regulated person has contravened any condition or requirement, and as a result, one or more consumers have suffered loss or damage or been caused inconvenience. This kind of protection is available to any consumer in relation to electricity conveyed by distribution systems or transmission systems, as well as in relation to gas conveyed through pipes. This means that they can be households or businesses.

Remedial action under a consumer redress order includes paying an amount to affected consumers, preparing and distributing a written statement setting out the contravention and its consequences, or terminating or varying any contracts. In the latter case, the consent of the affected consumer is required.

Effectively Protected from Competition Failures, June 2013, para. 66 ff., in both cases there was a close collaboration between Ofgem and the Office of Fair Trading. It is also suggested that investigations begun on competition law grounds can lead to the implementation of new regulatory measures.

40 See s. 25(4A-6) Electricity Act 1989, ss 51–53 Enterprise and Regulatory Reform Act 2013, the Competition Act 1998 (Concurrency), Regulation 2014 (S.I. no. 536/2014).

41 See the UKCN Statement of Intent published in December 2013.

42 See CMA, *Guidance on Concurrent Application of Competition Law to Regulated Industries*, March 2014, p 34.

The close connection with private enforcement can be indentified in the right given to consumers to independently enforce the order. The obligations stemming from the order are explicitly given a contractual qualification. Therefore, the consumer will be able to claim the compensation provided in the order and any damages stemming from noncompliance with the order. The reference to 'inconvenience' caused to the consumers seems to suggest that compensation might be granted even when general contract law would not allow any damage claims.[43] At the same time, it cannot be excluded that the consumer might claim additional damages that are causally connected to the contravention but in this case subject to ordinary rules on the burden of proof. Moreover, the order could open the way to damage claims even though it does not contain any compensation, but only other types of measures.

Of course, when compensation is already provided by Ofgem, it can be expected that there will be no need for private enforcement. However, Ofgem may impose a penalty together with the compensation. Their maximum total amount cannot exceed 10% of the regulated person's turnover. In that case, the compensation included in the order might provide only partial relief to consumers.

Ofgem was not the first UK authority to obtain redress powers. Ofcom and the Financial Services Authority (now Financial Conduct Authority) had already been granted such powers. The Consumer Rights Bill, introduced into the Parliament on 24 January 2014, might extend the redress powers to public enforcers for any breach of consumer law. The fundamental difference with the energy sector is that private enforcement by consumers is not allowed. The Secretary of State is granted the power to extend enforcement measures to private enforcers, but they seem to include only consumer bodies like Which? or other private organizations. Moreover, redress obtained from public enforcers will foreclose individual civil actions by consumers.

An immediate impact on private enforcement in the energy sector might stem from another part of the Consumer Rights Bill. Several measures are aimed to strengthen private antitrust enforcement. They include the extension of the jurisdiction of the Competition Appeal Tribunal (CAT) to stand-alone actions, an opt-out collective actions regime, an opt-out collective settlement regime, as well as the promotion of ADR with a certifying redress scheme administered by the CMA.

At least in the energy sector, the new measures on private antitrust enforcement might well represent a step change. The United Kingdom can be included among the EU countries with considerable private enforcement

43 See OFGEM, *Statement of Policy*, p 5 ff.

experience.[44] However, in the energy sector, the National Grid decision led to just one follow-on action before the CAT, settled in 2013.

It cannot be excluded that public enforcement will maintain its leadership role in the future. If compensation through the redress orders of the regulator and ADR measures in the field of competition law will provide a satisfactory level of relief, it is difficult to believe that the number of private antitrust actions will significantly rise.[45] Public enforcement might even compensate for the limited use of the ombudsman scheme by energy customers.[46] Hence, the United Kingdom exemplifies the difficulty to change the balance between public and private enforcement.

Another general point is worth underlying. The expansion of sector regulators' redress powers means that common law rules play an increasingly residual role. While an explicit reference is made to the contractual qualification of the obligations owed to affected energy consumers, there is no reason to suppose that contractual (or more generally private law) concepts will influence the evolution of the new regulatory powers. The tendency of the UK regulatory system to keep regulation and common law rules in 'separated rooms' was already pointed out several years ago.[47] The latest reforms can only accelerate it. Whether this vanishing connection entails any drawbacks, for example, on the ground that traditional common law principles help identify the boundaries of public powers, is an open question. For now, what can be observed is that in energy markets the quest for effective remedies has gained priority and overcome any doubts about systemic coherence.

3. The Telecommunications Sector

In the electronic communications sector, EU law has moved towards progressively more detailed provisions, wider enforcement tools for NRAs, and whenever possible, a shift of enforcement powers to the supranational level. The 2009 reforms broadened the reach of NRAs' enforcement powers in matters related to

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44 See RODGER, *Competition Law*, p 102 ff.; B.J. RODGER, 'Why Not Court? A Study of Follow-On Actions in the UK', 1. *J. Antitrust Enforcement* (*Journal of Antitrust Enforcement*) 2013, p 104.

45 See the observations by C. HODGES, 'Fast, Effective and Low Cost Redress: How Do Public and Private Enforcement and ADR Compare?', in RODGER, *Competition Law*, p 255 ff. (suggesting that regulatory compensation might well prove more effective than collective private actions in restoring unbalanced markets and making redress available to consumers).

46 The UK government is planning to take action to ensure comprehensive ADR coverage when implementing the ADR Directive. However, ADR will not be made compulsory across the board. See *Department for Business and Innovation Skills*, *Government Response to the Consultation on Implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation*, November 2014.

47 J. BLACK, 'Law and Regulation', in *Regulating Law*, eds C. Parker et al. (Oxford: Oxford University Press, 2004).

access and interconnection, obligations to be imposed to operators with significant market power (SMP), co-location and sharing of network elements, security and integrity of networks. The scope of the provision about dispute resolution was broadened to include operators who only supply services (new text of Art. 20 Directive 2002/21/EC or Framework Directive). For cross-border disputes, the role of BEREC was acknowledged (Art. 21 Framework Directive). An explicit rule on NRAs' sanctioning powers was laid down (Art. 21a Framework Directive).

Regarding telecoms end-users' rights, there is no doubt that their breadth and number have progressively increased. In the 2013 proposed regulation, the Commission tried to shift to full harmonization, but the European Parliament preferred to further increase the breadth of consumers' protection without curbing MSs' freedom. The only concession to Commission's worries about excessive fragmentation was the enlargement of BEREC's power to issue harmonization guidelines. [48]

The following two subsections discuss enforcement powers in network access and consumer disputes. Subsection 3.1 deals with network access disputes in the Italian regulatory framework. Subsection 3.2 deals with consumer disputes in the French regulatory framework. For both countries, the vertical and horizontal interactions among enforcement mechanisms are analyzed.

3.1. Italy: Regulation by Administrative Adjudication

Obligations related to access, interconnection and interoperability are one of the hallmarks of the EU regulatory framework for electronic communications. Since the 1990s, there has been a steady increase in the type of operators that enjoy access rights and in the type of networks that should grant them. Even though the present framework still refers to the obligation to 'negotiate' interconnection, it is clear that in markets with a limited degree of competition the difference between such an obligation and a right to third party access (available in the energy sector) is quite small.[49] What is really different is the larger number of networks (fixed, mobile, or virtual) and of technological solutions available to implement the access obligations. This means that monitoring and enforcing those obligations is relatively more difficult in the communications than in the energy sector.

48 See Commission proposal COM (2013) 627 of 11 Sep. 2013 and the European Parliament resolution voted on 3 Apr. 2014.

49 Directive 2002/19/EC (Access Directive) makes a distinction between the access and interconnection obligations that can be imposed on undertakings with and without SMP. In the latter case, the scope of the obligations can be broader. See, for a detailed account, I. WALDEN, 'Access and Interconnection', in *Telecommunications Law and Regulation*, ed. I. Walden (4th edn, Oxford: Oxford University Press 2012); P. NIHOUL & P. RODFORD, *EU Electronic Communications Law* (2nd edn, Oxford: Oxford University Press 2011), p 171 ff.

Additionally, the need to balance incentives to invest in new infrastructures and promotion of competition has led to uneasy compromises in the communications sector. Whereas the energy sector addressed the same issue by providing exemptions from third party access for new infrastructures, the communications sector has had to rely on case-by-case assessments. The jury is still out on whether such an approach succeeded.[50]

Being one of the classical problems to be tackled in the liberalization process, access issues mobilize a large armoury of public and private enforcement tools. The availability of more than one type of remedy can be justified by the monitoring problems mentioned above. However, it is clear that a broad range of enforcement tools increases coordination costs. Moreover, it adds complexity to the strategic choices to be made by the NRAs and the operators. In the remainder of this section, we shall try to identify coordination costs and strategic choices from both a vertical (EU MSs) and a horizontal (different enforcement tools available at national level) point of view.

Let us focus on vertical relationships first. Access and interconnection issues are not the exclusive domain of national enforcement. Under the notification procedure laid down by Article 7a Framework Directive, control over the remedies implemented by NRAs is entrusted to the Commission and BEREC. When remedies about access and interconnection are proposed, the Commission and BEREC can recommend changes or withdrawal. The last word rests with the NRA, but a disagreement with the Commission's recommendation might prompt infringement proceedings.[51] Even though the Commission cannot exercise a veto power, it seems that its recommendations have generally been followed.[52] Such an

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50 See, e.g., A. RENDA, 'Competition-Regulation Interface in Telecommunications: What's Left of the Essential Facility Doctrine', 34. *Tel. Pol'y* (*Telecommunications Policy*) 2010, p 23 (aggressive access policy resulted in excessive service-based competition with low investment); BOSTON CONSULTING GROUP, *Reforming Europe's Telecoms Regulation to Enable the Digital Single Market*, 12 Jul. 2013, available at www.etno.eu (higher return on capital for access seekers than for telco incumbents between 2007 and 2011).

51 Unlike Art. 7a, Art. 7 Framework Directive confers on the Commission a veto power for national decisions concerning the definition of markets and the assessment of SMP. As of mid-2014, the veto power had been exercised thirteen times. A veto power is also granted to the Commission by Art. 8.3 Access Directive, but only in case of access remedies different from those enumerated in Arts 9 to 13. Moreover, Art. 19 Framework Directive allows the Commission to issue recommendations or binding decisions when inconsistent implementation by NRAs creates barriers to the internal market.

52 Usually, an agreement on amendments is found or the proposed measure is withdrawn. See, e.g., BEREC, *Annual Reports – 2013*, June 2014, p 39 ff. When the recommendations are not followed, the question arises whether the NRAs bear a heavier burden of motivation. Italian administrative judges seem willing to accept that national regulatory decisions are compatible with Commission's recommendations if they take into account local specificities and if they clearly explain why European objectives cannot be achieved immediately: see references in F.

outcome supports the claim that soft governance may reduce frictions between the EU and national levels, as well as increase effective implementation of hard EU law.[53] However, the Commission tried to gain new veto powers with the 2013 proposed regulation on the European single market for electronic communications. The European Parliament voted against such change.[54] This could mean that in the vertical relationship persisting diversity on enforcement choices should be expected. More generally, the lack of further harmonization could make it more difficult for the Commission to control over- or underenforcement by NRAs.[55]

What kind of enforcement tools were made available in case of infringement of access obligations? Besides general sanctioning powers (Art. 21a Framework Directive), the most important enforcement tool is the dispute resolution power. For disputes between undertakings related to any obligations (including access and interconnection) arising from the EU regulatory framework, such a power is conferred on NRAs. For disputes between undertakings and consumers or end users, MSs shall make available out-of-court procedures, but the involvement of the NRAs is not required. In both cases, dispute resolution

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MARINI BALESTRA, *Manuale di diritto europeo e nazionale delle comunicazioni elettroniche* (Padova: Cedam 2013), p 263 ff. For a Dutch case in which the national judges forced the NRA not to follow the Commission's recommendation, see M. CANTERO GAMITO, 'EU Soft Law, Internal Market and Private Relationships: The Rise of Executive Power in the EU and the Implementation of the EU Framework for Electronic Communications as a Paradigm', in *European Regulatory Private Law – The Paradigms Tested* (EUI Working Papers Law 2014/04), eds H.-W. Micklitz et al., p (41) 51 ff.

53 See S. SIMPSON, 'The Interactive Nature of "Soft" and "Hard" Governance in the EU Information Society', 16. *Information, Communication & Society* 2013, p 899 for a discussion of the reasons why the Commission was denied veto powers on regulatory remedies in the 2009 Telecoms Package.

54 Article 35(2) (conferring to the Commission a veto power on obligations imposed by NRAs on European electronic communications operators) and Art. 35(3) (transforming in a binding provision the three criteria test to be met to regulate markets not identified in the Recommendation on relevant markets or to not regulate a market identified in the Recommendation) proposed regulation COM (2013) 627 fin. were deleted from the text adopted by the European Parliament on 3 Apr. 2014.

55 The Commission's proposal would move the electronic communications sector closer to horizontal competences in competition law, where enforcement powers can be used in matters already regulated by NRAs. Margin squeeze cases are the context in which the relationship between competition law and regulation has been discussed more extensively. See, e.g., J. TAPIA & D. MANTZARI, 'The Regulation/Competition Interaction', in *Handbook on European Competition Law*, eds I. Lianos & D. Geradin (Cheltenham: Edward Elgar Publishing 2013); M. COLANGELO, 'The Interface between Competition Rules and Sector-Specific Regulation in the Telecommunications Sector: Evidence from Recent EU Margin Squeeze Cases', *Competition and Regulation in Network Industries* 2013, p 214; G.A. HAY & K. MCMAHON, 'The Diverging Approach to Price Squeezes in the United States and Europe', 8. *J. Comp. L. & Econ.* 2012, p 259.

procedures shall be available for national and cross-border controversies, in the latter case with the involvement of BEREC.[56]

In interpreting provisions related to access and dispute resolution, the ECJ has generally increased the scope of NRAs' powers. For example, in 2002, it was held that the NRA must be empowered to intervene at any moment of the negotiations leading up to the interconnection agreement.[57] In 2009, it was held that undertakings without SMP can be required to negotiate interconnection or interoperability in good faith. Such an obligation is breached when the undertaking proposes interconnection under unilateral conditions likely to hinder the emergence of a competitive market at the retail level.[58] To be sure, the ECJ has also held that an obligation to negotiate access cannot be imposed without an evaluation of the degree of competition on the market concerned. However, in the same case, it stated that NRAs can be granted a general power to achieve the objectives of Article 8 Framework Directive in the context of access and interconnection. Such a general power includes a decision by the NRA granting access if negotiations fail.[59] No less relevant is the case law of the ECJ, which, by acknowledging the direct effect of some provisions or the right of appeal of competitors against NRAs' decisions, opens up the way to private enforcement of EU law.[60]

While in theory allowing the NRAs to search for a balance between the promotion of competition and incentives to invest, the EU regulatory framework leaves unanswered two crucial questions. First, how different enforcement tools should be coordinated? It is clear that access issues can be disposed of within the

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56 See Arts 20 and 21 Framework Directive, Art. 34 Directive 2002/22/EC (Universal Service Directive), and Art. 17 Reg. (EU) no. 513/2012 of 31 Jun. 2012 (Roaming Regulation). The 2013 proposed regulation made it more explicit the obligation to provide out-of-court procedures in cross-border disputes related to consumers and end users (Art. 22, agreed on by the European Parliament). However, more specific rules for the coordination between the NRAs of the home and host MSs when exercising their monitoring, enforcement, and dispute resolution powers on electronic communications providers were rejected by the European Parliament.

57 ECJ 19 Sep. 2002, *Commission* v. *Belgium*, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-221/01&td=ALL.

58 ECJ 12 Nov. 2009, *Teliasonera Finland Oyj*, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-192/08&td=ALL.

59 ECJ 13 Nov. 2008, *Commission* v. *Poland*, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-227/07&td=ALL. In this case, the Commission pleaded for a more restrictive interpretation of NRAs' powers, clearly fearing that unfettered discretion in the choice of remedies might increase overenforcement risks.

60 On direct effect, see ECJ 17 Jul. 2008, *Arco AG & Co. KG et al.* v. *Bundesrepublik Deutschland,* http://curia.europa.eu/juris/liste.jsf?language=en&num=C-152/07&td=ALL. On appeal rights, see, in the new regulatory framework, ECJ 21 Feb. 2008, *Tele2 Telecommunication GmbH* v. *Telekom-Control-Kommission*, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-426/05&td=ALL.

dispute resolution procedures but also with the imposition of general obligations. Moreover, the parties involved may activate other types of remedies, including judicial actions grounded in contract law and ADR schemes. Finally, public and private enforcement of competition law is not rare in the telecommunications sector. Second, to what extent the wide discretion conferred on the NRAs in access issues leads to outcomes that are completely divergent from traditional contract law? Are the NRAs just supplying faster and less costly dispute resolution procedures, or are they completely reshaping the substance and remedies of the network access contractual relationships?

Answers to these questions will be looked for in the analysis of the Italian implementation of the EU regulatory framework. This case study can be useful for two reasons. First, in Italy, the alternatives to the fixed communications network of the incumbent operator (Telecom Italia) are fewer than in other MSs.[61] This is one of the reasons why the market share of the incumbent is much higher in Italy.[62] The lack of alternatives implies that obtaining access or interconnection from the incumbent is of paramount importance for its competitors. At the same time, the incumbent knows that it can defend its market share by making access or interconnection more costly. Therefore, any access relationship is bound to be very contentious.

Second, Italy has experimented with several different solutions for access issues. They include functional separation of the network owned by the incumbent, regulatory dispute resolution, private ADR, and public and private competition law enforcement. What shall be understood is whether the different solutions work in a complementary way or lead to conflicting outcomes.

Let us begin with the structural solutions implemented by Agcom to improve access conditions. After years of troublesome relationships with new entrants, in 2008 the incumbent submitted a proposal for binding commitments. The proposal took inspiration from the UK experience with the BT commitments.[63] Under some respects, the version eventually approved by Agcom was stricter than the UK one. Among the fourteen groups of commitments, the most relevant here are given as follows: a) a new and more transparent delivery process for the management of SMP access services through the Open Access functional unit, b) the institution of an independent Monitoring Board for the

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61 See *Achieving the Objectives of the Digital Agenda for Europe in Italy*, Report of the expert advisory committee appointed by President Letta, 30 Jan. 2014, pp 39–40, available at www.fub.it (less alternatives, like cable networks, than in other MSs; Digital Agenda objectives for broadband can only be achieved if the historic incumbent decides to invest).

62 In the third quarter of 2014, the incumbent's market share in the fixed lines segment was 61.3%, in the retail broadband segment 48.7%. See AGCOM, *Quarterly Telecommunication Markets Observatory*, updated to 30 Sep. 2014.

63 See R. CADMAN, 'Means Not Ends: Deterring Discrimination through Equivalence and Functional Separation', 34. *Tel. Pol'y* 2010, p 366.

implementation of the commitments, c) measures aimed at the nondiscriminatory supply of services for next generation networks, d) the institution of OTA Italia, a body in charge of settling technical and operational disputes associated with the supply of network access services, and e) new conciliation procedures to deal with the high number of consumer disputes related to unrequested services and the high bills of premium-rate services.[64]

Did the commitments succeed in reducing barriers to network access for new entrants? According to some commentators, the commitments did not ensure more transparency in cost allocation and did not lessen price discrimination risks.[65] More optimistic assessments can be found in the reports issued by the Monitoring Board and OTA Italia. The former pushes the incumbent towards fulfilling the commitments in the most effective way. When noncompliant behaviour is identified, the Monitoring Board attempts to work out acceptable solutions. Overall, the annual reports suggest that the compliance rate has increased over time.[66] Similarly, OTA Italia reports that it has succeeded in smoothing out the relationship between the incumbent and the Other Licensed Operators (OLOs). Agreement on technical processes is generally feasible within the working groups organized and supervised by OTA Italia. This body can also exercise mediation powers, but no instance of such procedure has been reported so far.

Two lessons can be drawn from these experiences. First, fully implementing the commitments takes many years. In rapidly changing markets, this is a big shortcoming. Second, the commitments did not prompt Telecom to turn to more advanced versions of functional separation. [67] Therefore, the availability of other enforcement tools that could enhance network access shall be assessed.

Competition law enforcement tells a different story. In 2013, Telecom was fined by the Agcm because of two different types of abuses of dominant position. The abusive behaviours referred to the period 2009–2011, that is, shortly after the commitments with Agcom were undertaken. The first abuse consisted of a refusal to supply access to the network. The second abuse was related to Telecom's

64 For a full description of the commitments in English, see AGCOM, *Annual Report 2009*, p 121 ff.

65 A. NUCCIARELLI & B.W. SADOWSKI, 'The Italian Way to Functional Separation: An Assessment of Background and Criticalities', 34. *Tel. Pol'y* 2010, p 384.

66 The annual reports of the Monitoring Board are available at http://organodivigilanza.telecomitalia.it/ita/index.shtml.

67 In May 2013, Telecom proposed to move from the current approach of Equivalence of Output to Equivalence of Input. The latter ensures access on identical terms between the incumbent and the OLOs. See for the definitions ss 6g) and h) of Commission's recommendation 2013/466/EU of 11 Sep. 2013.

pricing policy and fell within the category of margin squeeze.[68] The most striking aspect of the decision is that the first abuse was about activities covered by the regulatory commitments and supervised by the Monitoring Board. The second abuse had to do with prices not directly monitored by Agcom. The Italian competition authority carved out a space in which the gaps in the controls carried out by Agcom and the Monitoring Board could be filled. In the opinion expressed within the same procedure, Agcom acknowledges that the regulatory commitments leave room for abusive practices. Moreover, it argues that its own market tests on pricing policies are not aimed at avoiding predatory practices. However, the crucial issue is whether the sector regulator can ensure effective access without the intervention of the competition authority.

There is no doubt that this decision will fuel the debate about the relationship between competition law and regulation.[69] What is useful to observe here is that this case cannot be described as an instance of complementarity. If the incumbent is still able to refuse access in difficult-to-detect ways, regulatory monitoring and enforcement appear to be ineffective. Even though continuous monitoring could lead to improvements over time, such an outcome cannot be taken for granted. Competition law jumps in to replace ineffective regulation with different enforcement tools. More generally, it can be observed that in Italy public and private enforcement of competition law has been invoked against the historic incumbent several times, mostly with reference to regulated behaviours.[70] It could be argued that each type of enforcement pursues different goals. However, such

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68 See Agcm's Decision A428 – Wind-Fastweb/Condotte Telecom Italia of 9 May 2013, in Agcm Bulletin no. 20 of 27 May 2013. For a summary in English, see G. Nizi, 'The ICA Fines Telecom Italia for Unilateral Practices in the Market for Network Infrastructure', *Italian Antitrust Review* 2013, p 71. The fine of EUR 103.794 million was affirmed by Tar Lazio Rome, Chamber 1, 8 May 2014, no. 4801, available at www.giustizia-amministrativa.it.

69 The stakes are high: three of Telecom's competitors started follow-on civil actions before the Tribunal of Milan claiming damages in excess of EUR 3 billion. See Telecom Italia, *Annual Financial Report*, 31 Dec. 2013, pp 405–406. On the evolution of the relationship between Agcm and Agcom, see A. Manganelli, 'Il principio di concorrenza fra antitrust e regolazione. Il caso delle comunicazioni elettroniche', *Concorrenza e mercato* 2013, p 279.

70 Since the beginning of the liberalization process, the incumbent has been fined six times for abuse of dominant position (the last in 2013: see n. 68). The original amount of the fines exceeded EUR 400 million, but it was reduced by the administrative judges (see, e.g., Council of State, VI Chamber, 10 Mar. 2006, no. 1271, *Foro italiano* 2006, III, p 512, with comment by A. Bitetto). Moreover, binding commitments have been accepted four times. Private enforcement, grounded in competition law or unfair competition law, was used against the incumbent in several cases, but when damages were awarded (usually in follow-on actions) they do not seem to provide a strong deterrence effect: see, e.g., Court of Appeal Milan 24 Dec. 1996, *Danno e responsabilità* 1997, p 602, with comment by S. Bastianon (EUR 1.680.000); Court of Appeal Rome 20 Jan. 2003, *Diritto industriale* 2003, p 548, with comment by A. Mastrorilli (EUR 1,404,856.93); Tribunal of Milan 13 Feb. 2013, available at www.osservatorioantitrust.eu (EUR 1,830,000).

an argument is more difficult to defend if different enforcement tools focus on the same type of behaviour. Rightly understood, complementarity means that each type of enforcement tool proves effective in its own sphere of action, not that one type of enforcement tool replaces the other one. We shall discuss later (s. 4) the deeper reasons why complementarity is difficult to attain.

Regulatory enforcement is no less interesting than competition law enforcement. Agcom has made wide use of its adjudicatory powers to smooth out network access disputes. Each decision is exploited not only to address the issues raised by the parties but also to clarify or even extend the regulatory obligations. Of course, it is legitimate to ask whether such a strategy of 'regulation by litigation' leads to satisfactory outcomes.

Two different dispute resolution procedures are available. The first one applies to disputes between operators and implements Article 20 Framework Directive. In this case, adjudicatory powers can only be exercised by Agcom.[71] The second one applies to disputes between operators and end users. The latter can be consumers or not.[72] In this case, conciliation is mandatory and can take place before regional committees or other ADR bodies, while adjudicatory powers can be exercised by the regional committees or Agcom.

Judging from available statistics, both procedures confer some advantages on operators and end users. First of all, frequency of use is quite high. Second, settlement is the most recurrent outcome.[73] Of course, both frequency and settlement can be interpreted in different ways. If other remedies are not

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71 Even though the Italian legislator implemented the 2009 Telecoms Package in 2012, the Agcom did not modify its dispute resolution procedure (Decision 352/08/CONS) to extend the range of operators that can use it and to add new procedural rules about cross-border disputes. See generally A. LEONE, 'La risoluzione delle controversie tra operatori', in *Diritto delle comunicazioni elettroniche*, ed. F. Bassan, (Milan: Giuffré 2010); S. LUCATTINI, *Modelli di giustizia per i mercati* (Turin: Giappichelli 2013), p 115 ff.

72 The Italian legislator exploited the discretion afforded by Art. 34(1) Universal Service Directive to extend dispute resolution procedures to other end users. See for the Italian implementation Art. 1 lett. pp) Code of Electronic Communications (legislative Decree no. 259 of 2003, as amended) and Art. 1, lett. i) Decision 173/07/CONS (Agcom's regulation of dispute resolution procedures). The procedure is discussed by E. MINERVINI, 'La risoluzione delle controversie tra operatori di comunicazioni elettroniche e utenti finali', in *Diritto delle comunicazioni elettroniche*, p 299; LUCATTINI, *Modelli*, p 125 ff.

73 As far as disputes between operators are concerned, between 2005 and 2012, Agcom dealt with more than 150 cases. Only in a small percentage (less than 10%) the regulator issued a decision. In most cases, the parties settled the dispute. See AGCOM, *Bilancio di mandato 2005–2012*, April 2012, pp 38–39; G. NAVA, *Regolamentazione e contenzioso tra operatori nelle comunicazioni elettroniche* (Turin: Giappichelli 2012), pp 95–96. The same trend can be observed in the seventeen cases decided until April 2013 (AGCOM, *Relazione Annuale 2013*, p 225 ff.) and in the sixteen cases decided until April 2014 (AGCOM, *Relazione Annuale 2014*, p 204 ff.). Regarding disputes with end users, between 2002 and 2012, conciliation was possible for 300,000 of them, with refunds amounting to more than EUR 100 million. In this case also, settlement rates have

available, the Agcom's dispute resolution procedures may simply be the lesser evil. However, it does not mean they provide effective protection to operators' and end-users' rights. As suggested before, the real issue is the interplay with other remedies. In what follows, such an interplay is assessed with reference to disputes between operators.

The right to file a claim with Agcom is granted to each undertaking. However, the parties to the interconnection agreement (or other type of agreement in the electronic communications sector) can include an arbitration clause. In theory, such a clause could totally or partially exclude Agcom's competence on any dispute. In the early years of liberalization, the incumbent tried to avoid dispute resolution before Agcom, fearing that it could decide cases with a pro-competitive bias. However, arbitration procedures do not automatically deliver better outcomes for the incumbent.[74] Therefore, later contracts just provided for clauses allocating competence between arbitration panels and Agcom on the basis of temporal priority: the first body seized would have competence on the whole dispute. At least in the case of new entrants, the latest versions of wholesale agreements avoid any reference to arbitration and simply refer to Agcom's dispute resolution powers. One reason why arbitration seems today less appealing could be that arbitrators are bound to decide the dispute in accordance with the policy objectives laid down in Article 8 Framework Directive (Art. 20(2) Framework Directive and the Italian implementing provision in Art. 23(2) Code of Electronic Communications). This means that they do not enjoy much more leeway than Agcom itself. Another reason could be that regulatory and contractual issues are so tightly intertwined that the regulator is better positioned to deal with both of them.[75] More on this later in this section.

The interplay of Agcom's dispute resolution powers and judicial enforcement is more complex. Each undertaking can seize a court without first filing a claim with Agcom. Alternatively, one party can start litigation before Agcom and then move to courts if it realizes that the regulator will rule against it. In this case, the procedure before Agcom must be suspended. Parties are given much room for strategic manoeuvring. They are free to use both regulatory dispute resolution and judicial enforcement as a dilatory tactic. The priority given

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been high (above 70%). In disputes above EUR 500, end users have obtained on average EUR 1,336, while in case of settlement the average sum has been about EUR 1,000 or less (AGCOM, *Bilancio di mandato*, p 59 ff.).

74 NAVA, *Regolamentazione*, p 92, refers to a 2007 arbitral award (unpublished) that asks Telecom to pay more than EUR 60 million to a competitor. For other examples of arbitral awards unfavourable to Telecom, see F. VARIOLA, 'L'accordo AIIP/Telecom sull'offerta di connessione e la soluzione delle relative controversie', *Diritto dell'informazione e dell'informatica* 2004, p 498.

75 However, operators receiving an unfavourable decision from Agcom can still try to obtain a better outcome by starting arbitral proceedings: see the dispute described in Agcom's Decision 17/08/CIR.

to judicial proceedings is meant to avoid conflicting decisions.[76] However, it is clear that opportunistic behaviour should be expected.

There are at least four reasons to believe that dispute resolution before Agcom is more appealing than litigation before Italian courts. First, the regulator has been willing to decide a wide range of disputes, including those related to markets where SMP had not been identified and obligations had not been imposed. Second, Agcom can provide interim relief to claimants. Judging from the fact that most disputes are dismissed after such relief has been granted, the measures applied by Agcom provide the claimant the protection he needs and probably help find the way towards settlement.[77] Third, dispute resolution before Agcom is linked to other enforcement powers available to the regulator. When a claim is filed, Agcom may start infringement proceedings and fine the party in breach of regulatory obligations. Alternatively, the start of the dispute resolution procedure may prompt the party in breach to offer binding commitments that foster competition. Hence, the effectiveness of Agcom's dispute resolution powers depends on and can only be assessed when looking at the combination of all its enforcement powers. Fourth, Agcom's decisions in dispute resolution procedures enjoy a high degree of finality. They have been appealed in a few cases so far, and the administrative judges have always confirmed Agcom's reasoning.

If Agcom appears an attractive forum when compared to arbitration and courts, its dispute resolution powers should also be assessed on substantive grounds. What kind of intervention into contractual relationships do its decisions make possible? How does the regulator use private law concepts?

Generally speaking, the following types of interventions can be identified:

(a) implementing already existing regulatory obligations, whether they are included in contract terms or not;
(b) interpreting already existing regulatory obligations (and the corresponding contract terms);
(c) integrating already existing regulatory obligations (and the corresponding contract terms);
(d) supplying contract terms (including price) if the parties cannot reach an agreement;

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76 If civil courts find out an infringement of competition law or a contract breach, there is a high probability that regulatory adjudication will conform to judicial adjudication. See, e.g., Agcom, Decision 584/13/CONS.

77 On Agcom's interim relief, see NAVA, *Regolamentazione*, p 144 ff. C. DECKER & H. GRAY, 'Public Utilities: Competition Litigation versus Regulatory Arbitration', *Global Competition Litigation Review* 2013, p (26) 33–34, observe that the availability of regulatory adjudication could make it less likely that the access provider will propose its best price during negotiations. If regulatory adjudication is exploited by access seekers to obtain a better price, its policy objectives could be seriously undermined.

(e) modifying existing contract terms.[78]

Each type of intervention has a direct impact on the contractual relationship. Therefore, the first observation is that regulatory enforcement would not be possible if Agcom were prevented from interfering with contractual relationships. Of course, the next question is what type of interference is legitimate. It seems that the policy objectives pursued by the regulator take precedence over any other private interest. This means that, if a specific interference is deemed to promote one of the policy objectives, Agcom's powers cannot be limited in any way. One example pointing in this direction is the power of the regulator to impose 'fair and equitable' prices in markets that, according to previous enquiries, have been judged sufficiently competitive. Even though such power helps foster competition, it greatly increases uncertainty for any contractual relationship. It is not difficult to foresee that any operator could try to use regulatory dispute resolution to obtain a better price.[79] The more general observation is that without a principled approach to regulatory adjudication all contractual relationships are doomed to be very contentious and unstable. No matter how detailed the contract terms are, they are open to modification if they do not comply with the regulatory framework. I hasten to add that the solution to regulatory uncertainty is not to prevent any regulatory interference with contractual relationships but to find out the dividing line between legitimate and illegitimate interferences. A broader involvement of civil courts could provide more balanced assessment of policy objectives and private interests.[80] However, such a proposal immediately raises the familiar problems of coordinating administrative and judicial enforcement that is the main reason why broad adjudicatory powers are granted to regulators.

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78 For a similar typology, see NAVA, *Regolamentazione*, p 151 ff.

79 After Agcom laid down an economic model for fair and equitable prices in Decision 111/11/CIR (affirmed by Council of State, Chamber III, 9 Apr. 2014, no. 1699, available at www.giustizia-amministrativa.it), the same model was applied in other three cases (115/12/CIR, 116/12/CIR, and 132/12/CIR). See the comments by NAVA, *Regolamentazione*, p (60 ff.) 141 ff. See also DECKER & HAY, 'Public Utilities', p 33: 'The bilateral nature of an arbitration means that the regulator may not be able to determine the terms and conditions to apply across an industry for a specific service.'

80 This seems to be the argument suggested by S.H.J. GIJRATH & J.M. SMITS, 'European Contract Law in View of Technical and Economic Regulation', in *The Future of European Contract Law*, eds K. Boele-Woelki and W. Grosheide (Austin, TX: Wolters Kluwer Law and Business 2007). According to A. OTTOW, 'Intrusion of Public Law into Contract Law: The Case of Network Sectors', The Europa Institute Working Paper 02/12, April 2012, Dutch case law excludes the competence of the NRA on contractual issues. However, it does not seem that such a distinction works well.

Reasons of space prevent an in-depth discussion of the interplay among enforcement tools in disputes involving end users. However, two quick observations are in order. First, coordination costs appear much higher. Even though frequency of recourse to regulatory adjudication and settlement rates are high, individual and collective judicial enforcement against telecoms operators is widespread.[81] Moreover, three different authorities (Agcm, Agcom and the Italian privacy authority) have used their sanctioning powers in the telecommunications sector in matters related to consumer protection much more often than in any other utilities sector.[82]

Second, as already observed for disputes between operators, in disputes with end users the interaction of regulatory and private law concepts is clearly visible. In regulatory adjudication, the two categories of concepts sit side by side, but regulation can displace private law. For example, Agcom refers to ordinary private law rules about the burden of proof, the liability of debtor's collaborators, or contributory negligence. At the same time, regulatory rules about indemnities completely displace ordinary rules about quantification of damages and the validity of limitation of liability clauses.[83]

To sum up, the Italian example shows that the variety of available enforcement tools increases coordination costs and leaves room for opportunistic behaviour. Traces of complementarity between public and private enforcement are difficult to come across. Further, the interaction between regulatory and private law concepts seems to respond to the logic of displacement: When the two bodies of rules collide, administrative enforcement grants priority to regulatory concepts.

3.2. France: Negotiated Regulation and Judicial Enforcement

This section explores the enforcement of telecommunications end-users' rights. Whereas the quantitative increase of consumers' rights is undeniable, their effectiveness is more doubtful. According to the Commission's Consumer Markets

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81 Surveys of case law are provided by L.C. NATALI, 'Profili problematici del contratto di telefonia', *Contratti* 2010, p 165; S. LOIACONO, 'La tutela dell'utente nel contratto di telefonia', *Contratti* 2012, p 157; G. VANACORE, 'Le controversie tra utenti e imprese di telecomunicazioni', *Responsabilità civile* 2012, p 759.

82 In 2012, the total amount of fines for telecommunications operators was EUR 5,131,797 or 57%. In the other utilities sectors (energy, audiovisual, water, and transport), the total amount was EUR 3,883,714. See C. DEDOLA et al., *Consumatori in rete 2013*, I-Com Policy Papers 01/13, p 47 ff., available at www.i-com.it.

83 See Agcom's guidelines issued with Decision 276/13/CONS. Ordinary damages can still be claimed before civil courts, but it can be guessed that in many cases the indemnities awarded in regulatory adjudication already compensate most of the losses.

Scoreboard, telecom markets perform worse than other markets for services.[84] Other studies confirm that the liberalization process has still to deliver its fruits. According to one estimate, the annual detriment for consumers having problems with internet access in EU-27 is between EUR 1,361.1 million and EUR 3,896.5 million. The same study suggests that consumers in EU-27 could save more than EUR 7 million per year by switching to a cheaper internet service provider.[85]

These data suggest that the consumer policy pursued in the telecommunications markets did not provide satisfactory answers to problems that are largely related to the economic features of information services and to consumers' bounded rationality.[86] Of course, enforcement tools cannot solve all the supply side and demand side problems, although it is worth asking whether the choices made at EU and national levels can help reduce consumer detriment. Like in the other sections, in this one, the two central questions are the type of interaction between public and private enforcement and its impact on private law concepts.

A focus on France seems useful for several reasons. First, in that country, three different laws enacted between 2008 and 2014 have tried to improve consumer protection in the electronic communications sector.[87] Second, a

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84 The cluster of four telecom markets (TV subscriptions, internet provision, mobile and fixed telephone services) has low scores for trust, choice of providers, and overall consumer satisfaction, as well as the highest incidence of problems and complaints of all the market clusters. See EUROPEAN COMMISSION, *Consumer Markets Scoreboard*, 10th edn, SWD (2014) 212 fin. of 27 Jun. 2014, p 22.

85 CIVIC CONSULTING, *Consumer Market Study on the Functioning of the Market for Internet Access and Provision from a Consumer Perspective*, 3 Dec. 2012, p (186 ff.) 268 ff. It seems that unsatisfactory performance and ineffective enforcement are somewhat correlated. The study shows that more than a third of consumers surveyed were not satisfied with complaint handling. At the same time, both public (NRAs) and private enforcement (ADR or courts) are exploited in a small number of cases (between 3% and 5%) (p 289 ff.).

86 For the discussion of behavioral insights in the telecommunications markets, see P. XAVIER & D. YPSILANTI, 'Behavioral Economics and Telecommunications Policy', in *Regulation and the Evolution of the Global Telecommunications Industry*, eds A. Gentzoglanis & A. Henten (Cheltenham: Edward Elgar Publishing 2010); O. BAR-GILL & R. STONE, 'Pricing Misperceptions: Explaining Pricing Structure in the Cell Phone Service Market', 9. *J. Emp. Stud.* (*Journal of Empirical Studies*) 2012, p 430.

87 Law 2008-3 of 3 Jan. 2008, the so-called *loi Chatel*, on which see E. CHEVRIER & X. DELPECH, 'Publication de la loi pour le développement de la concurrence', *D. 2008.68*; *ordonnance* 2011-1012 of 24 Aug. 2011, implementing the 2009 Telecoms Package, on which see P. ACHILLEAS & L. BINET, 'Un an de régulation du marché des communications électroniques', *Communication Commerce électronique*, no. 5, May 2012, chron. 5; Law 2014-344 of 17 Mar. 2014, the so-called *loi Hamon*, on which see H. AUBRY et al., 'Droit de la consommation mars 2013-mars 2014', *D.2014.1297*.

specialized ADR body has been put in place since 2003.[88] Third, the French regulatory framework performs quite well from the point of view of enforcement indicators.[89] Let us discuss in more detail the impact of these measures.

First of all, the *Médiateur*. It was created by the major French telecom operators on a purely voluntary basis. The implementation of the 2002 Telecoms Package only asked each operator to supply information about opportunities for amicable settlement. With the implementation of the 2009 Package, it became mandatory for operators to make mediation services available (Art. L121-84-9 Consumer Code). However, the parties are free to start litigation before a court without first trying mediation (Art. 11 *Charte de Médiation de l'AMCE*). Despite being an initiative of the industry, the mediator is granted full independence. His appointment requires an agreement between the *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* (DGCCRF), Arcep, the consumer associations and the telecom operators (Art. 1 *Charte*). The French Commission of Mediation of Consumer Affairs, created in 2010, recognized that the mediator of electronic communications follows its good practices.[90]

Judging from numbers, the mediator deals successfully with most disputes. Until 2012, the number of opinions issued each year has increased steadily. A 26% decrease was registered in 2013. Moreover, the opinions are usually followed by the operators. Another strength of the mediator is its power to issue recommendations aimed at improving controversial practices in the sector. This means that the mediator should be able to influence the evolution of the sector, probably exploiting its position in between the telecom operators and the other bodies charged with a consumerist mission.

The mediator displays some weaknesses. First, it only deals with consumer disputes. For disputes with other types of end users, the standard contracts proposed by French operators sometimes refer to the opportunity for amicable settlement, but in general the only option is litigation in court. Second, the mediator's opinions are confidential. This rule is in line with the traditional approach to mediation, but it clearly reduces the contribution the mediator might

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88 The *Médiateur des Communications Électroniques* (www.mediateur-telecom.fr) was created in 2003 under the impulse of the biggest telecom operators. Today, almost all the operators participate to this dispute resolution scheme.

89 France ranks between the 11th and the 12th position for the fixed, mobile, and internet markets and is above EU-28 average for all consumer markets. In the three telecom markets, it is always included among the best performing countries as far as the complaints indicator is concerned. See EUROPEAN COMMISSION, *Monitoring Consumer Markets in the European Union 2013 – Part II – Market Reports*, p 131 ff. However, another study (CIVIC CONSULTING, *Consumer Market Study*, p 290) shows that in France a satisfactory answer to a complaint was obtained only by 57% of surveyed consumers.

90 See the activities of the Commission at www.mediation-conso.fr.

give to the interpretation of sector regulation. Moreover, the confidential nature of the opinions prevents them from exercising any reputational constraint on telecom operators. Third, it is not clear to what extent the recommendations issued by the mediator push the telecom operators to give up unfair practices or unfair terms. Improvements in the relationships between operators and customers might depend on the initiatives of other consumer protection bodies.[91]

For example, in 2007, the *Conseil National de la Consommation* (CNC) reported a growing number of complaints in the electronic communications sector. It issued a recommendation about the procedures to be put in place by the operators to handle the complaints.[92] Data collected by the DGCCRF show that between 2008 and 2011 the number of complaints decreased by 53%. Further decreases were registered in the following two years.[93] It is plausible that the recommendation of the CNC played a role in achieving this outcome. However, it cannot be excluded that complaints shifted from the DGCCRF to the mediator. Moreover, in the same period, the *loi Chatel* and the implementation of the 2009 Telecoms Package were enacted. According to the Arcep, in the early years, the *loi Chatel* did not improve significantly the level of consumer protection. The regulator proposed several measures aimed at clarifying and integrating the regulatory framework. At the same time, the French government stepped in and negotiated a significant improvement of commercial practices with the *Fédération Française des Telecoms*.[94] According to the evaluations made by the mediator, the telecom industry gave a positive answer to the elimination or modification of the more contentious commercial practices.[95] It can be argued that any improvements in consumer protection do not depend on strong enforcement tools available to

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91 Other two criticisms usually levelled at ombudsman schemes could apply in this case. First, requiring consumers to exhaust company complaint procedures might dissuade them from pursuing a claim through the ombudsman scheme. Second, there is no guarantee that the decisions of the ombudsman will be correct in law or consistent with previous decisions. See P. Spiller & K. Tokeley, 'Individual Consumer Redress', in *Handbook of Research on International Consumer Law*, eds G. Howells et al. (Cheltenham: Elgar Pub. 2010), p (482) 501–502.

92 *Rapport du Conseil National de la Consommation sur les Communications Electroniques*, 27 Mar. 2007, available at http://www.economie.gouv.fr/cnc.

93 In 2013, complaints from the telecommunications sector represented 11% of the total: see B. Arnaud, 'Èvolution des tariffs et de la relation-client dans le secteur des télécommunications depuis le 1998', DGCCRF-èco no. 3, February 2012, pp 11–12, and the data available in *Le baromètre des réclamations* at http://www.economie.gouv.fr/dgccrf. Statistics on complaints are also available at www.afutt.fr.

94 See Arcep, *Rapport au Parlement sur l'impact de l'article 17 de la loi du 3 Janvier 2008 pour le développement de la concurrence au bénéfice des consommateurs*, July 2010; Arcep, *Améliorer les offres faites aux consommateurs de services de communications électroniques et postaux – Propositions et recommendations*, February 2011.

95 The mediator says that its recommendations are generally followed, albeit in some cases it has to reiterate them. See Le mediateur des communications electroniques, *Rapport 2013*, p 13 ff.

the regulator or the mediator but on the negotiation between the government, the industry, the regulator, and other consumer protection bodies.

Negotiated regulation is surely in line with theories of responsive regulation, new governance, and experimentalist governance, which suggest exploiting a large range of soft, informal, or semiformal enforcement mechanisms.[96] Whether the French negotiated regulation is really successful is difficult to assess. It seems that the French legislator chose not to give the regulator additional enforcement powers in the field of consumer protection.[97] It relied instead on the enforcement tools already available in consumer law. From a systemic point of view, it is telling that the rules about consumer protection are not located in the *Code des Postes et Communications Électroniques* but in the *Code de la Consommation*. However, such a choice raises two issues.

First, the enforcement mechanisms available in French consumer law have been criticized many times. Doubts have been raised about the controls on unfair terms by the *Commission des Clauses Abusives* and the monitoring and sanctioning activities by the DGCCRF.[98] Furthermore, attempts by consumer associations to exploit collective actions have been unsuccessful,[99] and maybe the changes introduced in 2014 by the *loi Hamon* are going to increase the

96 On the relevance of the regulatory governance literature for the design of enforcement mechanisms, see G. Bellantuono, 'The Regulatory Governance of Public and Private Enforcement', paper presented at the Biennial Conference of the ECPR Standing Group on Regulation and Governance, IBEI, Barcelona, 25-27 Jun. 2014, available at http://reggov2014.ibei.org/.

97 Indeed, Arcep has used its sanctioning powers in consumer matters only once.

98 See R. Sefton-Green, 'A Comparison of the Institutional Implications of the Directive on Unfair Terms in Consumer Contracts in France and the UK', in *European Contract Law and the Welfare State*, ed. J. Rutgers (Groningen: Europa Law Pub. 2012) (arguing that neither the Commission nor the DGCCRF is able to forbid unfair terms); X. Gabaix et al., *La protection du consommateur: rationalité limitée et régulation* (Paris: Conseil d'Analyse Economique, La Documentation Française 2012), p 39 ff. (recommending to strengthen the sanctioning power of the DGCCRF). On the limited role played by the DGCCRF in enforcing consumer law, see also É. Poillot, 'Les litiges relatifs au contrat de consommation', in *Le contrats de consommation. Régles communes*, ed. N. Sauphanor-Brouillaud (Paris: LGDJ 2013), pp 1069-1070.

99 The consumer association UFC-Que choisir tried to use the joint representation action against telecom operators who had already been sanctioned by the national competition authority, but the action was rejected on procedural grounds. See Cass civ., 1st ch., 26 May 2011, no. 10-15676, and the comment by É. Poillot, 'Les litiges', pp 1078-1079. On the limited success of the joint representative action (just five instances since 1992), see also the *Rapport d'information*, no. 499 of 26 May 2010 of the French Senate. Severe limits to follow-on actions were imposed by Conseil d'État, 2nd and 7th joint ch., 4 Jul. 2012, no. 334062, that denies the Arcep the power to order restitution of past surcharges, even though it established that the tariffs applied were not cost-oriented.

effectiveness of enforcement tools.[100] However, the more general question is whether consumer protection in electronic communications markets should only rely on the enforcement activities of nonspecialist bodies.

The second question is related to the first. The lack of sector-specific enforcement tools makes it unavoidable to rely heavily on judicial enforcement. It cannot be excluded that such an interplay slows down the development of interpretations balancing collective and individual interests. There is a concrete risk that the perspective of the individual dispute overlooks the many policy goals pursued through sector-specific regulation. This outcome can be avoided if civil courts pay attention to sector regulation when applying consumer law.

To be sure, in many cases, French civil judges have adopted interpretations that match regulator's decisions. In one case, it was decided that a tariff increase could not be applied without previously informing the customer (a business providing services to final customers). The Court found a breach of contractual terms, but information duties had also been introduced by the regulator.[101] In another case, the Court has applied the stricter version of liability (*obligation de résultat*) to protect a consumer who had been denied access to television services because of technical problems. The fact that the technical problems were ascribed to another operator did not excuse contractual nonperformance.[102] Finally, in a case involving a contract with a business customer where the procedure of number portability devised by the regulator had not been followed, the court has applied Article 1116 French Civil Code and annulled the contract on grounds of fraudulent nondisclosure.[103]

Maybe the congruence between the outcome of civil litigation and regulator's policies is coincidental. However, it cannot be excluded that one of the advantages of embedding sector-specific rules in general consumer law is a higher probability that the judges will try to lessen tensions between those rules and the

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100 A new class action has been introduced by Art. L423-1 ff. Consumer Code. The DGCCRF has been given broader monitoring powers on unfair terms and a new power to apply administrative sanctions (Arts L141-1 and L141-1-2 Consumer Code). At the same time, criminal sanctions have been increased (Arts 130–133, Law 2014-344 Consumer Code). Moreover, the effects of judicial decisions declaring the unfairness of contract terms have been extended to any other contracts subscribed with the defendant (Arts L421-2 and L421-6 Consumer Code).

101 Cass. civ. ch. comm., 5 Jun. 2012, no. 10-25773. The ART Avis no. 01-1149 of 7 Dec. 2001, referred to in the appeal claims, asked France Telecom to inform the customers at least one month before the new tariffs became operative.

102 Cass. civ. 1st ch., 19 Nov. 2009, no. 08-21.645, D.2009. AJ 2927, obs. P. GUIOMARD. However, see Cass. civ. 1st ch., 31 March 2011, no. 10-11.831, which denies the liability of the telecom operator if no charges were applied until the telephone line was operative.

103 Cour d'Appel de Douai, 19 Sep. 2013, no. 12/00915. The motivation refers to Arcep's Decision no. 2006-0381.

interpretation of traditional private law concepts like strict liability or fraudulent nondisclosure.

The French case study suggests two observations. First, even in a country where administrative enforcement is weak, the institutional framework can provide resources to change unfair practices and terms through negotiation. Second, negotiated regulation can only partially compensate for the weakness of administrative enforcement. Judicial enforcement becomes a crucial asset. In theory, private law concepts can be used to achieve sector-specific policy goals. However, the success of such a strategy cannot be taken for granted.

4. Conclusions: From Optimal Mixes to Optimal Hybrids

The three tables below provide a snapshot of the analysis carried out in sections 2 and 3. Table 1 suggests divergent national developments. However, three countries (France, Italy, and United Kingdom) strengthened public enforcement. Two (France and United Kingdom) also strengthened private enforcement. In line with a long-standing European legal tradition, all the four countries give primacy to public enforcement. However, Table 1 can also be aggregated in a different way. Whereas United Kingdom and Italy were willing to expand the adjudicatory powers of regulators, Germany and France relied on judicial enforcement. Even between countries moving in the same direction, several differences can still be detected. For example, in Germany, private enforcement relies partly on competition law and partly on contract law. Conversely, in the United Kingdom, private enforcement is dependent on the initiatives of the energy regulator. In consumer disputes, Italy and France show the same frequency of litigation before courts, but in the former the regulator handles consumer disputes, and in the latter they are decided by an independent mediator.

Behind these similarities and differences lurk some pressing issues, that is:

(1) what is the real content of the remedies available with public and private enforcement;
(2) the relationship between the EU and the national levels of enforcement;
(3) the direction policymakers should move on when searching a new balance between enforcement tools.

First, the comparative evidence shows that the dichotomy between the two enforcement mechanisms masks the real functions each of them can perform. It has already been suggested that each remedy can be assigned a regulatory or compensatory goal. This means that injunctions, damages, restitution or contract modification might differ depending on the administrative or judicial setting in

which they are deployed.[104] What the analysis undertaken above adds is that judicial remedies tend to stick to their traditional compensatory role (think about the German case law on s. 315 BGB), while administrative remedies may fulfil both regulatory and compensatory goals (think about the UK consumer redress order; see Table 2). Even when the integration of private law concepts leads to outcomes that are coherent with regulatory law (e.g., in France), such a happy situation depends much more on the compatibility of the goals to be pursued than on the intrinsic flexibility of private law concepts. This observation is hardly irrelevant if we are concerned with the effectiveness of the enforcement system. Whenever the same remedy is capable to perform a double function, risks of overdeterrence and overenforcement are greatly diminished because coordination is built in. Conversely, when each remedy is only capable of performing a single function, the legal system shall invest in coordinating the different remedies to avoid overdeterrence and overenforcement.

The comparative evidence collected here confirms that coordinating administrative and judicial enforcement is not that simple. For example, the refusal of German courts to revise network tariffs that were set up by the sector regulator might be understood as a spontaneous coordination mechanism.[105] The problem is that it rests on the idea of delegating the decision to the most competent decisionmaker, not on an evaluation of the fulfilment of the regulatory and compensatory goals through administrative enforcement. Without such an evaluation, deference to regulators might simply lead to the denial of compensation. The more general point is that the balance between public and private enforcement cannot be easily manipulated. In each legal system, some options are available and others are not. Moreover, the number of options is usually small.

Second, the countries considered here have been influenced by EU law to a different extent. The broader question is whether EU law should provide a unified solution for the balance between public and private enforcement in the two sectors. A full answer is beyond the goals of this article, but it is worth briefly mentioning two aspects highlighted by the comparative analysis.

On the public side of enforcement, EU law influence can be detected in the expansion of the powers granted to national regulators. However, the choices made by the four countries about institutional design and the remedies available to regulators are much more connected to national factors than to EU law.

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104 F. Cafaggi & H.-W. Micklitz, 'Collective Enforcement of Consumer Law: A Framework for Comparative Assessment', 16. *ERPL* 2008, p (391) 419.

105 The presumption of legitimacy that German courts attach to network tariffs set up by the regulator could play the role of a heightened evidentiary standard that avoids overdeterrence and overenforcement. See R.D. Bierschbach & A. Stein, 'Overenforcement', 93. *Georgetown L. J.* 2005, p 1743.

Differences do exist, but there is no reason to suppose they compromise the effectiveness of enforcement. We have seen that in the telecommunications sector the Commission has widely used its hard and soft powers to avoid the application of excessive remedies by NRAs. This is clearly an example of a vertical control mechanism that tries to prevent overenforcement.[106] However, granting wider veto powers to the Commission might prevent each MS from making choices that improve on its NRA's enforcement capabilities. Hence, observed variation in public enforcement tools does not automatically support a quest for further harmonization.

On the private side of enforcement, the EU horizontal policies in the fields of competition and consumer law are already pushing the four countries to introduce compensatory remedies. In this case also, the variety of solutions suggests caution when proposing further harmonization. Applying general contract law to fill the gaps in the sector regulation or in competition law (Germany), broadening the reach of the adjudicatory powers of sector regulators to include contractual issues (Italy), entrusting sector regulators with compensatory remedies (United Kingdom), or banishing unfair practices with negotiated regulation (France) are very different approaches, each entailing advantages and disadvantages from the point of view of effectiveness. Here, a reference to the EU principle of Member States' procedural autonomy seems apt: If the national remedies shall fulfil the requirements of effectiveness and equivalence, any private enforcement tool chosen by a Member State should be accepted until and unless a lack of effectiveness or equivalence can be proved. What could be challenged from the point of view of EU law is exclusive reliance on public or private enforcement, not the discretionary choice about the design of each enforcement tool.[107]

Third, and related to the two previous issues, the comparative analysis suggests one crucial policy implication: Successful enforcement regimes depend much more on hybridization of functions than on the search for perfect complementarity. Although the small sample analyzed here does not allow sweeping generalizations, it is useful to reflect on the balance between public and private enforcement not only from a descriptive but also from a prescriptive point

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106 In the energy sector, Art. 39 Directive 72/2009/EC and Art. 43 Directive 73/2009/EC grant a veto power to the Commission whenever an NRA does not comply with the guidelines. These provisions are similar to those in the electronic communications sector, but they have never been used. The reason is not that vertical relationships are less contentious but that there exist several coordination mechanisms, including the Energy Fora, the Regional Initiatives, and the networks of transmission system operators. See Table 2.

107 See M. DOUGAN, 'Who Exactly Benefits from the Treaties? The Murky Interaction between Union and National Competence over the Capacity to Enforce EU Law', 12. *Cambridge Y. Eur. Legal Studies* 2009–2010, p (73) 105 ff., for a discussion of the ECJ's case law about the role of private parties and public bodies.

of view. Borrowing from the debate in the field of competition law, the usual position is that the two types of enforcement should complement each other. Their relationship should be designed to avoid any conflict or overlap, although real-world examples of perfect complementarity are difficult to come upon in any sector. The examples from the energy and telecommunications sector discussed in this article confirm this observation (see Table 3). The reason is that each enforcement tool can be effective only if it is supported by adequate incentives. However, strengthening one type of enforcement increases the risk of negative side effects on the other type.[108]

Hybridization of enforcement tools puts aside any pretence of designing perfect complementarity. Its starting point is that in any legal system one type of enforcement is given primacy. Therefore, the easiest and less costly path to increasing the effectiveness of enforcement is not to introduce from scratch new enforcement tools or expand the reach of secondary ones but to modify the dominant tool. Modifications may include broader standing, broader scope, and larger number of remedies. The crucial benefit of hybridization is that there is no need for coordination with enforcement tools administered by private parties or other public bodies. The only limit is that each type of enforcement can be stretched only to some extent. In some legal systems, the opportunities to adopt specific modifications could be more limited or not available at all. However, whenever there is room for manoeuvre, hybridization could well be the path of least resistance towards the reform of enforcement tools.[109]

The example of the UK consumer redress order is probably the best example of hybridization: Deterrence and compensation can be pursued by the same authority. However, hybridization is also visible in the way the Italian regulator uses its adjudicatory powers to deal with contractual disputes. Sometimes it pops up in French judicial decisions.

Two objections against hybridization shall be discussed. The first one is that hybrids are always ill-defined concepts. They are attempts to come to grips with phenomena we do not understand.[110] It is clear that any reference to hybrids in the field of enforcement is meant to overcome too stark oppositions between regulatory and compensatory functions and between public and private

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108 See, e.g., S.B. Burbank et al., 'Private Enforcement', 17. *Lewis & Clark L. Rev.* 2013, p (637) 667 ff. (listing potential disadvantages of private enforcement).

109 While Reich, 'The Interrelation', and H.-W. Micklitz, 'A Self-Sufficient European Private Law – A Viable Concept?', in *A Self-Sufficient European Private Law: A Viable Concept?* (EUI Working Papers Law 2012/31), eds H.-W. Micklitz & Y. Svetiev, p 5, refer to hybridization to describe the relationship between the EU and national level, I use the word to describe the functions to be performed by each enforcement tool.

110 See K. Tuori, 'On Legal Hybrids', in *A Self-Sufficient*, p (31) 67 and 73 ('There are no legal hybrids as such but only as seen from the perspective of a particular conceptual and systematizing framework').

enforcement. It is also true that hybrids appear in transitory states, when a stable equilibrium has yet to be reached. What we call today the hybridization approach should evolve towards a full set of criteria that take into account the goals and structures of a multilevel system. More specifically, we would need the following: a) criteria asking each enforcer to make transparent decisions on how it chooses among different enforcement tools;[111] b) criteria guiding each enforcer to choose how much space to leave to private autonomy.

The second objection is that no legal system relies on public or private enforcement only. When both types of enforcement are available, it becomes inevitable to design coordination mechanisms that foster complementarity. If the proposed directive on antitrust damages and the recommendation on collective actions will reinforce the tendency of EU law to rely on some version of adversarial legalism, coordination between public and private enforcement will become one of the hottest issues.[112] A related objection is that asking a single enforcer to trade-off multiple goals when making enforcement choices (e.g., promoting competition and compensating damaged consumers) risks creating a coordination problem inside the enforcer itself. Therefore, the advantages of hybridization may be more apparent than real.[113]

Still, this objection cannot be taken to suggest that only one type of relationship between public and private enforcement will be possible. After all, the idea of complementarity is itself subject to change over time.[114] Hybridization and complementarity approaches differ in the way they propose to allocate resources to enforcement mechanisms. Therefore, it can be expected that each

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111 The US literature on agencies' choice of policymaking instruments offers some useful suggestions on this issue: see, e.g., M.E. MAGILL, 'Agency Choice of Policymaking Form', 71. *U. Chi. L. Rev.* (*University of Chicago Law Review*) 2004, p 1444; A.P. MORRISS et al., 'Choosing How to Regulate', 29. *Harv. Env. L. Rev.* 2005, p 179; Y. GIVATI, 'Game Theory and the Structure of Administrative Law', 81. *U. Chi. L. Rev.* 2014, p 481.

112 On the political economy of adversarial legalism in Europe, see R.D. KELEMEN, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge, MA: Harvard University Press 2011).

113 See, e.g., E. BIBER, 'Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies', 33. *Harv. Env. L. Rev.* 2009, p 1 (discussing advantages and disadvantages of intra-agency and inter-agency solutions); J. FREEMAN & J. ROSSI, 'Agency Coordination in Shared Regulatory Space', *Harv. L. Rev.* 2012, p (1131) 1151 ff. (explaining the limits of consolidation as an answer to the problems posed by agencies' sharing of regulatory space); D.A. HYMAN & W.E. KOVACIC, 'Competition Agencies with Complex Policy Portfolios: Divide or Conquer?', *Concurrences* 2013, p 9 (analyzing seven criteria to decide how many tasks should be assigned to an agency).

114 On the evolutionary process that shapes institutional complementarities, see R. DEEG & G. JACKSON, 'Towards a More Dynamic Theory of Capitalist Variety', 5. *Socio-Economic Review* 2007, p (149) 167 ff.

approach will lead to different outcomes.[115] However, they are both attuned to the need to pursue different and sometimes conflicting goals. The energy and the telecommunications sectors might experiment both approaches in different Member States. It cannot be excluded that some national legal traditions could adapt more easily to one enforcement system or that regulatory failure could be contrasted more effectively with one of those two approaches. Political science literature has pointed out that the balance between public and private enforcement can be traced back to the constitutional division of powers in a specific country.[116] This observation not only suggests that the balance is difficult to implement but also that national differences are not something to be swept away as soon as possible.

Therefore, proposals directed to foster complementarity face the same evidentiary burden of proposals directed to create hybrids: explaining which factors help achieve the chosen goals while avoiding the twin evils of overenforcement and underenforcement.

Table 1 Changes in Public and Private Enforcement

Country	*Public Enforcement*	*Private Enforcement*
France	 New consumer protection powers	 New collective action and broad recourse to judicial enforcement
Germany	 New enforcement powers for BKA	 Limited impact of judicial enforcement
Italy	 Frequent recourse to administrative adjudication	 Limited impact of judicial enforcement

115 This is more generally true of regulatory design: see HYMAN & KOVACIC, 'Competition Agencies', p 21 ('decision about *where* to place certain responsibilities are simultaneously decisions about *who* will resolve certain disputes, and, in turn, *what* the outcome is likely to be').

116 See S. FARHANG, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton: Princeton University Press 2010); S. STASZAK, 'Realizing the Rights Revolution: Litigation and the American State', 38. *L. & Soc. Inquiry* (*Law and Social Inquiry*) 2013, p 222.

United Kingdom	 Strengthening of Ofgem's enforcement powers	 New collective action and broader opportunities for private competition law enforcement

Table 2 Regulation and Compensation

Country	*Regulatory + Compensatory Function*	*Regulatory Function*	*Compensatory Function*
France	Mediation, judicial enforcement		
Germany		BNA dispute resolution	Judicial enforcement
Italy	Agcom dispute resolution		
United Kingdom	Ofgem consumer redress order		

Table 3 Energy and Telecommunications Enforcement

Sector	*Vertical Relationship*	*Horizontal Relationship*
Energy	Many formal and informal coordination mechanisms	Primacy of public enforcement, difficult coordination
Telecoms	Very contentious	More room for private enforcement, difficult coordination

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